

## Appendix 101

# The Law of Homicide

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This Appendix deals with the law governing the killing of human beings. In the United States each year, there are about 20,000 criminal homicides. We also experience large numbers (in excess of 40,000) deaths each year from motor vehicle crashes (some of which are also criminal homicides). We also experience numerous homicides resulting from accidental killings in the home and workplace. When one human being causes the death of another human being, it is always a tragic event. It is not always, however, a crime. This appendix provides general information on the traditional law of homicide and specific information on Indiana statutes governing the law of homicide and related topics. The statutes reported in this appendix reflect changes through the First Regular Session of the 2001 Indiana General Assembly.

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### App. 101.1 Defining Homicide

**Homicide is the killing of one human being by another human being.**

The word "homicide" is neutral: it merely means the killing of one human being by another human being. Homicides may be justifiable, excusable or criminal, depending upon the circumstances of the killing and the state of mind of the killer. Suppose a person is struck in the head by a falling meteor and killed. Such a death is not a homicide. The victim is certainly dead, but the cause of death was not the act of another human being. Suppose a person becomes lost in the woods in the winter, falls in the snow unconscious, and is eaten by wolves. The victim is dead, but the death is not a homicide because the death was not caused by the act of another human being. Suppose a person is walking down the street when he suffers a heart attack and dies. The victim of the heart attack is dead, but the death is not a homicide because the death was not caused by the act of another human being.

**A human death is a homicide if the dead person was once alive and is now dead because of the act of another human being.**

In order to call a death a homicide, we must find the following facts to be true:

1. a human being who was once alive is now dead, and,
2. the death was caused by the act of another human being.

If a human being who was once alive is now dead, but the death was not caused by the act of another human being, the death is not a homicide.

**Fetuses and cadavers are not human beings for purposes of criminal homicide.**

Although it is not ordinarily difficult to determine that a homicide victim was a human being and was once alive, certain circumstances can complicate the determination. The criminal law does not recognize fetuses as human beings for purposes of criminal homicide (since the death of a fetus is the subject matter of the law of abortion and feticide). Thus,

if the dead human being is a small baby, we must first determine that the baby was born alive and that the umbilical cord was severed in order for that baby to have an independent existence (which was then terminated by the act of another human being). Terminating the life of a fetus is not a criminal homicide, but rather, is an abortion or feticide which may be lawful or criminal depending upon the circumstances. A similar difficulty arises in the unusual circumstance where a person dies of natural causes and then a would-be killer inflicts a wound on the corpse. The would-be killer certainly intended to commit a homicide (that is, to kill another human being), but could not do so for the simple reason that the intended victim was already dead. Merely causing physical damage to a cadaver is not a homicide (but is the crime of abuse of a corpse) because there is no living human being to kill, and the act may or may not be criminal depending upon the circumstances. Sometimes investigators discover the physical remains of what appears to be a human being, but the remains are so badly decomposed or otherwise distorted (as by burning in a very hot fire, or dismemberment into many small pieces) that they are not easily identifiable as human remains. We must first find convincing evidence (typically from forensic pathologists and forensic anthropologists) that the remains were indeed human, that the human was alive when the lethal act was performed, and that the act of another human being caused the death.

Suppose that a person is inattentive in city traffic, steps of a curb without looking, and is struck and killed by a city bus. The victim is dead, and the killing is a homicide because the cause of death is the act of another human being, the bus driver, who ran over the victim. Suppose that a police officer lawfully orders a fleeing felon to halt, but that the felon instead turns and discharges a firearm at the police officer. The officer returns fire and kills the felon. The felon is dead and the killing is a homicide because one human being has killed another human being. Suppose an armed robber enters the "Stop and Rob" convenience store and in the course of the robbery shoots and kills the clerk. The clerk is dead and the killing is a homicide because the death was caused by the act of another human being.

Once we have determined that a previously living human being is now dead, we must inquire into the cause of death. If the death was not caused by the act of another human being, we are no longer interested (at least from the viewpoint of criminal law). If the death was probably caused by the act of another human being, we will label the death a "homicide" and then inquire into what kind of homicide it might be: justifiable, excusable, or criminal.

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### App. 101.2 Justifiable Homicide

**Justifiable homicides are killings which are commanded or authorized by law.**

Some killings of one human being by another human being are authorized or commanded by law. For example, the killing of an enemy soldier in combat by another soldier is a homicide, that is, one human being has killed another human being.

However, it is a justifiable homicide because the soldier is both authorized and obligated by law to kill under the circumstances of combat. Some killings of one human being by another human being are justifiable homicide because they are ordered by a court. Whenever a condemned murderer is to be executed, a court must order the execution and some person must, acting under the command and authorization of the court order, kill the condemned person (by electrocuting him, introducing poison gas into a chamber, shooting or hanging him, or injecting him with poison). Some killings of one human being by another human being are authorized by law because of the peculiar circumstances of the killing. Suppose a person awakens in his own bedroom to discover a stranger present. The stranger is apparently armed with a deadly weapon and is offering to kill the homeowner in his bed. The homeowner reaches into his night stand, removes a pistol, and shoots the intruder dead. This is a homicide, because one human being has killed another human being, but it is a justifiable homicide because killings in self-defense when the killer reasonably fears for his life and has no reasonable alternative but to use deadly force are authorized by law.

If the killer has no criminal intent, and the killing occurs under circumstances where killings of other human beings are either commanded or authorized by law, the killing is called a justifiable homicide.

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### App. 101.3 Excusable Homicide

**Excusable homicides are killings of human beings which are not deserving of punishment.**

Some killings of one human being by another human being, although not commanded or authorized by law, are nonetheless killings for which we do not wish to punish the killer. Such killings are termed excusable homicides. Typically, excusable homicides are killings which result from accident or inadvertence, or they are killings done by persons who lack the capacity to commit crimes (such as very young children or persons who are legally insane).

Suppose two professional boxers are engaged in a licensed boxing match. One boxer strikes the other who collapses in the ring and dies. The surviving boxer did not mean to kill his opponent, merely to strike him within the rules of the boxing contest. This killing is certainly a homicide, that is, the act of one human being has caused the death of another human being. This killing is certainly not a justifiable homicide because the killing of one boxer by another in the prize ring is not commanded or authorized by law. Such a killing is, however, an excusable homicide because it is a killing by inadvertence and without criminal intent on the part of the killer.

Suppose that you are driving your automobile down a city street on a bright, dry day. You are obeying all traffic rules and you are attentive to your driving. Suddenly, a small child runs from between parked cars just a few feet from your front bumper. Despite your best efforts, your car strikes and kills the child. You have committed a homicide because your act of driving your car into the child caused the child's death. The homicide is certainly not a justifiable homicide because the law does not command or authorize you to run over children with your car. It is, however, an excusable homicide because it is a killing by accident without criminal intent and without criminal negligence.

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#### **App. 101.4 Criminal Homicide**

**A criminal homicide is any unjustified, unexcused killing of one human being by another human being.**

A criminal homicide is any killing of one human being by another human being which is not justifiable and not excusable. Criminal homicides may be intentional killings or killings by accident or killings which result from criminal negligence depending upon the circumstances of the killing and the state of mind of the killer. Criminal homicides come in two basic varieties: murder and manslaughter.

**Murder** is the unjustified, unexcused killing of one human being by another human being with malice aforethought.

**Manslaughter** is the unjustified, unexcused killing of one human being by another human being without malice aforethought.

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#### **App. 101.5 Murder**

**Murder is the unjustified, unexcused killing of one human being by another human being with malice aforethought.**

Malice aforethought is a state of mind which distinguishes murders from manslaughters. It is a technical term which is somewhat confusing at first because it does not mean exactly what it seems. Malice aforethought does not require that the killer be angry or vindictive toward his victim, nor does it require that the killer think about what he is doing before he does it. Rather, malice aforethought is a technical term which includes five distinct states of mind. A prosecutor must prove any one of these states of mind to establish that a killer had malice aforethought when he killed. Any one of the following states of mind constitute malice aforethought:

1. the intent to kill;
2. the intent to do great bodily harm;
3. the intent to resist lawful arrest;
4. the intent to commit an inherently dangerous felony; and
5. the intent to do any act with such a reckless disregard for the probability of the death of another human being as to be the equivalent of an intent to kill (the shorthand term for this is the "abandoned and malignant heart").

Malice aforethought as the intent to kill is fairly easy to understand: the killer deliberately sets out to terminate the

life of his victim. We determine an intent to kill (as we do any other state of mind) by inferring it from the behavior of the accused. Thus, if the evidence shows that the accused pointed a pistol at his victim, pulled the trigger, and discharged a bullet into the victim's head, causing death, it seems reasonable for us to infer that the accused intended to kill his victim.

We know from ordinary human experience that persons who use deadly weapons against other persons usually intend to kill.

Malice aforethought as the intent to do great bodily harm is a little less obvious. This definition of malice aforethought covers situations where the accused contends that he did not really mean to kill the victim. The state of mind of the accused is still malice aforethought, however, if the accused intended to do great bodily harm to the victim (*e.g.*, by torture, poisoning, running over with a car) and the victim dies as a result. No specific intent to kill is required so long as the prosecutor can prove that the accused intended to inflict the harm which, in fact, resulted in the victim's death.

Traditionally, the intent to resist lawful arrest has been defined as malice aforethought for the protection of police officers and other public officials with arrest powers. Suppose a police officer attempts to serve a valid arrest warrant, and the person to be arrested resists by lightly pushing the officer away. The officer stumbles, falls, and strikes his head on the concrete curb. As a result of this fall, the officer dies from a fractured skull. Even this accidental death would be a murder because the accused intended to resist a lawful arrest (by failing to submit) and a result of that resistance was the death of the police officer.

Malice aforethought as the intent to commit an inherently dangerous felony is referred to as the felony-murder rule.

When a person voluntarily commits an inherently dangerous felony (that is, a felony likely to result in the use of force or resistance by the victim, such as robbery, rape, or aggravated assault), that person knows that a foreseeable result of the commission of the felony is the killing of another human being. Traditionally, any death resulting from the commission or attempted commission of an inherently dangerous felony has been defined as a murder. This is true even where the killing is accidental, and where the decedent is the intended victim of the felony, or a bystander, or even an accomplice of the accused.

Finally, malice aforethought as the "abandoned and malignant heart" includes rather unusual situations involving no specific intent to kill or even harm a victim, but where the behavior of the accused is so reckless as to amount to the functional equivalent of an intent to kill. A common situation where a court might find the "abandoned and malignant heart" state of mind to exist would be where a person throws a concrete block from an expressway overpass and strikes a passing vehicle, causing the driver to crash and die. Another example of this extreme kind of life-threatening recklessness would be where a person, wishing to test the accuracy of his new pistol, fires several shots at a passing city bus, striking and killing a passenger. In these cases, there is no focused intent to kill or even to injure another person, but the behavior of the accused in killing his victim is so extreme and so unreasonable that it would be apparent that a death would be the likely result of the conduct.

### App. 101.6 Manslaughter

**Manslaughter is the unjustified, unexcused killing of one human being by another human being without malice aforethought.**

If the prosecutor can prove that the accused, without justification and without excuse, did an act which caused the death of the victim, and that the accused had any one of the five states of mind that constitute malice aforethought, then the accused is guilty of murder. If the prosecutor can prove that the accused, without justification or excuse, did an act which caused the death of the victim, but cannot prove that the accused has one of the five states of mind which constitute malice aforethought, then the accused is guilty of manslaughter.

Manslaughter is the unjustified, unexcused killing of one human being by another human being without malice aforethought, and it comes in two varieties: voluntary manslaughter and involuntary manslaughter.

**App. 101.7**  
**Voluntary Manslaughter**

**Voluntary manslaughter is the unjustified, unexcused, intentional killing of one human being by another human being without malice aforethought and with heat of passion (or heat of blood or sudden heat).**

Voluntary manslaughter is the unjustified, unexcused, intentional killing of one human being by another human being without malice aforethought and where the following elements are present:

1. there was an adequate provocation of the accused which would be sufficient to enrage any reasonable person;
2. the accused, because of the provocation, attained a mental state referred to as heat of passion, heat of blood, or sudden heat;
3. the killing of the victim was sudden with no cooling off; and
4. there was a causal connection between the provocation, the heat of passion, and the killing.

In such a case, what would otherwise be a murder becomes a voluntary manslaughter. In the case of voluntary manslaughter, the "intent" to kill is the product of rage producing a non-rational state of mind. The intent to kill necessary to prove malice aforethought for murder is a cool, deliberate intent. The law has traditionally distinguished between the "cold blooded" killing and the killing which is the product of anger by providing a lesser punishment for voluntary manslaughter.

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**App. 101.8**  
**Involuntary Manslaughter**

**Involuntary manslaughter is the unjustified, unexcused, unintentional killing of one human being by another human being without malice aforethought.**

Involuntary manslaughter is the unjustified, unexcused, unintentional killing of one human being by another human being without malice aforethought and where the killing results from either:

1. the doing of an unlawful act (not a dangerous felony); or
2. the doing of a lawful act in a criminally negligent manner.

A simple battery (striking another person) is only a misdemeanor yet can result in death under certain circumstances. When it does, the death is unintentional and the crime is involuntary manslaughter. Likewise, a person might engage in an act with extreme carelessness (but not so reckless as to constitute the abandoned and malignant heart) and cause a death; an accidental shooting which results from horseplay with a firearm would be an example.

Most states also have a special statutory form of involuntary manslaughter to cover the very common situation where the accused has killed the victim through the operation of a motor vehicle. Such a specialized statutory crime is variously called just involuntary manslaughter, involuntary manslaughter by motor vehicle, reckless homicide, or vehicular homicide, depending upon the jurisdiction's particular statutory definition. In many states, causing death by the operation of a motor vehicle by ordinary (*i.e.*, non-criminal) negligence constitutes a misdemeanor form of involuntary manslaughter, the only instance of a criminal homicide which is treated as a misdemeanor.

**App. 101.9**

## Indiana Criminal Statutes

### App. 101.9.1

#### Criminal Jurisdiction of the State of Indiana

**IC 35-41-1-1.** (a) As used in this section, "Indiana" includes:

- (1) The area within the boundaries of the state of Indiana, as set forth in Article 14, Section 1 of the Constitution of the State of Indiana;
- (2) The portion of the Ohio River on which Indiana possesses concurrent jurisdiction with the state of Kentucky under Article 14, Section 2 of the Constitution of the State of Indiana; and
- (3) The portion of the Wabash River on which Indiana possesses concurrent jurisdiction with the state of Illinois under Article 14, Section 2 of the Constitution of the State of Indiana.

(b) A person may be convicted under Indiana law of an offense if:

- (1) Either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana;
- (2) Conduct occurring outside Indiana is sufficient under Indiana law to constitute an attempt to commit an offense in Indiana;
- (3) Conduct occurring outside Indiana is sufficient under Indiana law to constitute a conspiracy to commit an offense in Indiana, and an overt act in furtherance of the conspiracy occurs in Indiana;
- (4) Conduct occurring in Indiana establishes complicity in the commission of, or an attempt or conspiracy to commit, an offense in another jurisdiction that also is an offense under Indiana law; or
- (5) The offense consists of the omission to perform a duty imposed by Indiana law with respect to domicile, residence, or a relationship to a person, thing, or transaction in Indiana.

(c) When the offense is homicide, either the death of the victim or bodily impact causing death constitutes a result under subsection (b)(1). If the body of a homicide victim is found in Indiana, it is presumed that the result occurred in Indiana.

### App. 101.9.2

#### Basis of Criminal Liability

**IC 35-41-2-1.** (a) A person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense. However, a person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty to perform the act.

(b) If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession.

**IC 35-41-2-2.** (a) A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

(b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

(c) A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

(d) Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct.

**IC 35-41-2-3.** (a) A corporation, limited liability company, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, limited liability company, partnership, or unincorporated association is limited to the property of the corporation, limited liability company, partnership, or unincorporated association.

### App. 101.9.3

#### Defenses Relating to Culpability

**IC 35-41-3-1.** A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.

**IC 35-41-3-2.** (a) A person is justified in using reasonable force against another person to protect himself or a third

person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary.

(b) A person is justified in using reasonable force, including deadly force, against another person if he reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on his dwelling or curtilage.

(c) With respect to property other than a dwelling or curtilage, a person is justified in using reasonable force against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in his possession, lawfully in possession of a member of his immediate family, or belonging to a person whose property he has authority to protect. However, a person is not justified in using deadly force unless that force is justified under subsection (a) of this section.

(d) Notwithstanding subsections (a), (b), and (c) of this section, a person is not justified in using force if:

- (1) He is committing, or is escaping after the commission of, a crime;
- (2) He provokes unlawful action by another person, with intent to cause bodily injury to the other person; or
- (3) He has entered into combat with another person or is the initial aggressor, unless he withdraws from the encounter and communicates to the other person his intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

**IC 35-41-3-3.** (a) A person other than a law enforcement officer is justified in using reasonable force against another person to effect an arrest or prevent the other person's escape if:

- (1) A felony has been committed; and
- (2) There is probable cause to believe the other person committed that felony.

However, such a person is not justified in using deadly force unless that force is justified under section 2 [IC 35-41-3-2] of this chapter.

(b) A law enforcement officer is justified in using reasonable force if the officer reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only if the officer:

- (1) Has probable cause to believe that that deadly force is necessary:
  - (A) To prevent the commission of a forcible felony; or
  - (B) To effect an arrest of a person who the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person; and
- (2) Has given a warning, if feasible, to the person against whom the deadly force is to be used.

(c) A law enforcement officer making an arrest under an invalid warrant is justified in using force as if the warrant was valid, unless the officer knows that the warrant is invalid.

(d) A law enforcement officer who has an arrested person in custody is justified in using the same force to prevent the escape of the arrested person from custody that the officer would be justified in using if the officer was arresting that person. However, an officer is justified in using deadly force only if the officer:

- (1) Has probable cause to believe that deadly force is necessary to prevent the escape from custody of a person who the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person; and
- (2) Has given a warning, if feasible, to the person against whom the deadly force is to be used.

(e) A guard or other official in a penal facility or a law enforcement officer is justified in using reasonable force, including deadly force, if the officer has probable cause to believe that the force is necessary to prevent the escape of a person who is detained in the penal facility.

(f) Notwithstanding subsection (b), (d), or (e), a law enforcement officer who is a defendant in a criminal prosecution has the same right as a person who is not a law enforcement officer to assert self-defense under IC 35-41-3-2.

**IC 35-41-3-4.** [Repealed.]

**IC 35-41-3-5.** It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body:

- (1) without his consent; or
- (2) when he did not know that the substance might cause intoxication.

**IC 35-41-3-6.** (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

(b) As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

**IC 35-41-3-7.** It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense.

**IC 35-41-3-8.** (a) It is a defense that the person who engaged in the prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another person. With respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.

(b) This section does not apply to a person who:

- (1) Recklessly, knowingly, or intentionally placed himself in a situation in which it was foreseeable that he would be subjected to duress; or
- (2) Committed an offense against the person as defined in IC 35-42.

**IC 35-41-3-9.** (a) It is a defense that:

- (1) The prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
- (2) The person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

**IC 35-41-3-10.** With respect to a charge under IC 35-41-2-4, IC 35-41-5-1, or IC 35-41-5-2, it is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his effort to commit the underlying crime and voluntarily prevented its commission.

#### **App. 101.9.4**

##### **Standard of Proof; Bars to Prosecution**

**IC 35-41-4-1.** (a) A person may be convicted of an offense only if his guilt is proved beyond a reasonable doubt.

(b) Notwithstanding subsection (a), the burden of proof is on the defendant to establish the defense of insanity (IC 35-41-3-6) by a preponderance of the evidence.

**IC 35-41-4-2.** (a) Except as otherwise provided in this section, a prosecution for an offense is barred unless it is commenced:

- (1) within five (5) years after the commission of a Class B, Class C, or Class D felony; or
- (2) within two (2) years after the commission of a misdemeanor.

(B) a prosecution for a Class B or Class C felony that would otherwise be barred under this section may be commenced within one (1) year after the earlier of the date on which the state:

- (1) first discovers the identity of the offender with DNA (deoxyribonucleic acid) evidence; or
- (2) could have discovered the identify of the offender with DNA (deoxyribonucleic acid) evidence by the exercise of due diligence.

However, for a Class B or Class C felony in which the state first discovered the identity of an offender with DNA (deoxyribonucleic acid) evidence after the time otherwise allowed for prosecution and before July 1, 2001, the one (1) year period provided in this subsection is extended to July 1, 2002.

(c) A prosecution for a Class A felony may be commenced at any time.

(d) A prosecution for murder may be commenced:

- (1) at any time; and
- (2) regardless of the amount of time that passes between:
  - (A) the date a person allegedly commits the elements of murder; and

- (B) the date the alleged victim of the murder dies.
- (e) A prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age:
- (1) IC 35-42-4-3(a) (Child molesting).
  - (2) IC 35-42-4-5 (Vicarious sexual gratification).
  - (3) IC 35-42-4-6 (Child solicitation).
  - (4) IC 35-42-4-7 (Child seduction).
  - (5) IC 35-46-1-3 (Incest).
- (f) Notwithstanding subsection (E)(1), a prosecution for child molesting under IC 35-42-4-3(c) or IC 35-42-4-3(d) where a person who is at least sixteen (16) years of age allegedly commits the offense against a child who is not more than two (2) years younger than the older person, is barred unless commenced within five (5) years after the commission of the offense.
- (g) A prosecution for forgery of an instrument for payment of money, or for the uttering of a forged instrument, under IC 35-43-5-2, is barred unless it is commenced within five (5) years after the maturity of the instrument.
- (h) If a complaint, indictment, or information is dismissed because of an error, defect, insufficiency, or irregularity, a new prosecution may be commenced within ninety (90) days after the dismissal even if the period of limitation has expired at the time of dismissal, or will expire within ninety (90) days after the dismissal.
- (i) The period within which a prosecution must be commenced does not include any period in which:
- (1) the accused person is not usually and publicly resident in Indiana or so conceals himself that process cannot be served on him;
  - (2) the accused person conceals evidence of the offense, and evidence sufficient to charge him with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence; or
  - (3) the accused person is a person elected or appointed to office under statute or constitution, if the offense charged is theft or conversion of public funds or bribery while in public office.
- (j) For purposes of tolling the period of limitation only, a prosecution is considered commenced on the earliest of these dates:
- (1) The date of filing of an indictment, information, or complaint before a court having jurisdiction.
  - (2) The date of issuance of a valid arrest warrant.
  - (3) The date of arrest of the accused person by a law enforcement officer without a warrant, if the officer has authority to make the arrest.
- (k) A prosecution is considered timely commenced for any offense to which the defendant enters a plea of guilty, notwithstanding that the period of limitation has expired.

**IC 35-41-4-3.** (a) A prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if:

- (1) The former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.); or
  - (2) The former prosecution was terminated after the jury was impaneled and sworn or, in a trial by the court without a jury, after the first witness was sworn, unless
    - (i) the defendant consented to the termination or waived, by motion to dismiss or otherwise, his right to object to the termination,
    - (ii) it was physically impossible to proceed with the trial in conformity with law,
    - (iii) there was a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law,
    - (iv) prejudicial conduct, in or outside the courtroom, made it impossible to proceed with the trial without injustice to either the defendant or the state,
    - (v) the jury was unable to agree on a verdict, or
    - (vi) false statements of a juror on voir dire prevented a fair trial.
- (b) If the prosecuting authority brought about any of the circumstances in subdivisions (a)(2)(i) through (a)(2)(vi) of this section, with intent to cause termination of the trial, another prosecution is barred.

**IC 35-41-4-4.** (a) A prosecution is barred if all of the following exist:

- (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
- (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 [IC 35-41-4-3] of this chapter.
- (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

(b) A prosecution is not barred under this section if the offense on which it is based was not consummated when the trial under the former prosecution began.

**IC 35-41-4-5.** In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 [IC 35-41-4-3] of this chapter.

**IC 35-41-4-6.** A former prosecution is not a bar under section 3, 4, or 5 [IC 35-41-4-3, IC 35-41-4-4, or IC 35-41-4-5] of this chapter if:

- (1) It was before a court that lacked jurisdiction over the defendant or the offense;
- (2) It was procured by the defendant without the knowledge of the prosecuting authority and with intent to avoid a more severe sentence that might otherwise have been imposed; or
- (3) It resulted in a conviction that was set aside, reversed, vacated, or held invalid in a subsequent proceeding, unless the defendant was adjudged not guilty or ordered discharged.

#### **App. 101.9.5**

##### **Sentencing: General Provisions**

**IC 35-50-1-1.** The court shall fix the penalty of and sentence a person convicted of an offense.

**IC\_35-50-1-2.** (a) As used in this section, "crime of violence" means:

- (1) murder (IC\_35-42-1-1);
- (2) attempted murder (IC\_35-41-5-1) ;
- (3) voluntary manslaughter (IC\_35-42-1-3);
- (4) involuntary manslaughter (IC\_35-42-1-4);
- (5) reckless homicide (IC\_35-42-1-5);
- (6) aggravated battery (IC\_35-42-2-1.5);
- (7) kidnapping (IC\_35-42-3-2);
- (8) rape (IC\_35-42-4-1);
- (9) criminal deviate conduct (IC\_35-42-4-2);
- (10) child molesting (IC\_35-42-4-3);
- (11) sexual misconduct with a minor as a Class A felony (IC\_35-42-4-9);
- (12) robbery as a Class A felony or a Class B felony (IC\_35-42-5-1);
- (13) burglary as a Class A felony or a Class B felony (IC\_35-43-2-1); or
- (14) causing death when operating a motor vehicle (IC\_9-30-5-5).

(b) As used in this section, "episode of criminal conduct" means offenses or a connected series of offenses that are closely related in time, place, and circumstance.

(c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the aggravating and mitigating circumstances in IC\_35-38-1-7.1(b) and IC\_35-38-1-7.1(c) in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC\_35-50-2-8 and IC\_35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(d) If, after being arrested for one (1) crime, a person commits another crime:

- (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
- (2) while the person is released:
  - (A) upon the person's own recognizance; or
  - (B) on bond;

the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

(e) If a court determines under IC\_35-50-2-11 that a person used a firearm in the commission of the offense for which the person was convicted, the term of imprisonment for the underlying offense and the additional term of imprisonment imposed under IC\_35-50-2-11 must be served consecutively.

**IC 35-50-1-3.** [Repealed.]

**IC 35-50-1-4.** [Repealed.]

**IC 35-50-1-5.** If:

- (1) Prosecution is initiated against a petitioner who has successfully sought relief under any proceeding for postconviction remedy and a conviction is subsequently obtained; or
  - (2) A sentence has been set aside under a postconviction remedy and the successful petitioner is to be resentenced;
- the sentencing court may impose a more severe penalty than that originally imposed, and the court shall give credit for time served.

**IC 35-50-1-6.** (a) Before a person who has been convicted of an offense and committed to the department of correction is assigned to a department of correction program or facility under IC 11-10-1, the sentencing court may recommend that the department of correction place the person in a secure private facility (as defined in IC 31-9-2-116) if:

- (1) the person was less than sixteen (16) years of age on the date of sentencing; and
- (2) the court determines that the person would benefit from the treatment offered by the facility.

(b) A secure private facility may terminate a placement and request the department of correction to reassign a convicted person to another department of correction facility or program.

(c) When a convicted person becomes twenty-one (21) years of age or if a secure private facility terminates a placement under subsection (b) a convicted person shall:

- (1) be assigned to a department of correction facility or program under IC 11-10-1-3(b); and
- (2) serve the remainder of the sentence in the department of correction facility or program.

(d) A person who is placed in a secure private facility under this section:

- (1) is entitled to earn credit time under IC 35-50-6; and
- (2) may be deprived of earned credit time as provided under rules adopted by the department of correction under IC 4-22-2.

**IC 35-50-1-7.** Whenever a court commits a person to the department of correction as a result of a conviction, the court shall notify the department of correction of the last known name and address of any victim of the offense for which the person is convicted.

**IC\_35-50-2-1.** (a) As used in this chapter, "Class D felony conviction" means a conviction of a Class D felony in Indiana and a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter.

(b) As used in this chapter, "felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter.

(c) As used in this chapter, "minimum sentence" means:

- (1) for murder, forty-five (45) years;
- (2) for a Class A felony, twenty (20) years;

- (3) for a Class B felony, six (6) years;
- (4) for a Class C felony, two (2) years; and
- (5) for a Class D felony, one-half (1/2) year.

**IC 35-50-2-1.5.** As used in this chapter, "mentally retarded individual" has the meaning set forth in IC 35-36-9-2.

**IC\_35-50-2-2.** (a) The court may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 of this chapter.

(b) With respect to the following crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence:

- (1) The crime committed was a Class A or Class B felony and the person has a prior unrelated felony conviction.
- (2) The crime committed was a Class C felony and less than seven (7) years have elapsed between the date the person was discharged from probation, imprisonment, or parole, whichever is later, for a prior unrelated felony conviction and the date the person committed the Class C felony for which the person is being sentenced.
- (3) The crime committed was a Class D felony and less than three (3) years have elapsed between the date the person was discharged from probation, imprisonment, or parole, whichever is later, for a prior unrelated felony conviction and the date the person committed the Class D felony for which the person is being sentenced. However, the court may suspend the minimum sentence for the crime only if the court orders home detention under IC\_35-38-1-21 or IC\_35-38-2.5-5 instead of the minimum sentence specified for the crime under this chapter.
- (4) The felony committed was:
  - (A) murder (IC\_35-42-1-1);
  - (B) battery (IC\_35-42-2-1) with a deadly weapon or battery causing death;
  - (C) sexual battery (IC\_35-42-4-8) with a deadly weapon;
  - (D) kidnapping (IC\_35-42-3-2);
  - (E) confinement (IC\_35-42-3-3) with a deadly weapon;
  - (F) rape (IC\_35-42-4-1) as a Class A felony;
  - (G) criminal deviate conduct (IC\_35-42-4-2) as a Class A felony;
  - (H) child molesting (IC\_35-42-4-3) as a Class A or Class B felony;
  - (I) robbery (IC\_35-42-5-1) resulting in serious bodily injury or with a deadly weapon;
  - (J) arson (IC\_35-43-1-1) for hire or resulting in serious bodily injury;
  - (K) burglary (IC\_35-43-2-1) resulting in serious bodily injury or with a deadly weapon;
  - (L) resisting law enforcement (IC\_35-44-3-3) with a deadly weapon;
  - (M) escape (IC\_35-44-3-5) with a deadly weapon;
  - (N) rioting (IC\_35-45-1-2) with a deadly weapon;
  - (O) dealing in cocaine, a narcotic drug, or methamphetamine (IC\_35-48-4-1) if the court finds the person possessed a firearm (as defined in IC\_35-47-1-5) at the time of the offense, or the person delivered or intended to deliver to a person under eighteen (18) years of age at least three (3) years junior to the person and was on a school bus or within one thousand (1,000) feet of:
    - (i) school property;
    - (ii) a public park;
    - (iii) a family housing complex; or
    - (iv) a youth program center;
  - (P) dealing in a schedule I, II, or III controlled substance (IC\_35-48-4-2) if the court finds the person possessed a firearm (as defined in IC\_35-47-1-5) at the time of the offense, or the person delivered or intended to deliver to a person under eighteen (18) years of age at least three (3) years junior to the person and was on a school bus or within one thousand (1,000) feet of:
    - (i) school property;
    - (ii) a public park;
    - (iii) a family housing complex; or
    - (iv) a youth program center;
  - (Q) an offense under IC\_9-30-5 (operating a vehicle while intoxicated) and the person who committed the offense has accumulated at least two (2) prior unrelated convictions under IC\_9-30-5; or
  - (R) aggravated battery (IC\_35-42-2-1.5).

(c) Except as provided in subsection (e), 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.

(d) The minimum sentence for a person convicted of voluntary manslaughter may not be suspended unless the court finds at the sentencing hearing that the crime was not committed by means of a deadly weapon.

(e) Whenever the court suspends that part of a sex and violent offender's (as defined in IC\_5-2-12-4) sentence that is suspendible under subsection (b), the court shall place the offender on probation under IC\_35-38-2 for not more than ten (10) years.

(f) An additional term of imprisonment imposed under IC\_35-50-2-11 may not be suspended.

(g) A term of imprisonment imposed under IC\_35-47-10-6 or IC\_35-47-10-7 may not be suspended if the commission of the offense was knowing or intentional.

(h) A term of imprisonment imposed for an offense under IC\_35-48-4-6(b)(1)(B) may not be suspended.

**IC 35-50-2-2.1.** (a) Except as provided in subsection (b) or section 2 [IC 35-50-2-2] of this chapter, 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; or

(C) One (1) Class C and one (1) Class D 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.

(b) Notwithstanding subsection (a), the court may suspend any part of the sentence for a felony, except as provided in section 2 of this chapter, 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, though failing to establish a defense; or

(4) The acts in the juvenile record would not be Class A or Class B 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.

**IC 35-50-2-3.** (a) A person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), a person who was at least sixteen (16) years of age at the time the murder was committed may be sentenced to:

(1) Death; or

(2) Life imprisonment without parole;

under section 9 [IC 35-50-2-9] of this chapter unless a court determines under IC 35-36-9 that the person is a mentally retarded individual.

**IC 35-50-2-4.** A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000).

**IC 35-50-2-5.** A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000).

**IC 35-50-2-6.** (a) A person who commits a Class C felony shall be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances or not more than two (2) years subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed nonsupport of a child as a Class C felony under IC 35-46-1-5, upon motion of the prosecuting attorney, the court may enter judgment of conviction of a Class D felony under IC 35-46-1-5 and sentence the person accordingly. The court shall enter in the record detailed reasons for the court's action when the court enters a judgment of conviction of a Class D felony under this subsection.

**IC 35-50-2-7.** (a) A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 ½) years, with not more than one and one-half (1 ½) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000). (b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if:

(1) the court finds that:

(A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and

(B) the prior felony was committed less than three (3) years before the second felony was committed;

(2) the offense is domestic battery as a Class D felony under IC 35-42-2-1.3;

(3) the offense is auto theft (IC 35-43-4-2.5); or

(4) the offense is receiving stolen auto parts (IC 35-43-4-2.5).

The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

**IC 35-50-2-7.1.** [Repealed.]

**IC 35-50-2-8.** (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:

(1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction; or

(2) the offense is an offense under IC\_9-30-10-16 or IC\_9-30-10-17.

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and

(2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

(d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:

(1) the conviction has been set aside; or

(2) the conviction is one for which the person has been pardoned.

(e) The requirements in subsection (b) do not apply to a prior unrelated felony conviction that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense. However, a prior unrelated felony conviction under IC\_9-30-10-16, IC\_9-30-10-17, IC\_9-12-3-1 (repealed), or IC\_9-12-3-2 (repealed) may not be used to support a sentence as a habitual offender.

(f) If the person was convicted of the felony 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 under IC\_35-38-1-3.

(g) A person is a habitual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

(h) The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

**IC 35-50-2-10.** (a) As used in this section:

(1) "Drug" means a drug or a controlled substance (as defined in IC 35-48-1).

(2) "Substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime. The term includes an offense under IC 9-30-5 and an offense under IC 9-11-2 (before its repeal July 1, 1991).

(b) The state may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated substance offense convictions.

(c) After a person has been convicted and sentenced for a substance offense committed after sentencing for a prior unrelated substance offense conviction, the person has accumulated two (2) prior unrelated substance offense convictions. However, a conviction does not count for purposes of this subsection if:

(1) it has been set aside; or

(2) it is a conviction for which the person has been pardoned.

(d) If the person was convicted of the substance offense 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, under IC 35-38-1-3.

(e) A person is a habitual substance offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated substance offense convictions.

(f) The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3. If the court finds that three (3) years or more have elapsed since the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated substance offense conviction and the date the person committed the substance offense for which the person is being sentenced as a habitual substance offender, then the court may reduce the additional fixed term. However, the court may not reduce the additional fixed term to less than one (1) year.

(g) If a reduction of the additional year fixed term is authorized under subsection (f), the court may also consider the aggravating or mitigating circumstances in IC 35-38-1-7.1 to:

(1) decide the issue of granting a reduction; or

(2) determine the number of years, if any, to be subtracted, under subsection (f).

**IC 35-50-2-11.** (a) As used in this section, "firearm" has the meaning set forth in IC 35-47-1-5.

(b) As used in this section, "offense" means:

(1) a felony under IC 35-42 that resulted in death or serious bodily injury;

(2) kidnapping; or

(3) criminal confinement as a Class B felony.

(c) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense.

(d) If after a sentencing hearing a court finds that a person who committed an offense used a firearm in the commission of the offense, the court may sentence the person to an additional fixed term of imprisonment of five years.

**IC 35-50-2-12.** The Indiana criminal justice institute shall review characteristics of offenders committed to the department of correction over such period of time it deems appropriate and of the offenses committed by those offenders in order to ascertain norms used by the trial courts in sentencing. The Indiana criminal justice institute shall from time to time publish its findings in the Indiana Register and provide its findings to the legislative services agency and the judicial conference of Indiana.

**IC 35-50-2-13.** (a) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense of dealing in a controlled substance under IC 35-48-4-1 through IC 35-48-4-4 sentenced

to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally:

- (1) Used a firearm; or
- (2) Possessed a:
  - (A) Handgun in violation of IC 35-47-2-1;
  - (B) Sawed-off shotgun in violation of IC 35-47-5-4.1; or
  - (C) Machine gun in violation of IC 35-47-5-8;

while committing the offense.

(b) If after a sentencing hearing a court finds that a person committed an offense as described in subsection (a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

- (1) If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.
- (2) If the firearm is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may sentence the person to an additional fixed term of imprisonment of not more than twenty (20) years. The additional sentence under this subdivision is in addition to any additional sentence imposed under section 11 [IC 35-50-2-11] of this chapter for use of a firearm in the commission of an offense.

**IC 35-50-2-14.** (a) The state may seek to have a person sentenced as a repeat sexual offender for a sex offense under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3 by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated one (1) prior unrelated felony conviction for a sex offense under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3.

(b) After a person has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3, the person has accumulated one (1) prior unrelated felony conviction. However, a conviction does not count for purposes of this subsection, if:

- (1) it has been set aside; or
- (2) it is one for which the person has been pardoned.

(c) The court alone shall conduct the sentencing hearing under IC 35-38-1-3.

(d) A person is a repeat sexual offender if the court finds that the state has proved beyond a reasonable doubt that the person had accumulated one (1) prior unrelated felony conviction under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3.

(e) The court may sentence a person found to be a repeat sexual offender to an additional fixed term that is the presumptive sentence for the underlying offense. However, the additional sentence may not exceed ten (10) years.

#### **App. 101.9.6**

##### **Death Penalty or Life Imprisonment Without Parole**

**IC 35-50-2-9.** (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not

proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is a mentally retarded individual.

(b) The aggravating circumstances are as follows:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:
  - (A) Arson (IC 35-43-1-1).
  - (B) Burglary (IC 35-43-2-1).
  - (C) Child molesting (IC 35-42-4-3).
  - (D) Criminal deviate conduct (IC 35-42-4-2).
  - (E) Kidnapping (IC 35-42-3-2).
  - (F) Rape (IC 35-42-4-1).
  - (G) Robbery (IC 35-42-5-1).
  - (H) Carjacking (IC 35-42-5-2).

- (I) Criminal gang activity (IC 35-45-9-3).
  - (J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
  - (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
  - (3) The defendant committed the murder by lying in wait.
  - (4) The defendant who committed the murder was hired to kill.
  - (5) The defendant committed the murder by hiring another person to kill.
  - (6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:
    - (A) the victim was acting in the course of duty; or
    - (B) the murder was motivated by an act the victim performed while acting in the course of duty.
  - (7) The defendant has been convicted of another murder.
  - (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.
  - (9) The defendant was:
    - (A) under the custody of the department of correction;
    - (B) under the custody of a county sheriff;
    - (C) on probation after receiving a sentence for the commission of a felony; or
    - (D) on parole;at the time the murder was committed.
  - (10) The defendant dismembered the victim.
  - (11) The defendant burned, mutilated, or tortured the victim while the victim was alive.
  - (12) The victim of the murder was less than twelve (12) years of age.
  - (13) The victim was a victim of any of the following offenses for which the defendant was convicted:
    - (A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
    - (B) Kidnapping (IC 35-42-3-2).
    - (C) Criminal confinement (IC 35-42-3-3).
    - (D) A sex crime under IC 35-42-4.
  - (14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.
  - (15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):
    - (A) into an inhabited dwelling; or
    - (B) from a vehicle.
  - (16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).
- (c) The mitigating circumstances that may be considered under this section are as follows:
- (1) The defendant has no significant history of prior criminal conduct.
  - (2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.
  - (3) The victim was a participant in or consented to the defendant's conduct.
  - (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
  - (5) The defendant acted under the substantial domination of another person.
  - (6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
  - (7) The defendant was less than eighteen (18) years of age at the time the murder was committed.
  - (8) Any other circumstances appropriate for consideration.
- (d) 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. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency.

The defendant may present any additional evidence relevant to:

- (1) the aggravating circumstances alleged; or
- (2) any of the mitigating circumstances listed in subsection (c).

(e) Except as provided by IC 35-36-9, 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. The jury may recommend:

- (1) the death penalty; or
- (2) life imprisonment without parole;

only if it makes the findings described in subsection (k). The court shall make the final determination of the sentence, after considering the jury's recommendation, and

the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation. In making the final determination of the sentence after receiving the jury's recommendation, the court may receive evidence of the crime's impact on members of the victim's family.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

- (1) sentence the defendant to death; or
- (2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (k).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) 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. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general.

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.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

- (1) conviction or sentence was in violation of the:
  - (A) Constitution of the State of Indiana; or
  - (B) Constitution of the United States;
- (2) sentencing court was without jurisdiction to impose a sentence; and
- (3) sentence:
  - (A) exceeds the maximum sentence authorized by law; or
  - (B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

- (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and
- (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

#### **App. 101.9.7 "Human Being" Defined**

**IC 35-41-1-14** . "Human being" means an individual who has been born and is alive.

**App. 101.9.8**

**Murder**

**IC\_35-42-1-1.** A person who:

- (1) knowingly or intentionally kills another human being;
- (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, consumer product tampering, criminal deviate conduct, kidnapping, rape, robbery, or carjacking;
- (3) kills another human being while committing or attempting to commit:
  - (A) dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC\_35-48-4-1);
  - (B) dealing in a schedule I, II, or III controlled substance (IC\_35-48-4-2);
  - (C) dealing in a schedule IV controlled substance (IC\_35-48-4-3); or
  - (D) dealing in a schedule V controlled substance; or
- (4) knowingly or intentionally kills a fetus that has attained viability (as defined in IC\_16-18-2-365);

commits murder, a felony.

**App. 101.9.9**

**Causing Suicide**

**IC 35-42-1-2.** A person who intentionally causes another human being, by force, duress, or deception, to commit suicide commits causing suicide, a Class B felony.

**App. 101.9.10**

**Assisting Suicide**

**IC 35-42-1-2.5.** (a) This section does not apply to the following:

- (1) A licensed health care provider who administers, prescribes, or dispenses medications or procedures to relieve a person's pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, unless such medications or procedures are intended to cause death.
- (2) The withholding or withdrawing of medical treatment or life-prolonging procedures by a licensed health care provider, including pursuant to IC 16-36-4 (living wills and life-prolonging procedures), IC 16-36-1 (health care consent), or IC 30-5 (power of attorney).

(b) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following commits assisting suicide, a Class C felony:

- (1) Provides the physical means by which the other person attempts or commits suicide.
- (2) Participates in a physical act by which the other person attempts or commits suicide.

**App. 101.9.11**

**Voluntary Manslaughter**

**IC 35-42-1-3.** (a) A person who knowingly or intentionally:

- (1) kills another human being; or
- (2) kills a fetus that has attained viability (as defined in IC 16-18-2-365);

while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon.

(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) [IC 35-42-1-1(1)] of this chapter to voluntary manslaughter.

**App. 101.9.12**

**Involuntary Manslaughter**

**IC 35-42-1-4.** (a) As used in this section, "fetus" means a fetus that has attained viability (as defined in IC 16-18-2-365).

(b) A person who kills another human being while committing or attempting to commit:

- (1) a Class C or Class D felony that inherently poses a risk of serious bodily injury;
- (2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony.

(c) A person who kills a fetus while committing or attempting to commit:

- (1) a Class C or Class D felony that inherently poses a risk of serious bodily injury;
- (2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or
- (3) battery;

commits involuntary manslaughter, a Class C felony. However, if the killing results from the operation of a vehicle, the offense is a Class D felony.

#### **App. 101.9.13**

##### **Reckless Homicide**

**IC 35-42-1-5.** A person who recklessly kills another human being commits reckless homicide, a Class C felony.

#### **App. 101.9.14**

##### **Feticide**

**IC 35-42-1-6.** A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits feticide, a Class C felony. This section does not apply to an abortion performed in compliance with:

- (1) IC 16-34; or
- (2) IC 35-1-58.5 (before its repeal).

#### **App. 101.9.15**

##### **Abuse of a Corpse**

**IC 35-45-11-1.** (a) This chapter does not apply to the use of a corpse for:

- (1) Scientific;
- (2) Medical;
- (3) Organ transplantation;
- (4) Historical;
- (5) Forensic; or
- (6) Investigative;

purposes.

(b) This chapter does not apply to:

- (1) A funeral director;
- (2) An embalmer; or
- (3) An employee of an individual described in subdivision (1) or (2);

engaged in the individual's normal scope of practice and employment.

**IC 35-45-11-2.** A person who knowingly or intentionally:

- (1) mutilates a corpse;
- (2) has sexual intercourse or sexual deviate conduct with the corpse; or
- (3) opens a casket with the intent to commit an act described in subdivision (1) or (2);

commits abuse of a corpse, a Class D felony.

#### **App. 101.9.16**

##### **Unlawful Transfer of a Human Organ**

**IC 35-46-5-1.** (a) As used in this section, "fetal tissue" means tissue from an infant or a fetus who is stillborn or aborted.

(b) As used in this section, "human organ" means the kidney, liver, heart, lung, cornea, eye, bone marrow, bone, pancreas,

or skin of a human body.

(c) As used in this section, "item of value" means money, real estate, funeral related services, and personal property. "Item of value" does not include:

- (1) the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ; or
  - (2) the reimbursement of travel, housing, lost wages, and other expenses incurred by the donor of a human organ related to the donation of the human organ.
- (d) A person who intentionally acquires, receives, sells, or transfers in exchange for an item of value:
- (1) a human organ for use in human organ transplantation; or
  - (2) fetal tissue;
- commits unlawful transfer of human tissue, a Class C felony.

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## Appendix 102

# Search and Seizure

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### App. 102.1

#### The Investigator's Conflicting Roles

In the United States (and in any free and democratic society), coroner's and their deputies perform two essential roles:

1. Coroners protect the important rights of all **individuals** by performing their duties within the limits of constitutional rules.
2. Coroners protect the vital interests of our **society** by detecting criminal homicides and other wrongful deaths.

These two roles make the work of the coroner both very interesting and very demanding since coroners must seek to enforce the law without themselves violating the law in a legal system where criminals have exactly the same rights as decent, honest citizens.

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#### App. 102.2

##### **Search and Seizure Compliance Produces Guilty Pleas**

Because the outcome of any criminal trial is not always predictable, the best way to resolve a criminal case is to provide sufficient properly collected evidence to **induce the perpetrator to plead guilty** rather than run the risk of an even greater punishment after a trial. Because courts will routinely exclude unconstitutionally obtained evidence, the best way to ensure that an obviously guilty person will **not be punished** is for the police to violate the constitutional rights of the accused during the evidence collection process.

#### App. 102.3

##### **Fourth Amendment to the U.S. Constitution**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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#### App. 102.4

##### **Fourteenth Amendment to the U.S. Constitution**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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#### App. 102.5

##### **Appellate Courts Supervise the Justice System**

Appellate courts make decisions which set the rules for enforcing the law. If an appellate court rules that a certain police practice violates the constitution, then the police must change that practice to comply with the judicial rule. When the Supreme Court of the United States or the Supreme Court of Indiana rules on a case, their ruling becomes the law. This is true no matter what the Congress or the Indiana General Assembly might think. The appellate courts are the ultimate source of law because they interpret the limits placed on the justice system by the Constitution, and they interpret the meaning of federal and state statutes. Legislative bodies are free to amend the Constitution or to change statutes, but until they do whatever the courts say is the law, is the law. And, of course, should legislatures change the statute or the Constitution, the appellate courts then get to interpret the legal meaning of those changes.

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#### App. 102.6

##### **The Incorporation Doctrine**

The United States Supreme Court has used the "due process" clause of the 14th Amendment to "incorporate" most of the rights in the federal Bill of Rights, thus applying those rights to *state* as well as federal prosecutions. The "incorporation doctrine" is a concept used to describe the process by which the United States Supreme Court has selectively "incorporated" many of the federal rights specified in the Bill of Rights into the "due process" clause of the 14th Amendment and has thus applied those federal rights to the states. The court itself has never recognized this doctrine as a rule of law, but rather scholars have used this doctrine to describe what the court has actually done over the past 25 years or so.

Originally, the federal Bill of Rights (that is, the first 10 amendments to the U.S. Constitution) applied only to the federal government. Many of the same individual rights embodied in the federal constitution were adopted as parts of the various state constitutions, but the constitutional standards were not (nor did they have to be) the same. After the Civil War, the 14th Amendment was added to the U.S. Constitution. In that amendment, states were prohibited from denying any person "due process of law." The 5th Amendment of the Bill of Rights also requires that the federal government afford persons "due process." It is a fundamental rule of logic and of legal interpretation that the same words used in different

places in the same document must mean the same thing. Therefore, what is due process for the federal government must necessarily be due process for state governments as well.

The Supreme Court has not totally incorporated the federal Bill of Rights into the 14th Amendment; it has merely incorporated most of the important individual rights to ensure "fundamental fairness" in both federal and state criminal proceedings. Such an incorporation of rights is "fundamental to our concept of ordered liberty." (*Duncan v. Louisiana*, 1968).

#### App. 102.7 The Rights Incorporated

##### Fourth Amendment Rights

*Wolf v. Colorado* (1949) 4<sup>th</sup> Amendment right to be free from unreasonable searches and seizures.

*Mapp v. Ohio* (1961) 4<sup>th</sup> Amendment requires exclusionary rule for evidence obtained by state officers who unreasonably search and seize.

##### Fifth Amendment Rights

*Malloy v. Hogan* (1964) 5<sup>th</sup> Amendment privilege against self-incrimination.

*Benton v. Maryland* (1969) 5<sup>th</sup> Amendment prohibition against double jeopardy.

##### Sixth Amendment Rights

*In re Oliver* (1948) 6<sup>th</sup> Amendment right to a public trial.

*Gideon v. Wainwright* (1963) 6<sup>th</sup> Amendment right to counsel in felony cases.

*Pointer v. Texas* (1965) 6<sup>th</sup> Amendment right to confront witnesses.

*Klopfer v. North Carolina* (1967) 6<sup>th</sup> Amendment right to speedy trial.

*Washington v. Texas* (1967) 6<sup>th</sup> Amendment right to compulsory process for obtaining witnesses.

*Duncan v. Louisiana* (1968) 6<sup>th</sup> Amendment right to a jury trial.

*Argersinger v. Hamlin* (1972) 6<sup>th</sup> Amendment right to counsel in misdemeanor cases where there is potential jail time.

##### Eighth Amendment Rights

*Robinson v. California* (1962) 8<sup>th</sup> Amendment prohibition against cruel and unusual punishments.

*United States v. Bajakajian* (1998) 8<sup>th</sup> Amendment prohibition against excessive fines.

##### Rights Not Incorporated

*Hurtado v. California* (1884) States are not required to adopt the 5<sup>th</sup> Amendment requirement that there is a right to indictment by grand jury for capital or infamous crimes. States are free to use either grand jury indictments or to use bills of information (formal charging instruments created by the prosecutor).

*No case.* The court has never had a case involving the 8<sup>th</sup> Amendment prohibition against excessive bail.

#### App. 102.8 The Exclusionary Rule

The exclusionary rule prohibits the use of evidence illegally obtained by the police. The Supreme Court has evolved a remedy for the violation of 4th, 5th and 6th Amendment rights: the "exclusionary rule." Although most rules of evidence are exclusionary rules, the exclusionary rule refers to the general principle that evidence obtained by police violations of the defendant's constitutional rights will not be admitted into evidence as proof of guilt.

Generally, all illegally obtained evidence must be excluded. Further, any other evidence acquired directly or indirectly as a result of the unlawful police conduct is "tainted" by the illegality and becomes "fruit of the poisonous tree" and thus inadmissible.

#### App. 102.9 Fruit of the Poisonous Tree

The "fruit of the poisonous tree" doctrine holds that illegal police conduct "taints" evidence so that it cannot be used in court, and even evidence obtained from leads produced by the "tainted" evidence cannot be used in court. When a defendant claims that his constitutional rights have been violated by police misconduct, he is entitled to a "suppression hearing" where an independent judge will hear evidence to determine whether the challenged evidence is admissible or

whether it should be excluded from trial. The practical result of a decision to suppress evidence is often that the state cannot prosecute at all because some key item of evidence is no longer usable at trial.

The defendant may testify at the suppression hearing and then later refuse to testify at his trial.

The prosecution may not comment on his refusal to take the stand at trial and may not use any of his testimony given at the suppression hearing. The state bears the burden of proof to establish the admissibility of the evidence.

If the defendant makes a timely objection to the admission of illegally obtained evidence at his trial, it is error for the judge to admit such evidence. Such an error of law requires reversal upon appeal unless the error was "harmless." A harmless error is one which does not in any way contribute to the conviction. If the appellate court determines that the admission of illegally obtained evidence might have contributed to the conviction in any way, then the court must reverse the conviction because of "prejudicial" error. Some kinds of judicial error (*e.g.*, admission of an involuntary confession; conducting trial without defense counsel) are so fundamental that they require automatic reversal because such errors are presumed to be prejudicial.

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#### App. 102.10 Search Defined

A search is any governmental intrusion upon a person's reasonable expectation of privacy.

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#### App. 102.11 Seizure Defined

A seizure is the exercise of governmental control over a person or thing. In its broadest sense, a "search" is any governmental intrusion upon a person's reasonable expectation of privacy. A "seizure" is the exercise of governmental control over a person or thing. The 4th Amendment requires that searches and seizures be "reasonable." If a search warrant is issued, it must be based upon "probable cause" supported by oath or affirmation and must particularly describe what is to be searched for and seized.

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#### App. 102.12 Search and Seizure Analysis in 12 Questions

Any search and seizure problem can be analyzed by the following logical sequence of questions:

- (1) **Was the conduct complained of by the defendant governmental conduct?** (If not, there is no 4th Amendment problem, since private conduct is not governed by the 4th Amendment).
- (2) **If there was governmental conduct, did the defendant have a reasonable expectation of privacy?** (If not, there is no 4th Amendment problem, since government conduct in searching or seizing where there is no expectation of privacy does not violate the amendment).
- (3) **If there was governmental conduct, and if that conduct intruded upon the defendant's reasonable expectation of privacy, did the police have a valid warrant to support the intrusion?** (If the police had a valid warrant, there is no 4th Amendment problem since searches and seizures pursuant to valid warrants are, by definition, reasonable).
- (4) **If there was an invalid warrant issued by a judicial mistake, did the police act in good faith in obtaining the warrant?** The U.S. Supreme Court has recognized a "good faith" exception to the exclusionary rule on the basis that excluding evidence would have no effect on police conduct since the invalid warrant was issued by a judge's mistake, not a mistake by the police.
- (5) **If there was no warrant, was the search done with consent of an authorized person?** If so, the evidence seized is admissible.
- (6) **If there was no warrant, was the search a "stop and frisk"?** If the pat-down of the suspect's outer clothing was based on the officer's reasonable suspicion of criminal activity and was done for the officer's protection, the evidence seized is admissible.
- (7) **If there was no warrant, was the search incident to a lawful arrest?** If so, the evidence seized from the area where the defendant might have reached for a weapon or to destroy evidence is admissible.
- (8) **If there was no warrant, was the seizure of an item of evidence in plain view?** If the officer was lawfully present at the place where the contraband evidence was seized, it is admissible.
- (9) **If there was no warrant, was the search conducted pursuant to the automobile exception?** If the officer made a good motor vehicle stop and had probable cause to believe the vehicle was carrying contraband, the evidence seized from the vehicle and from containers in the vehicle is admissible.
- (10) **If there was no warrant, was the search justified by the exigency of the ephemeral nature of the evidence?**

If the evidence was of a kind that would probably disappear quickly unless it was seized immediately without the delay of obtaining a warrant, it is admissible.

- (11) **If there was no warrant, was the search conducted at the conclusion of a "hot pursuit"?** If so, the officer may continue to pursue the fleeing suspect and the evidence seized is admissible.
- (12) **If there was no warrant, was the entry and search to respond to some "emergency (e.g., fire or life-threatening jeopardy)?"** If so, the evidence is admissible.

**If the search or seizure is by the government, intrusive on the expectation of privacy, is without a valid warrant, and is not covered by any of the exceptions to the warrant requirement, then the search or seizure violates the 4th Amendment and the evidence obtained must be suppressed.**

#### App. 102.13

##### **Question 1: Was the conduct complained of by the defendant governmental conduct?**

Seizures of evidence by private persons do not violate the 4th Amendment, and the evidence is admissible at trial. Seizures made by coroners, police officers, other government agents, and persons working at the direction of government agents (for example, police informants) must comply with the 4th Amendment requirements.

The Fourth Amendment protects persons against constitutional misconduct by government agents. The Fourth Amendment does not apply to searches and seizures conducted by private persons. Included as "government agents" are the following:

- (1) **Official enforcement personnel** (including federal police agents, state and local police officers, coroners, and enforcement officers of administrative agencies).
- (2) **Private persons acting under police direction** (e.g., paid police informants, volunteer informants working for the police, and persons directed to assist a police officer in an emergency).
- (3) **Private security guards who are deputized as members of a public police department.** Note that private security guards who are not deputized have the same status as any other private citizen.

#### App. 102.14

##### **Question 2: If there was governmental conduct, did the defendant have a reasonable expectation of privacy?**

A defendant has no reasonable expectation of privacy if the search or seizure involves things of an "essentially public nature" or if the defendant lacks "standing" to complain about a Fourth Amendment violation. Items of an essentially public nature (that is, things which are "held out to the public") include handwriting exemplars, a person's voice, bank records, paint on the outside of a car, and telephone numbers dialed (which can be recorded by a "pen register").

"Standing" means that a court will recognize the right of a defendant to raise an issue on his own behalf because the defendant has a sufficient connection with the issue to have his own interests at stake. Essentially, the label of "standing" determines whether a defendant will be allowed to complain about the violation of rights alleged in the case. As to Fourth Amendment claims, a defendant generally has "standing" to complain about a violation of rights if (1) the defendant owned or had a possessory right in the place searched, or (2) the defendant in fact made the place searched his dwelling whether or not he had the rights of ownership or possession.

Note carefully that persons who do not own, possess or live on the premises have no "standing" to complain about unlawful searches and seizures (even though those defendants might be legitimately on the premises). For example, passengers in another person's car or short-term social guests in another person's home have no standing to complain about the violation of the car owner's or the home owner's constitutional rights. Note also, however, that overnight guests in another person's home do have an expectation of privacy to give them standing [*Minnesota v. Olson* (1990)]. The general principle is that a defendant can complain only about the violation of his own rights, and not the rights of third parties. This is true even when the violation of a third party's rights produces evidence against the defendant (and even if the evidence is suppressed as against the third party). Likewise, there is no "automatic standing" even in the case of an accusation of a possession offense (e.g. possession of heroin). Further, mere alleged ownership of property (absent some indication of an expectation of privacy) is not in itself sufficient to create standing (e.g., in a case where the defendant put his narcotics in his girlfriend's purse which was then searched by the police, the defendant had no standing to complain about the search even though he admitted to ownership of the narcotics).

Even if officers violate no particular rule of criminal procedure in gathering evidence, the court may still suppress evidence if it is gathered in an unfair manner which "shocks the conscience" of the court. For example, officers may direct medical personnel to draw a blood sample from an unwilling suspect to gather evidence of DWI, but when officers

restrain a suspect while medical personnel pump his stomach against his will to retrieve a heroin capsule, this physical restraint coupled with the significant intrusion into the suspect's body will "shock the conscience" of the court and the heroin capsule will be suppressed.

**App. 102.15**

**Question 3: If there was governmental conduct, and if that conduct intruded upon the defendant's reasonable expectation of privacy, did the police have a valid warrant to support the intrusion?**

**App. 102.15.1**

**Issuance of Search Warrants**

**IC 35-33-5-1.** (a) A court may issue warrants only upon probable cause, supported by oath or affirmation, to search any place for any of the following:

- (1) Property which is obtained unlawfully.
- (2) Property, the possession of which is unlawful.
- (3) Property used or possessed with intent to be used as the means of committing an offense or concealed to prevent an offense from being discovered.
- (4) Property constituting evidence of an offense or tending to show that a particular person committed an offense.
- (5) Any person.
- (6) Evidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children.

(b) As used in this section, "place" includes any location where property might be secreted or hidden, including buildings, persons, or vehicles.

**App. 102.15.2**

**Affidavit and Form for Search Warrant; Warrant Without Affidavit**

**IC 35-33-5-2.** (a) Except as provided in section 8 [IC 35-33-5-8] of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit:

- (1) Particularly describing:
  - (A) The house or place to be searched and the things to be searched for; or
  - (B) Particularly describing the person to be arrested;
- (2) Alleging substantially the offense in relation thereto and that the affiant believes and has good cause to believe that:
  - (A) The things as are to be searched for are there concealed; or
  - (B) The person to be arrested committed the offense; and
- (3) Setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause.

(b) When based on hearsay, the affidavit must either:

- (1) Contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or
- (2) Contain information that establishes that the totality of the circumstances corroborates the hearsay.

(c) An affidavit for search substantially in the following form shall be treated as sufficient:

STATE OF INDIANA     )  
  ) SS:  
COUNTY OF             )

AB swears (or affirms, as the case may be) that he believes and has good cause to believe (here set forth the facts and information constituting the probable cause) that (here describe the things to be searched for and the offense in relation thereto) are concealed in or about the (here describe the house or place) of C D, situated in the county of         , in said state.

Subscribed and sworn to before me this     day of     19     .

§ 35-33-5-3. A search warrant in substantially the following form shall be sufficient:

COUNTY OF

IN THE COURT OF

To (herein insert the name, department or classification of the law enforcement officer to whom it is addressed)

You are authorized and ordered, in the name of the State of Indiana, with the necessary and proper assistance to enter into or upon (here describe the place to be searched), and there diligently search for (here describe property which is the subject of the search). You are ordered to seize such property, or any part thereof, found on such search.

Dated this day of , 19 , at the hour of M.

(Signature of Judge)

Executed this day of , 19 , at the hour of M.

(Signature of Law Enforcement Officer)

**IC 35-33-5-8.** (a) A judge may issue a search or arrest warrant without the affidavit required under section 2 [IC 35-33-5-2] of this chapter, if the judge receives sworn testimony of the same facts required for an affidavit:

- (1) In a nonadversarial, recorded hearing before the judge;
- (2) Orally by telephone or radio; or
- (3) In writing by facsimile transmission (FAX).

(b) After reciting the facts required for an affidavit and verifying the facts recited under penalty of perjury, an applicant for a warrant under subsection (a)(2) 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.

(c) After transmitting an affidavit, an applicant for a warrant under subsection (a)(3) shall transmit to the judge 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 transmit to the applicant a duplicate of the warrant. The judge shall then sign the warrant retained by the judge, adding the time of the issuance of the warrant.

(d) If a warrant is issued under subsection (a)(2), the judge shall record the conversation on audio tape and 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.

(e) If a warrant is issued under subsection (a)(3), the judge shall order the court reporter to [the] retype or copy the facsimile transmission for entry in the record. The judge shall certify the transcription or copy and warrant retained by the judge for entry in the record.

(f) The court reporter shall notify the applicant who received a warrant under subsection (a)(2) or (a)(3) when the transcription or copy required under this section is entered in the record. The applicant shall sign the typed, transcribed, or copied entry upon receiving notice from the court reporter.

#### **App. 102.15.3**

##### **Disposition of Seized Items**

**IC\_35-33-5-5.** (a) All items of property seized by any law enforcement agency as a result of an arrest, search warrant, or warrantless search, shall be securely held by the law enforcement agency under the order of the court trying the cause, except as provided in this section.

(b) Evidence that consists of property obtained unlawfully from its owner may be returned by the law enforcement agency to the owner before trial, in accordance with IC\_35-43-4-4(h).

(c) Following the final disposition of the cause at trial level or any other final disposition the following shall be done:

- (1) Property which may be lawfully possessed shall be returned to its rightful owner, if known. If ownership is

unknown, a reasonable attempt shall be made by the law enforcement agency holding the property to ascertain ownership of the property. After ninety (90) days from the time:

- (A) the rightful owner has been notified to take possession of the property; or
- (B) a reasonable effort has been made to ascertain ownership of the property;

the law enforcement agency holding the property shall, at such time as it is convenient, dispose of this property at a public auction. The proceeds of this property shall be paid into the county general fund.

(2) Except as provided in subsection (e), property, the possession of which is unlawful, shall be destroyed by the law enforcement agency holding it sixty (60) days after final disposition of the cause.

(d) If any property described in subsection (c) was admitted into evidence in the cause, the property shall be disposed of in accordance with an order of the court trying the cause.

(e) A law enforcement agency may destroy or cause to be destroyed chemicals or controlled substances associated with the illegal manufacture of drugs or controlled substances without a court order if all the following conditions are met:

(1) The law enforcement agency collects and preserves a sufficient quantity of the chemicals or controlled substances to demonstrate that the chemicals or controlled substances were associated with the illegal manufacture of drugs or controlled substances.

(2) The law enforcement agency takes photographs of the illegal drug manufacturing site that accurately depict the presence and quantity of chemicals and controlled substances.

(3) The law enforcement agency completes a chemical inventory report that describes the type and quantities of chemicals and controlled substances present at the illegal manufacturing site.

The photographs and description of the property shall be admissible into evidence in place of the actual physical evidence.

(f) For purposes of preserving the record of any conviction on appeal, a photograph demonstrating the nature of the property, and an adequate description of the property must be obtained before the disposition of it. In the event of a retrial, the photograph and description of the property shall be admissible into evidence in place of the actual physical evidence. All other rules of law governing the admissibility of evidence shall apply to the photographs.

(g) The law enforcement agency disposing of property in any manner provided in subsection (b), (c), or (e) shall maintain certified records of any such disposition. Disposition by destruction of property shall be witnessed by two (2) persons who shall also attest to the destruction.

(h) This section does not affect the procedure for the disposition of firearms seized by a law enforcement agency.

(i) A law enforcement agency that disposes of property by auction under this section shall permanently stamp or otherwise permanently identify the property as property sold by the law enforcement agency.

(j) Upon motion of the prosecuting attorney, the court shall order property seized under IC\_34-24-1 transferred, subject to the perfected liens or other security interests of any person in the property, to the appropriate federal authority for disposition under 18 U.S.C. 981(e), 19 U.S.C. 1616a, or 21 U.S.C. 881(e) and any related regulations adopted by the United States Department of Justice.

#### **App. 102.15.4**

##### **Return of Search Warrant**

**IC 35-33-5-4.** When the warrant is executed by the seizure of property or things described in it or of any other items:

- (1) The officer who executed the warrant shall make a return on it directed to the court or judge, who issued the warrant, and this return must indicate the date and time served and list the items seized.
- (2) The items so seized shall be securely held by the law enforcement agency whose officer executed the search warrant under the order of the court trying the cause, except as provided in section 6 [IC 35-33-5-6] of this chapter.

#### **App. 102.15.5**

##### **Search for Dead Bodies**

**IC 35-33-5-6.** When an affidavit is filed before a judge alleging that the affiant has good reasons to believe, and does believe, that a dead human body is illegally secreted in a certain building, or other particularly specified place in the county, the judge may issue a search warrant authorizing a law enforcement officer to enter and search the building or other place for the dead body. While making the search, the law enforcement officer shall have the power of an officer executing a regular search warrant.

#### **App. 102.15.6**

##### **Execution of Search Warrant**

**IC 35-33-5-7.** (a) A search warrant issued by a court of record may be executed according to its terms anywhere in the state. A search warrant issued by a court that is not a court of record may be executed according to its terms anywhere in the county of the issuing court.

(b) A search warrant must be:

- (1) Executed not more than ten (10) days after the date of issuance; and
- (2) Returned to the court without unnecessary delay after the execution.

(c) A search warrant may be executed:

- (1) On any day of the week; and
- (2) At any time of the day or night.

(d) A law enforcement officer may break open any outer or inner door or window in order to execute a search warrant, if he is not admitted following an announcement of his authority and purpose.

(e) A person or persons whose property is wrongfully damaged or whose person is wrongfully injured by any law enforcement officer or officers who wrongfully enter may recover such damage from the responsible authority and the law enforcement officer or officers as the court may determine. The action may be filed in the circuit court, superior court or county court in the county where the wrongful entry took place.

#### **App. 102.15.7**

##### **Evidence Obtained in Good Faith**

**IC 35-37-4-5.** (a) In a prosecution for a crime or a proceeding to enforce an ordinance or a statute defining an infraction, the court may not grant a motion to exclude evidence on the grounds that the search or seizure by which the evidence was obtained was unlawful if the evidence was obtained by a law enforcement officer in good faith.

(b) For purposes of this section, evidence is obtained by a law enforcement officer in good faith if:

(1) It is obtained pursuant to:

- (A) A search warrant that was properly issued upon a determination of probable cause by a neutral and detached magistrate, that is free from obvious defects other than nondeliberate errors made in its preparation, and that was reasonably believed by the law enforcement officer to be valid; or
- (B) A state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated; and

(2) The law enforcement officer, at the time he obtains the evidence, has satisfied applicable minimum basic training requirements established by rules adopted by the law enforcement training board under IC 5-2-1-9.

(c) This section does not affect the right of a person to bring a civil action against a law enforcement officer or a governmental entity to recover damages for the violation of his rights by an unlawful search and seizure.

**Note:** In 1984, the U.S. Supreme Court essentially adopted the rule of this statute by holding that evidence obtained under an invalid warrant was admissible when the officers acted in "good faith" and where the errors in the warrant were made by the judge and not the police officers. **See:** *United States v. Leon*, 104 S.Ct. 3405, and *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984).

#### **App. 102.15.8**

##### **Seizure of Property**

**IC 34-24-1-1.** (a) The following may be seized:

(1) All vehicles (as defined by IC 35-41-1), if they are used or are intended for use by the person or persons in possession of them to transport or in any manner to facilitate the transportation of the following:

(A) A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:

- (i) Dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-1).
- (ii) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2).
- (iii) Dealing in a schedule IV controlled substance (IC 35-48-4-3).
- (iv) Dealing in a schedule V controlled substance (IC 35-48-4-4).
- (v) Dealing in a counterfeit substance (IC 35-48-4-5).
- (vi) Possession of cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-6).
- (vii) Dealing in paraphernalia (IC 35-48-4-8.5).
- (viii) Dealing in marijuana, hash oil, or hashish (IC 35-48-4-10).

- (B) Any stolen (IC 35-43-4-2) or converted property (IC 35-43-4-3) if the retail or repurchase value of that property is one hundred dollars (\$ 100) or more.
- (C) Any hazardous waste in violation of IC 13-30-6-6.
- (2) All money, negotiable instruments, securities, weapons, communications devices, or any property commonly used as consideration for a violation of IC 35-48-4 (other than items subject to forfeiture under IC 16-42-20-5 or IC 16-6-8.5-5.1 before its repeal):
- (A) furnished or intended to be furnished by any person in exchange for an act that is in violation of a criminal statute;
- (B) used to facilitate any violation of a criminal statute; or
- (C) traceable as proceeds of the violation of a criminal statute.
- (3) Any portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.
- (4) A vehicle that is used by a person to:
- (A) commit, attempt to commit, or conspire to commit;
- (B) facilitate the commission of; or
- (C) escape from the commission of;
- murder (IC 35-42-1-1), kidnapping (IC 35-42-3-2), criminal confinement (IC 35-42-3-3), rape (IC 35-42-4-1), child molesting (IC 35-42-4-3), or child exploitation (IC 35-42-4-4).
- (5) Real property owned by a person who uses it to commit any of the following as a Class A felony, a Class B felony, or a Class C felony:
- (A) Dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-1).
- (B) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2).
- (C) Dealing in a schedule IV controlled substance (IC 35-48-4-3).
- (D) Dealing in marijuana, hash oil, or hashish (IC 35-48-4-10).
- (6) Equipment and recordings used by a person to commit fraud under IC 35-43-5-4(11).
- (7) Recordings sold, rented, transported, or possessed by a person in violation of IC 24-4-10.
- (8) Property (as defined by IC 35-41-1-23) or an enterprise (as defined by IC 35-45-6-1) that is the object of a corrupt business influence violation (IC 35-45-6-2).
- (9) Unlawful telecommunications devices (as defined in IC 35-45-13-6) and plans, instructions, or publications used to commit an offense under IC 35-45-13.
- (b) A vehicle used by any person as a common or contract carrier in the transaction of business as a common or contract carrier is not subject to seizure under this section, unless it can be proven by a preponderance of the evidence that the owner of the vehicle knowingly permitted the vehicle to be used to engage in conduct that subjects it to seizure under subsection (a).
- (c) Money, negotiable instruments, securities, weapons, communications devices, or any property commonly used as consideration for a violation of IC 35-48-4 found near or on a person who is committing, attempting to commit, or conspiring to commit any of the following offenses shall be admitted into evidence in an action under this chapter as prima facie evidence that the money, negotiable instrument, security, or other thing of value is property that has been used or was to have been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute:
- (1) IC 35-48-4-1 (dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine).
- (2) IC 35-48-4-2 (dealing in a schedule I, II, or III controlled substance).
- (3) IC 35-48-4-3 (dealing in a schedule IV controlled substance).
- (4) IC 35-48-4-4 (dealing in a schedule V controlled substance) as a Class B felony.
- (5) IC 35-48-4-6 (possession of cocaine, a narcotic drug, or methamphetamine as a Class A felony, Class B felony, or Class C felony).
- (6) IC 35-48-4-10 (dealing in marijuana, hash oil, or hashish) as a Class C felony.

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**App. 102.16**  
**Obtaining a Search Warrant**

The Fourth Amendment, by its very terms, makes any search or seizure without a warrant "unreasonable" (and thus unconstitutional) in the absence of some judicially recognized exception. Thus, in order for a search or seizure to be constitutionally valid, it must be conducted pursuant to a warrant or pursuant to one of the 6 exceptions to the warrant

requirement.

A magistrate may issue a valid search warrant upon a showing of probable cause. "Probable cause" means that the officers who are seeking the search warrant must present to the magistrate who will issue the warrant "sufficient underlying facts and circumstances such that a reasonable person would conclude that seizable evidence would be found on the premises or person to be searched." Such underlying facts and circumstances are made known to the magistrate by presenting an affidavit (that is, a sworn statement in writing). The affidavit must contain information sufficient for the magistrate to make an independent evaluation of the existence of probable cause; affidavits must contain allegations of facts and not just conclusions of the police officer.

A valid warrant, under the terms of the Fourth Amendment, must describe the place to be searched and the person or things to be seized. This description must be reasonably precise; for example, if the place to be searched is an apartment, the warrant must name the exact apartment number and not just the street address of the building to be searched. Further, the warrant must be issued by a "neutral and detached magistrate" (a magistrate is a judge or a subordinate judicial officer). A magistrate is not "neutral and detached" if he receives a fee for issuing the warrant, or if he is involved in the investigation, or if he participates in the search itself.

Note that search warrants can be issued for third-party premises (that is, for the premises of persons who are not themselves suspected of crime but where evidence of crime is expected to be found). *Zurcher v. Stanford Daily* (1979) permitted the search of and seizure from the photographic files of a student newspaper, photographs which allowed the identification of campus demonstrators who had injured police officers.

#### **App. 102.16.1 The Affidavit**

The affidavit of the police officer may be based entirely on "hearsay" (hearsay is an out-of-court assertion introduced in court to prove that the very thing asserted is true) information from a police informant who need not be identified. In such a circumstance, the affidavit must contain a statement of sufficient underlying facts and circumstances to allow the judge to understand how the informant reached the conclusion reported in the hearsay assertion, and there must be a sufficient statement of facts to establish that the informant is reliable. Informant reliability may be demonstrated by showing that the informant has previously given reliable information, or that the informant gave information which exposed him to criminal prosecution himself, or that the informant was a member of a reliable group such as the clergy, or that the informant gave clear and precise details of his observation which could only have come from personal observation and knowledge. Generally, the identity of the informant does not have to be disclosed, however, if the informant is also a "material witness" (e.g., the informant also was a participant in the drug buy which is the basis of the prosecution), then the informant must be identified or the evidence must be suppressed.

Defendants may challenge the validity of warrants by proving that a false statement was included in the affidavit which gave rise to the warrant. If the police acted in good faith, but there was in fact a false statement in the affidavit (unknown to the police at the time), the warrant is still valid. However, if there was a false statement in the affidavit, if the false statement was necessary to the finding of probable cause, and if the officer "knowingly or recklessly" included the false statement in the affidavit, then the warrant is invalid and the evidence gathered pursuant to it must be suppressed.

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#### **App. 102.17 Execution of Warrants**

The "execution" of a warrant means merely that the search and seizure are conducted under the terms of the warrant and the warrant is then "returned" to the court which issued it. The warrant must be executed by police officers who knock and announce their authority and purpose. If after the "knock and announce" requirement is met, the occupants do not open the door, officers may break and enter to execute the warrant. In actual emergencies, a "no-knock" entry is allowed (that is, the police can actually break in without knocking or announcing) if there is a reasonable belief that knocking and announcing would endanger the police officers or allow the occupants to escape or destroy evidence.

When executing a search warrant, officers may detain persons present on the premises while the search is being conducted [*Michigan v. Summers* (1981)]. If officers have probable cause to arrest a person found at the search scene, they may make a Chimel-type search of the person incident to the arrest. Likewise, if officers have reasonable suspicion that criminal activity is afoot at the search scene, they may conduct a "frisk" of persons present even if they are not named in the search warrant. Officers may not, however, search persons on the premises who are not named in the warrant, who are not arrested, and of whom there is no reasonable suspicion of criminal activity.

Search warrants must be executed without "unreasonable delay." Some jurisdictions place arbitrary time limits (typically 10 days) on the execution of search warrants. Some jurisdictions restrict search warrant execution to the

daytime hours (unless night searches are specifically authorized by the court). Not that arrest warrants (that is, court orders for the seizure of a specific person) have no expiration time and are valid until withdrawn or executed.

The scope of the search pursuant to a warrant must be limited to the exact premises described in the warrant and must be limited to the exact items described in the warrant. During the execution of the warrant, officers may also seize any contraband, fruits of crime or instrumentalities of crime which they discover (whether described in the warrant or not).

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**App. 102.18**

**Question 4: If there was an invalid warrant issued by a judicial mistake, did the police act in good faith in obtaining the warrant?**

In 1984, the United States Supreme Court decided *United States v. Leon* and *Massachusetts v. Sheppard*. Both of these cases involved situations where police officers, believing they had probable cause, applied for search warrants and relied on assurances from judges that the warrants were valid. The judges were mistaken, but, because the police officers had done nothing wrong (that is, they were acting in "good faith"), the Supreme Court said that the evidence seized should be allowed into evidence anyway. The exclusionary rule is designed to control for *police* misconduct, not judicial misconduct. Therefore, when police officers obtain a search warrant in good faith, but it later turns out to be invalid because of judge's mistake, the evidence is still admissible.

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**App. 102.19**

**Searches Without Warrants**

Searches without warrants are by definition unreasonable and unconstitutional, except . . .

There are 6 general categories of exceptions to the search warrant requirement:

- (1) Searches by consent [Question 5].
- (2) Investigatory detentions ("stop and frisk") [Question 6].
- (3) Searches incident to a lawful arrest [Question 7].
- (4) Seizures of seizable items in "plain view" [Question 8].
- (5) Searches of motor vehicles [Question 9].
- (6) Searches under exigent circumstances:
  - (A) Ephemeral evidence [Question 10].
  - (B) Hot pursuit [Question 11].
  - (C) Emergency [Question 12].

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**App. 102.20**

**Question 5: If there was no warrant, was the search done with consent of an authorized person?**

A valid search may be conducted without a warrant if the defendant has given voluntary and intelligent consent to the search. Police officers do not have an obligation to advise a suspect of his right to refuse to consent to a search. Police may not, however, coerce a suspect into giving consent, nor may police claim that they have a valid search warrant when they do not in order to induce consent to search.

Searches pursuant to consent are limited to the scope of the consent given. For example, consent to search for a stolen refrigerator would not justify the discovery of a small quantity of marijuana inside a cigar box (where no refrigerator could fit). Consent may be revoked at any time, and the search must stop at that time. Consent may be given by any adult who has an equal right to the use or possession of the property searched. For example, one roommate may consent to the search of a common room and evidence found may be used against the other roommate (unless, of course, the other roommate is present and refuses consent). Generally, persons sharing living quarters can consent only to the search of commonly shared areas (but can not consent, for example, to a privately reserved area of the premises such as a closet used exclusively by the other tenant). Clearly, a landlord or an innkeeper does not have the authority to consent to the search of a tenant's private premises within the larger building.

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**App. 102.21****Question 6: If there was no warrant, was the search a "stop and frisk"?**

The landmark case for "stop and frisk" (or "investigatory detention") is *Terry v. Ohio* (1968). Since *Terry*, police may detain a person briefly for questioning with less than probable cause to believe that the person committed a crime. Such an "investigatory stop" is not an arrest and is permitted when three factors are present: (1) the officer observes unusual conduct of the suspect; (2) the officer has a "reasonable suspicion" that criminal activity may be afoot; and (3) the officer can articulate specific facts to justify his suspicion.

A "frisk" is a limited pat-down of a person's outer clothing for the purpose of discovering weapons. Any weapons (or anything else seizable which feels like a weapon) can be removed.

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**App. 102.22****Question 7: If there was no warrant, was the search incident to a lawful arrest?**

The landmark case for search incident to a lawful arrest is *Chimel v. California* (1969). Police officers may conduct a warrantless search incident to a full custodial arrest in order to discover weapons and to prevent the destruction of evidence. There is no requirement that officers actually fear for their safety or believe that there is any evidence to be destroyed.

To justify the search, the arrest itself must be lawful (that is, either based on an arrest warrant or based upon probable cause to arrest without a warrant). The *Chimel* rule is that upon making an arrest, officers may make a full search of the person arrested and of the area within the person's immediate reach where he might reach for weapons or to destroy evidence. The search incident to an arrest must be conducted at the same time and place as the arrest.

**App. 102.22.1****Arrest Defined**

An arrest is the taking of a person into custody to answer to a criminal charge. In the constitutional context, the concept of "arrest" is extended to any significant deprivation of liberty by legal authority. If a person is restrained by a police officer to the extent that the person is not free to leave of his own volition, that person has been "arrested" for 4th Amendment purposes. An arrest is a "seizure" of a person by the act of a government agent, and accordingly, must be "reasonable."

**IC 35-33-1-5.** Arrest is the taking of a person into custody, that he may be held to answer for a crime.

**App. 102.22.2****Constitutional Significance of an Arrest**

An arrest is a 4th Amendment seizure of a person. An arrest, with or without a warrant, must be based upon "probable cause." Probable cause exists when, at the time of arrest, the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense.

**App. 102.22.3****Probable Cause**

Arrests must be based upon "probable cause." Traditionally, an arrest has been defined as the taking of a person into custody to answer to a criminal charge. In recent years, however, courts have expanded the concept of arrest for some purposes to include all circumstances when the police detain a person under conditions where that person is not free to leave. The reason for this expansion of the idea of an arrest is a recognition that the Fourth Amendment prohibition of unreasonable "searches and seizures" also applies to arrests, since an arrest is just a "seizure" of a person. Thus, although some kinds of police detentions (such as a "stop and frisk" situation) may be allowed on less than probable cause, persons taken into police custody must be arrested only pursuant to an arrest warrant based upon probable cause or pursuant to probable cause under circumstances which excuse the absence of a warrant.

**App. 102.22.4****Standard for Probable Cause**

The standard of probable cause for an arrest is whether the officer's knowledge, at the exact time of the arrest, would justify a reasonable person in believing that the person arrested had committed a crime.

Generally speaking, if probable cause exists to make an arrest for a felony, then there is no need to obtain a warrant, even if there is plenty of time to do so. A warrant is required, however, for a police officer to make a misdemeanor arrest

unless the misdemeanor has been committed in the officer's presence.

The standard of probable cause for an arrest is whether the officer's knowledge, at the exact time of the arrest, would justify a reasonable person in believing that the person arrested had committed a crime. To obtain an arrest warrant, the facts upon which the officer relies for probable cause must be set forth in the affidavit with specificity so that the judge will have some independent basis for making a decision. Arrest warrants may be based upon hearsay if there is sufficient corroboration. Informants need not be identified, but there must be sufficient information in the affidavit so that the judge may know the basis of the informant's information.

To arrest an individual merely for investigation, but without probable cause is clearly unconstitutional. However, some limited detentions for the purposes of investigation are permitted. An officer may "stop and frisk" a suspect upon a "reasonable suspicion that a person has committed, is committing, or is about to commit a crime." [*Terry v. Ohio*, 88

S.Ct. 1869 (1968)] Clearly, officers may approach persons and ask them questions when conducting an investigation without worrying about probable cause. So long as the person being questioned is aware that he is free to leave and that his conversation with the police officer is voluntary, no arrest or even detention has occurred.

#### **App. 102.22.5**

##### **Arrests Without Warrants**

A police officer may arrest a person for a felony without a warrant if the officer has probable cause to believe that a felony has been committed and that the particular person arrested committed it. An officer may arrest a person for a misdemeanor without a warrant only if the misdemeanor was committed in the presence of the officer.

Officers need not obtain an arrest warrant to make a lawful arrest in a public place, even where there is sufficient time and opportunity to obtain a warrant (so long, of course, as probable cause exists). Officers must have an arrest warrant to enter a person's home to arrest him (unless there are exigent circumstances to justify the warrantless entry or unless the person consents to the entry). If officers are in "hot pursuit" of a person who retreats into his home, they may enter the home to make the arrest.

Generally, police officers must knock and announce their authority and purpose before using force to enter a home to make an arrest. Failure to knock and announce renders the subsequent arrest unlawful. An exception to this general rule occurs where officers reasonably believe that an announcement would endanger life, prompt the suspect to escape, or permit the destruction of evidence.

Note that the "stop and frisk" is not an "arrest" but merely an investigative stop or a brief detention which is short of an arrest.

#### **App. 102.22.6**

##### **Arrest by Law Enforcement Officer**

**IC\_35-33-1-1.** (a) A law enforcement officer may arrest a person when the officer has:

- (1) a warrant commanding that the person be arrested;
- (2) probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony;
- (3) probable cause to believe the person has violated the provisions of IC\_9-26-1-1(1), IC\_9-26-1-1(2), IC\_9-26-1-2(1), IC\_9-26-1-2(2), IC\_9-26-1-3, IC\_9-26-1-4, or IC\_9-30-5;
- (4) probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence;
- (5) probable cause to believe the person has committed a:
  - (A) battery resulting in death under IC\_35-42-2-1(a)(5);
  - (B) battery resulting in bodily injury under IC\_35-42-2-1; or
  - (C) domestic battery under IC\_35-42-2-1.3.

The officer may use an affidavit executed by an individual alleged to have direct knowledge of the incident alleging the elements of the offense of battery to establish probable cause;

- (6) probable cause to believe that the person violated IC\_35-46-1-15.1 (invasion of privacy);
- (7) probable cause to believe that the person has committed stalking (IC\_35-45-10);
- (8) probable cause to believe that the person violated IC\_35-47-2-1 (carrying a handgun without a license) or IC\_35-47-2-22 (counterfeit handgun license); or
- (9) probable cause to believe that the person is violating or has violated an order issued under IC\_35-50-7.

(b) A person who:

- (1) is employed full time as a federal enforcement officer;
- (2) is empowered to effect an arrest with or without warrant for a violation of the United States Code; and
- (3) is authorized to carry firearms in the performance of the person's duties;

may act as an officer for the arrest of offenders against the laws of this state where the person reasonably believes that a felony has been or is about to be committed or attempted in the person's presence.

**Note:** Federal enforcement officers are authorized to arrest for violations of Indiana law where the officer reasonably believes that a felony has been or is about to be committed in the officer's presence.

**App. 102.22.7**

**Arrest by Judge**

**IC 35-33-1-2.** A judge may arrest, or order the arrest of a person in his presence, when he has probable cause to believe the person has committed a crime.

**App. 102.22.8**

**Authority of Coroner to Arrest**

**IC 35-33-1-3.** A coroner has the authority to arrest any person when performing the duties of the sheriff under IC 36-2-14-4 and authority to arrest the sheriff under IC 36-2-14-5.

**App. 102.22.9**

**Citizens' Arrest**

**IC 35-33-1-4.** (a) Any person may arrest any other person if:

- (1) The other person committed a felony in his presence;
- (2) A felony has been committed and he has probable cause to believe that the other person has committed that felony; or
- (3) A misdemeanor involving a breach of peace is being committed in his presence and the arrest is necessary to prevent the continuance of the breach of peace.

(b) A person making an arrest under this section shall, as soon as practical, notify a law enforcement officer and deliver custody of the person arrested to a law enforcement officer.

(c) The law enforcement officer may process the arrested person as if the officer had arrested him. The officer who receives or processes a person arrested by another under this section is not liable for false arrest or false imprisonment.

**App. 102.23**

**Arrests with Warrants**

An arrest warrant is usually based upon a complaint (in the form of an affidavit) which sets forth facts which show the commission of an offense and the responsibility of the accused for the criminal act.

An arrest warrant is usually based upon a complaint (in the form of an affidavit) which sets forth facts which show the commission of an offense and the responsibility of the accused for the criminal act. Upon a finding of probable cause, the judge to whom the complaint is made will issue an arrest warrant (which is just an order to seize the named person and bring him to the court).

**App. 102.23.1**

**Issuance of Arrest Warrant**

**IC 35-33-2-1.** (a) Except as provided in chapter 4 of this article, whenever an indictment is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court, without making a determination of probable cause, shall issue a warrant for the arrest of the defendant.

(b) Whenever an information is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court shall issue a warrant for the arrest of the defendant after first determining that probable cause exists for the arrest.

(c) No warrant for arrest of a person may be issued until:

- (1) An indictment has been found charging him with the commission of an offense; or
- (2) 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.

**App. 102.23.2****Form of Arrest Warrant**

**IC 35-33-2-2.** (a) A warrant of arrest shall:

- (1) Be in writing;
- (2) Specify the name of the person to be arrested, or if his name is unknown, shall designate such person by any name or description by which he can be identified with reasonable certainty;
- (3) Set forth the nature of the offense for which the warrant is issued;
- (4) State the date and county of issuance;
- (5) Be signed by the clerk or the judge of the court with the title of his office;
- (6) Command that the person against whom the indictment or information was filed be arrested and brought before the court issuing the warrant, without unnecessary delay;
- (7) Specify the amount of bail, if any; and
- (8) Be directed to the sheriff of the county.

(b) An arrest warrant may be in substantially the following form:

TO:

You are hereby commanded to arrest        forthwith, and hold that person to bail in the sum of        dollars, to answer in the Court of        County, in the State of Indiana, an information or indictment for        .

And for want of bail commit him to the jail of the County, and thereafter without unnecessary delay to bring him before the said court.

IN WITNESS WHEREOF, I,        (Clerk/Judge) of said Court, hereto affix the seal thereof, and subscribe my name at        this        day of        A.D. 19\_.

Clerk or Judge of the Court

**App. 102.23.3****Expiration, Return, and Reissue of Arrest Warrants**

**IC 35-33-2-4.** A warrant of arrest for a misdemeanor expires one hundred eighty (180) days after it is issued. A warrant of arrest for a felony and a rearrest warrant for any offense do not expire. A sheriff who has an expired warrant shall make a return on the warrant stating that it has expired and shall return it to the clerk of the court that issued it. The clerk shall enter the fact that the warrant has expired in his records and shall notify the prosecuting attorney of the county that the warrant has expired. Upon request of the prosecuting attorney, the court shall issue another warrant.

**App. 102.23.4****Dismissal or Revocation of Arrest Warrant**

**IC 35-33-2-5.** When an information or indictment has been dismissed, the court shall order the sheriff to make a return on any outstanding arrest warrant or summons issued regarding a charge stating that the charge has been dismissed. The sheriff shall notify any law enforcement officer to whom the arrest warrant or summons has been delivered that it has been revoked.

**App. 102.23.5****Service and Arrest on Warrant**

**IC 35-33-2-3.** (a) The warrant is issued to the sheriff of the county where the indictment or information is filed. This warrant may be served or arrests on it made:

- (1) By any law enforcement officer;
- (2) On any day of the week; and
- (3) At any time of the day or night.

(b) A law enforcement officer may break open any outer or inner door or window in order to execute an arrest warrant, if he is not admitted following an announcement of his authority and purpose.

(c) The accused person shall be delivered to the sheriff of the county in which the indictment or information was filed, and the sheriff shall commit the accused person to jail or hold him to bail as provided in this article.

(d) A person or persons whose property is wrongfully damaged or whose person is wrongfully injured by any law

enforcement officer or officers who wrongfully enter may recover such damage from the responsible authority and the law enforcement officer or officers as the court may determine. The action may be filed in the circuit court, superior court or county court in the county where the wrongful entry took place.

**App. 102.23.6**

**Issuance of Summons**

**IC 35-33-4-1.** (a) When an indictment or information is filed against a person charging him with a misdemeanor, the court may, in lieu of issuing an arrest warrant under IC 35-33-2, issue a summons. The summons must set forth substantially the nature of the offense, and command the accused person to appear before the court at a stated time and place. However, the date set by the court must be at least seven (7) days after the issuance of the summons. The summons may be served in the same manner as the summons in a civil action.

(b) If the person summoned fails, without good cause, to appear as commanded by the summons and the court has determined that there is probable cause to believe that a crime (other than failure to appear) has been committed, the court shall issue a warrant of arrest.

(c) If after issuing a summons the court:

- (1) Is satisfied that the person will not appear as commanded by the summons; and
- (2) Has determined that there is probable cause that a crime (other than failure to appear) has been committed;

it may at once issue a warrant of arrest.

(d) The summons may be in substantially the following form:

CAUSE NO.

SUMMONS  
THE STATE OF INDIANA TO  
THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED, to appear before the above designated Court at \_\_\_\_\_, \_\_\_\_\_, at \_\_\_\_\_ .m. on (day) \_\_\_\_\_, 19\_\_\_\_, with respect to an (information or indictment) for \_\_\_\_\_.

If you do not so appear, an application may be made for the Issuance of a Warrant for your arrest.

ISSUED: \_\_\_\_\_, 19\_\_\_\_ in \_\_\_\_\_ (City or County) \_\_\_\_\_,

BY THE CLERK OF SAID \_\_\_\_\_ COURT:

CLERK

(e) When any law enforcement officer in the state serves a summons on a person, he shall file a return of service with the court issuing the summons. The return shall be in substantially the following form:

RETURN OF SERVICE

I hereby certify that I served this summons upon the above named defendant by delivering a copy of it and of the Information to the defendant personally or by certified mail return receipt requested, on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_.

DATED: \_\_\_\_\_, 19\_\_\_\_.

(Signature)

LAW ENFORCEMENT AGENCY

(f) In lieu of arresting a person who has allegedly committed a misdemeanor (other than a traffic misdemeanor) in his presence, a law enforcement officer may issue a summons and promise to appear. The summons must set forth substantially the nature of the offense and direct the person to appear before a court at a stated place and time.

(g) The summons and promise to appear may be in substantially the following form:

#### SUMMONS AND PROMISE TO APPEAR

YOU ARE HEREBY SUMMONED, to appear before the above designated Court  
at (Address) at .m. on Month Day, 19, in respect to the charge of

If you do not so appear, an application may be made for the issuance of a warrant for your arrest.

ISSUED: , 19 ,

in , Indiana

(City or County)

BY THE UNDERSIGNED LAW ENFORCEMENT OFFICER:

Officer's Signature

I.D. No.

Div. Dist.

Police Agency

#### COURT APPEARANCE

I promise to appear in court at the time and place designated above, or be subject to arrest.

Signature

YOUR SIGNATURE IS NOT AN ADMISSION OF GUILT.

(h) When any law enforcement officer issues a summons and promise to appear, he shall:

- (1) Promptly file the summons and promise to appear and the certificate of service with the court designated in the summons and promise to appear; and
- (2) Provide the prosecuting attorney with a copy thereof.

#### **App. 102.23.7**

##### **Fresh Pursuit**

**IC 35-33-3-1.** Any member of a duly organized state, county or municipal peace unit of another state who enters this state in fresh pursuit, and continues within this state in such fresh pursuit of a person in order to arrest him on ground that he is believed to have committed a felony in the other state, shall have the same authority to arrest and hold such person in custody as has any law enforcement officer of this state to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

#### **App. 102.23.8**

##### **Arrest and Hearing**

**IC 35-33-3-2.** If an arrest is made in this state by an officer of another state in accordance with the provisions of section

1 [IC 35-33-3-1] of this chapter, he shall, without unnecessary delay, take the person arrested before a judge of the county in which the arrest was made. The judge shall conduct a hearing for the purpose of determining the lawfulness

of the arrest. If the judge determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state. If the judge determines that the arrest was unlawful, he shall discharge the person arrested.

**IC 35-33-3-3.** Section 1 [IC 35-33-3-1] of this chapter shall not be construed so as to make unlawful any arrest in this state which otherwise would be lawful.

**IC 35-33-3-4.** For the purpose of this chapter, the word "state" shall include the District of Columbia.

**IC 35-33-3-5.** The term "fresh pursuit" as used in this chapter shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who reasonably is suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony actually has been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

**IC 35-33-3-6.** It shall be the duty of the secretary of state to certify a copy of this chapter to the executive department of each of the states of the United States.

**IC 35-33-3-7.** This chapter may be cited as the uniform act on fresh pursuit.

#### **App. 102.23.9**

##### **Arrest Without a Warrant**

**IC 35-33-7-1.** (a) A person arrested without a warrant for a crime shall be taken promptly before a judicial officer:

- (1) In the county in which the arrest is made; or
- (2) Of any county believed to have venue over the offense committed;

for an initial hearing in court.

(b) Except as provided in subsection (c), if the person arrested makes bail before the person's initial hearing before a judicial officer, the initial hearing shall occur at any time within twenty (20) calendar days after the person's arrest.

(c) If a person arrested under IC 9-30-5 makes bail before the person's initial hearing before a judicial officer, the initial hearing must occur within ten (10) calendar days after the person's arrest.

**IC 35-33-7-3.** (a) When a person is arrested for a crime before a formal charge has been filed, an information or indictment shall be filed or be prepared to be filed at or before the initial hearing, unless the prosecuting attorney has informed the court that there will be no charges filed in the case.

(b) If the prosecuting attorney states that more time is required to evaluate the case and determine whether a charge should be filed, or if it is necessary to transfer the person to another court, then the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays.

(c) Before recessing the initial hearing and after the ex parte probable cause determination has been made, the court shall inform a defendant charged with a felony of the rights specified in subdivisions (1), (2), (3), (4), and (5) of section 5 [IC 35-33-7-5(1)-(5)] of this chapter.

**IC 35-33-7-3.5.** The initial hearing of a person issued a:

- (1) Summons; or
- (2) Summons and promise to appear;

must take place according to the terms of the summons. At such an initial hearing, a determination of probable cause is not required unless the prosecuting attorney requests on the record that the person be held in custody before his trial.

#### **App. 102.23.10**

##### **Arrest under Warrant**

**IC 35-33-7-4.** A person arrested in accordance with the provisions of a warrant shall be taken promptly for an initial hearing before the court issuing the warrant or before a judicial officer having jurisdiction over the defendant. If the

arrested person has been released in accordance with the provisions for release stated on the warrant, the initial hearing shall occur at any time within twenty (20) days after his arrest.

**App. 102.23.11**

**Determination of Probable Cause**

**IC 35-33-7-2.** (a) At or before the initial hearing of a person arrested without a warrant for a crime, the facts upon which the arrest was made shall be submitted to the judicial officer, ex parte, in a probable cause affidavit. In lieu of the affidavit or in addition to it, the facts may be submitted orally under oath to the judicial officer. If facts upon which the arrest was made are submitted orally, the proceeding shall be recorded by a court reporter, and, upon request of any party in the case or upon order of the court, the record of the proceeding shall be transcribed.

(b) If the judicial officer determines that there is probable cause to believe that any crime was committed and that the arrested person committed it, 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.

**IC 35-33-7-5.** 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.

In addition, 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. 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.

**IC 35-33-7-6.** (a) Prior to the completion of the initial hearing, the judicial officer shall determine whether a person who requests assigned counsel is indigent. If the person is found to be indigent, the judicial officer shall assign counsel to him.

(b) If jurisdiction over an indigent defendant is transferred to another court, the receiving court shall assign counsel immediately upon acquiring jurisdiction over the defendant.

(c) If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:

(1) For a felony action, a fee of one hundred dollars (\$100).

(2) For a misdemeanor action, a fee of fifty dollars (\$50).

The clerk of the court shall deposit fees collected under this subsection in the county's supplemental public defender services fund established under IC 33-9-11.5-1.

(d) The court may review the finding of indigency at any time during the proceedings.

**IC 35-33-7-7.** An order releasing a person under this chapter does not bar further proceedings in the case.

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**App. 102.24**

**Question 8: If there was no warrant, was the seizure of an item in plain view?**

In circumstances where police officers are legitimately on the premises, they may also seize any fruits of crime, instrumentalities of crime or contraband which are in "plain view." Items in plain view are those items which are discoverable by the unaided senses of the police officers without a "search." For example, officers may seize contraband in plain view which they discover while executing a search warrant for some other item because they are lawfully present on the premises pursuant to the search warrant. Officers who are conducting an inventory of an impounded motor vehicle may seize any contraband or evidence of crime because they are lawfully conducting an inventory and not a search. Officers who knock on the door of a house in response to a complaint about a loud party may seize contraband and make an arrest when the host opens the door and has a joint of marijuana in his mouth.

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**App. 102.25****Question 9: If there was no warrant, was the search conducted pursuant to the automobile exception?**

The landmark case for the "automobile exception" is *Carroll v. United States* in the 1910's. Officers may search a motor vehicle without a warrant if they have probable cause to believe that the vehicle contains fruits of crime, instrumentalities of crime or contraband. The vehicle must be a "moving" vehicle stopped by the police (as opposed to a parked car). It is the mobility of the motor vehicle which justifies the failure to obtain a warrant; it is clear that while officers are obtaining a warrant, the vehicle could just drive away.

Generally, courts have recognized that persons have a lower "expectation of privacy" in a motor vehicle on a public street (and by extension, in an airplane or a boat in a public place) than they do in their homes. Note that officers may search the entire vehicle and may open any packages or luggage which could contain the items for which they have probable cause to search.

Vehicle searches need not occur at the same time and place as the stop of the vehicle. The vehicle may be towed to the police station, for example, and searched later.

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**App. 102.26****Questions 10, 11, And 12: Searches under exigent circumstances.**

Courts will recognize "exigent" (or emergency) circumstances which can justify a warrantless search. The common thread running through these exceptions is that there is simply no time to obtain or any practical opportunity to obtain a search warrant.

**[Question 10]** One exigent circumstance occurs when evidence is likely to disappear while officers seek a search warrant. The leading case for this "disappearing evidence" exception to the warrant requirement is *Schmerber v. California* (1966) where officers compelled medical personnel to draw a blood sample from an unwilling suspect to gather evidence of DWI. If the officers had taken the time to obtain a search warrant, the suspect's metabolic processes would have oxidized the alcohol in his blood, thus destroying any evidence of intoxication. Another example of this exception in *Cupp v. Murphy* (1973) where police officers took scrapings from the fingernails of an unwilling suspect (who was in the police station but not under arrest) to obtain hair and skin residue from the murder victim he had just strangled. If the officers had tried to obtain a warrant before the taking of the samples, the suspect could have just washed his hands and destroyed the evidence.

**[Question 11]** "Hot pursuit" is recognized as another exigent circumstance justifying a search without a warrant. If officers are in actual pursuit of a dangerous suspect, they may enter any building into which he flees and search the building for the felon. When officers have probable cause to make an arrest in a public place, they may pursue the suspect into a private dwelling to make their arrest.

**[Question 12]** Other kinds of emergencies also give rise to this exception. For example, if a police officer observes flames inside a dwelling, he may break and enter the dwelling in order to ascertain if persons are in danger from the fire, in order to fight the fire, and in order to obtain evidence of arson. (After the fire, however, officers must obtain warrants to enter the burned premises to search for evidence of arson).

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**App. 102.27**  
**Cases of Interest**

## App. 102.27.1

***State v. Barker***

\_\_\_\_ N.E.2d \_\_\_\_

[No. 71A03-0001-CR-4]

Court of Appeals of Indiana

August 30, 2000

*The Facts*

On December 17, 1998, South Bend Police Officer James Walsh received an anonymous tip that sixty-one year-old Janice Barker was growing marijuana in her home. Officer Walsh, joined by Officer Michael Critchlow, went to Barker's residence that evening. They were out of uniform and driving an unmarked vehicle. The officers knocked on Barker front door and identified themselves as police officers when Barker answered the door. The officers asked if they could enter the house and told Barker they could get a search warrant if she refused them entrance. Barker cooperated, telling the officers she had nothing to hide; there was no problem and that they could come in and look around. [citation omitted]

Once inside, Officer Walsh smelled the odor of marijuana coming from the basement. The officers asked to search the basement, and Barker obliged. Reaching a locked door in the basement, the officers asked Barker if she would open it. Barker retrieved the key from upstairs and Officer Critchlow unlocked the door. Inside, the officers found ten marijuana plants as well as potting soil and lights. After the search and seizure, the officers presented Barker a "Permit to Search" form that Barker signed. The document informed Barker that she had a right to refuse to consent to a search and to confer and speak with an attorney before she granted permission for a search. The "Permit to Search" authorized the officers to perform a search of her residence—which they had already done.

The State charged Barker with possession of marijuana, dealing in marijuana, and maintaining a common nuisance, all as Class D felonies. On July 20, 1999, Barker filed a

More troubling than the post-search consent, however, is the officers statement they could go get a search warrant if they were not allowed inside. In *Daniel*, our supreme court addressed a situation involving consensual fingerprinting of a minor. In its discussion, the court reviewed the distinction between an officer's advisement that a search warrant would be obtained as opposed to merely sought. It recognized that an officer's advisement a search warrant would be obtained renders choice illusory and vitiates subsequent consent to search. [citation omitted] The reason for this rule could not

## App. 102.27.2

***Callahan v. State***

\_\_\_\_ N.E.2d \_\_\_\_

[No. 82A01-9904-CR-128]

Court of Appeals of Indiana

November 17, 1999

*The Facts*

On April 15, 1997, Evansville City Police Officers Hahn and Pierce stopped Callahan because the vehicle he was driving had improperly tinted windows and a Texas license plate which appeared to have expired in 1994. Officer Hahn issued a "warning" ticket to Callahan for the window

motion to suppress evidence of marijuana found in her home. On September 24, 1999, the trial court granted Barker's motion, effectively forcing the State to dismiss. The State was allowed to dismiss the charges without prejudice and this appeal followed.

*The Legal Rules Involved*

The trial court found the marijuana was seized in violation of the Fourth Amendment to the United States Constitution. . . .

When the State seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving the consent was, in fact, freely and voluntarily given. [citation omitted] The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. [citation omitted]

*The Ruling of the Court*

[The Indiana Court of Appeals affirmed the trial court, ruling that the evidence was properly suppressed.]

We find, given the totality of the circumstances, the trial court grant of Barker motion to suppress was not clearly erroneous. We agree with the trial court that the consent was illusory and not freely and voluntarily given. [citation omitted] In reaching its conclusion, the trial court expressed concern over the fact the search preceded the execution of the police department form of waiver of rights and consent to search. While the execution of a consent form prior to a warrantless search is not required to show voluntariness, the fact the officers presented Barker with the form after the search is undoubtedly curious. We agree with the trial court assessment that both Officer Walsh and Officer Critchlow probably realized they hadn't crossed the necessary *i*'s and dotted the necessary *t*'s before they found the basement or they wouldn't have asked the lady after the fact to sign a form. [citation omitted]

be illustrated any better than Barker's own statement at trial. She stated: Because what am I going to do? He would go away and come right back, wouldn't he? [citation omitted] Additionally, the court considered evidence of Barker's age and her relative inexperience with law enforcement officials. These facts serve to make the officers statement they would obtain a warrant if not allowed inside to search even more coercive.

Affirmed.

violation. At that time, Officer Hahn testified, Callahan was free to go.

Officer Hahn, however, asked Callahan if he would like to step out of the car and stretch his legs because he appeared to have been driving for some time. Callahan exited the vehicle and he and Officer Hahn engaged in conversation, during the course of which Officer Hahn informed Callahan that he was a drug interdiction officer traveling with a canine unit. Officer Hahn testified that he told Callahan he did not have to cooperate, and asked if he could look inside the vehicle for weapons and narcotics. Callahan said, "You can search the inside of my car as much as you like." [citation

*omitted]* In searching the inside of the vehicle, Officer Hahn discovered a film canister containing what appeared to be marijuana. Officer Hahn then retrieved his canine unit. The dog alerted to the scent of narcotics at the rear of the vehicle. Officer Hahn asked Callahan if he could look at the spare tire carrier under the rear of the car, near where the dog had alerted. Callahan agreed. When Officer Hahn removed the carrier, he found eight bricks of what was ultimately determined to be over thirteen pounds of marijuana. Callahan was then placed under arrest.

Callahan was charged with dealing in marijuana as a Class C felony in violation of Indiana Code section 35-48-4-10. John Clouse and John Brinson were retained by Callahan to represent him, but he later discharged them. Dennis Brinkmeyer then entered his appearance on behalf of Callahan.

Brinkmeyer filed a motion to suppress on Callahan's behalf, seeking to suppress the fruits of the vehicle search, alleging that the search was pretextual, was conducted without probable cause, and was non-consensual. Officer Hahn testified at the hearing that after he gave Callahan a warning ticket, he continued to talk with Callahan and obtained his consent to search the car. Upon finding a small amount of marijuana in the car, Officer Hahn obtained Callahan's consent to getting his dog out to "search" the vehicle. When the dog "alerted" near the rear of the car, Officer Hahn obtained Callahan's permission to look under the car, where he found in excess of thirteen pounds of marijuana hidden in the spare tire. After a hearing, the trial court denied the motion.

*[Callahan, at his trial, asked to discharge Brinkmeyer, but the court refused the request. Ultimately, the case ended in a mistrial. Brinkmeyer then withdrew, and David Shaw was appointed to represent Callahan. At Callahan's new trial, he again requested to replace his lawyer and defend himself. The judge granted the request and asked Shaw to*

When the State seeks to rely upon consent to justify a warrantless search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. *[citation omitted]* The voluntariness of a consent to search is a question of fact to be determined from the totality of the circumstances. *[citation omitted]* A consent to search is valid except where it is procured by fraud, duress, fear, intimidation, or where it is merely a submission to the supremacy of the law. *[citation omitted]* To constitute a valid waiver of Fourth Amendment rights, a consent must be the intelligent relinquishment of a known right or privilege. *[citation omitted]* Such a waiver cannot be conclusively presumed from a verbal expression of assent unless the court determines, from the totality of the circumstances, that the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld. *[citation omitted]* Knowledge of the right to refuse a search is one factor which indicates voluntariness. *[citation omitted]*

The "totality of the circumstances" from which the voluntariness of a detainee's consent is to be determined includes, but is not limited to, the following considerations: (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

*attend the trial and serve as "stand-by" counsel. The trial ended in a hung jury. Callahan represented himself at his third trial (again with Shaw as stand-by counsel), and he was convicted and sentenced to four years. Shaw filed this appeal on Callahan's behalf.]*

#### *The Legal Rules Involved*

*[The only issue relevant to police work was whether the trial court properly denied the motion to suppress evidence discovered during a search of defendant's automobile by a drug interdiction officer who had stopped him for a minor traffic offense. There was also extensive discussion of issues of trial procedure and whether the defendant could represent himself at trial.]*

#### *The Ruling of the Court*

*[The Indiana Court of Appeals affirmed the conviction.]*

Prior to trial, Callahan filed a motion to suppress evidence seized as a result of the search of his car, specifically, the thirteen pounds of marijuana found in the spare tire carrier. *[footnote omitted]* Callahan contends that the trial court's denial of this motion was in error. . . .

During the course of a lawful stop to investigate a traffic violation, Callahan consented to the search of his car. Callahan concedes that the initial stop was lawful and that his subsequent consent to the search was objectively voluntary; however, he takes issue with the practice of drug interdiction officers watching for minor traffic offenses with the actual motive of uncovering a drug or weapons violation during the course of the traffic stop. Accordingly, he contends that his consent was not subjectively voluntary and that his Article I, section 11 privacy right under the Indiana Constitution was infringed by the officer's request that he give consent without either a specific advisement of the right to refuse consent or independent reasonable suspicion of some additional illegal activity.

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. *[citation omitted]*

The evidence most favorable to the trial court's ruling indicates that Officer Hahn did not place Callahan under arrest or restrain his liberty in any way until after he discovered the marijuana in the spare tire carrier. *[citation omitted]* Accordingly, Callahan was not advised of his *Miranda* rights prior to the search. *[citation omitted]* Officer Hahn observed that Callahan seemed to be a person of normal intelligence, and did not appear to be under the influence of drugs or alcohol. *[citation omitted]* After Officer Hahn gave Callahan a warning ticket for the tinted windows violation, Hahn told him he was free to go. *[citation omitted]* Callahan did not immediately leave, however, and during the ensuing conversation, Hahn told Callahan that he wanted to look inside the vehicle. *[citation omitted]* He told Callahan that he did not have to cooperate, but stated that Callahan was "100 percent cooperative from start to finish." *[citation omitted]* Callahan told Officer Hahn that he could "search the inside of [his] car as much as [he] like[d]." *[citation omitted]* Officer Hahn clearly told Callahan that he was a drug

interdiction officer and that his purpose was to stem the transport of illegal narcotics on our roadways by watching for traffic violations. [citation omitted] Officer Hahn told Callahan each time he wished to escalate the search (*i.e.* from looking inside the car to getting the dog out to looking under the car to removing the spare tire carrier) and Callahan consented each time. [citation omitted] At any time prior to the discovery of the large amount of marijuana in the spare tire carrier, Callahan was free to get in his car and drive away without repercussion. [citation omitted] This is sufficient indicia under the totality of the circumstances test to indicate that Callahan's consent to the search of his car was voluntarily given.

Callahan contends that unless a detainee is specifically advised that he has the right to refuse consent to a search, any consent he may give is not truly voluntary. He therefore suggests that, akin to requiring *Miranda* warnings, we adopt a bright-line constitutional requirement that a detainee be specifically advised that he is under no obligation to answer any questions or consent to a search before his consent could be considered to have waived his Article I, section 11 right against unreasonable search and seizure.

[The court then reviewed *State v. Scheibelhut*, a case similar to this one: an officer decided to ask to consent to search a vehicle after the business of the valid traffic stop was over. The officer found marijuana, and the defendant moved to dismiss on grounds that he had not given valid consent because the officer did not advise him that he could have refused the search. The trial court granted the motion, but the Court of Appeals reversed, holding that trial courts must consider the "totality of the circumstances" to judge the reasonableness of the search. The U.S. Supreme Court also took the same approach in *Ohio v. Robinette*. The court concludes that there is no need to even consider a claim under the Indiana constitution, because the officers told Callahan he was free to go and he did not have to cooperate further. The court also observed that it has been repeatedly held by courts of this state that a lawful traffic stop, even if pretextual, does not convert the stop into an unreasonable search and seizure. The court then cited a number of Indiana cases involving consent to search the vehicle after a valid traffic stop.]

In *Kenner*, an officer had been informed that a red Camaro and a tan Chevrolet appeared to have been traveling together and passing each other at excessive rates of speed. The officer spotted the red Camaro, determined it to be traveling ten miles per hour over the speed limit, and initiated a traffic stop. When the defendant exited the car at the officer's request, the officer smelled what he believed to be marijuana. The officer asked if there were any illegal drugs in the car, and the defendant responded not to his knowledge. The officer then asked consent to search the car, which the defendant denied because the car was not his. The officer called for a canine unit, and told the defendant he was free to leave but the car had to remain. The canine unit alerted for the presence of drugs, and the subsequent search uncovered twelve pounds of marijuana. The defendant was charged with possession of marijuana and dealing in marijuana. [citation omitted] This court affirmed the trial court's denial of defendant's motion to suppress. [citation omitted]

In *Voit*, officers were requested to be on the lookout for a burgundy Chevrolet, the driver of which was suspected of

drug activity. The officers spotted the vehicle, paced it at ten miles per hour over the speed limit, and initiated a traffic stop. When the officers approached the car, they detected a faint odor of alcohol. The defendant denied drinking or having any open containers when asked. The officers requested consent for a search, which the defendant gave. While one officer searched the car, the other stood outside the car with the defendant. He asked her if she had any weapons, which she denied. When the defendant opened her purse for examination, the officer observed the tops of plastic bags and asked what was in the bags. The defendant attempted to flee, but was apprehended and placed under arrest for resisting law enforcement. A subsequent search of her purse revealed that the plastic bags contained marijuana and cocaine. [citation omitted] This court reversed the trial court's grant of defendant's motion to suppress. [citation omitted]

Finally, in *Hollins*, a drug interdiction team monitoring a house where drug activity was suspected observed the defendant enter the house twice and leave a short time later each time. The second time he left, he was carrying a clear plastic bag. The team broadcast a description of the defendant, his automobile and his direction of travel. Two officers spotted defendant's vehicle, followed him, and pulled him over after he failed to signal a right hand turn. When the officers approached the vehicle, they observed a clear plastic bag containing a white powder wedged in the passenger seat. When the officers removed the bag, a film canister containing rocks of crack cocaine came out with it. [citation omitted] This court reversed the trial court's grant of defendant's motion to suppress. [citation omitted]

The key difference between these cases and the case at issue is that in each of the cited cases, although a search by some means followed an otherwise valid traffic stop, the officers did in fact have some independent reasonable suspicion of illegal activity. In this case, there are no articulable facts upon which to base a reasonable suspicion that Callahan was involved in illegal activity prior to the drug interdiction officer's request for consent to a search. Officer Hahn himself testified at the motion to suppress hearing that "I didn't have any reason to believe that he's committing a crime at the time. He was free to go when I gave him the warning ticket." [citation omitted] However, Officer Hahn's singular purpose was to watch for minor traffic offenses and try to ferret out drug or weapons violations during the course of the stop, and thus he sought consent for a search. . . .

Although we, too, are troubled by the increasingly common practice of police stopping vehicles for minor traffic offenses and seeking consent to search with no suspicion whatsoever of illegal contraband, all in the name of the war on drugs, we are unwilling under the facts of this case to say that our state constitution prohibits police from doing so. Callahan clearly and voluntarily consented to the search of his vehicle even after being told that he was free to go and that he did not have to cooperate with the officer. Thus, the State met its burden of proving an exception to the warrant requirement which rendered an otherwise unreasonable search presumably reasonable. The trial court did not err in denying Callahan's motion to suppress.

[The court also rejected Callahan's arguments concerning his waiver of the right to counsel.]

App. 102.27.3

**Neuhoff v. State**

\_\_\_\_ N.E.2d \_\_\_\_

[Cause No. 82A01-9806-CR-213]

**Indiana Court of Appeals**

**April 9, 1999**

*The Facts*

On June 10, 1997, postal inspectors in Texas intercepted a package being mailed from Brownsville, Texas to an address in Evansville, Indiana. The addressee was Robert Nelson. The inspectors were suspicious of the package because of its size, weight, and city of origin. When the package was presented to a drug sniffing dog in Texas, the dog alerted to the presence of drugs. The package was forwarded to Indiana and the Texas authorities notified Indiana postal inspector Steven Sadowitz. When the package arrived Sadowitz shook it and believed it contained narcotics. A trained dog from the Indianapolis Police Department sniffed the package and alerted to the presence of drugs. Thereafter Sadowitz sought and received a search warrant for the package, and as a result discovered therein over eleven pounds of marijuana.

Disguised as a mail carrier, Sadowitz delivered the package to the Evansville address. The only person present at the time was Michelle Brown who ultimately gave the inspector the names of her roommates: Harmonie Culbertson and David Neuhoff. Sadowitz placed the package inside the door of the apartment. With Brown's cooperation, Sadowitz and a uniformed officer hid inside the apartment. When Neuhoff and Culbertson arrived, Neuhoff asked Brown when the package arrived and whether she had signed for it. Acting nervously and commenting that the police were watching, Neuhoff moved the package from its position inside the door and toward the middle of the room. Shortly thereafter Sadowitz and the uniformed officer revealed their presence and arrested both Neuhoff and Culbertson. The State charged Neuhoff with dealing in marijuana as a Class C felony. Prior to trial Neuhoff filed a motion to suppress which the trial court denied after a hearing. At trial the marijuana was introduced into evidence over Neuhoff's objection. Ultimately a jury convicted Neuhoff of the included offense of attempted dealing in marijuana as a Class C felony. This appeal followed.

*The Legal Rules Involved*

*[The only issue of significance was Neuhoff's contention that the trial court should have suppressed the evidence because there was insufficient probable cause to issue the warrant.]*

*The Ruling of the Court*

*[The Indiana Court of Appeals affirmed the conviction.]*

Neuhoff first contends the trial court erred in denying

his motion to suppress because there was insufficient probable cause for the issuance of the search warrant. According to Neuhoff the only justification for authorizing the search was the alert by the two dogs. Continuing, Neuhoff argues the affidavit in support of the search warrant was deficient because it did not specify the dogs' reliability as drug detectors.

We first observe that smell testing by a trained dog is not a search within the meaning of the Fourth Amendment. *[citation omitted]* Rather, the alert of a trained dog can provide the probable cause necessary to obtain a search warrant. *[citation omitted]* In this case we disagree with Neuhoff's assertion that the probable cause affidavit was deficient because it did not specify the dogs' reliability. It is true there was nothing in the affidavit concerning the reliability of the Texas drug sniffing dog. However that is not true concerning the Indiana drug sniffing dog. We find sufficient the affiant's representation that the Indiana dog was recertified on June 6, 1997, by the Indianapolis Police Department as a Narcotic Detective Canine; that the dog has participated in approximately 250 searches both in the field and in training situations; that the dog and its handler are certified yearly by the Indianapolis Police Department as a Dog Handler and Narcotics Canine team; and that the dog and its handler have received specialized training in the detection of the odor of marijuana, cocaine, heroin, and methamphetamines. *[citation omitted]*

The smell testing by the Indiana dog was sufficient in itself to support the issuance of the search warrant. However there was additional information in the affidavit to justify the warrant in this case. The package contained several indicia enumerated in the drug smuggling profile utilized by postal inspectors in determining the suspiciousness of parcels sent through the United States mail. The profile contains the following elements: 1) the source city is known for its illegal drug trade; 2) the package is an unusual size and shape; and 3) the return addressee is fictitious. *[citation omitted]* *[footnote omitted]* In his affidavit supporting the issuance of a search warrant inspector Sadowitz represented that Brownsville, Texas, the package's origin, "is a major source city for narcotics in the United States." *[citation omitted]* He also represented that the package's size of twelve inches by twelve inches by thirteen inches and weight of sixteen pounds contributed to its suspicious character. Although the return address did not appear fictitious, the alleged sender, Anthony Page, could not be located at the return address. Based on these circumstances, the package was removed from shipment for investigation. . . . In the case before us there was sufficient probable cause for the issuance of the search warrant. . . .

*[The court also rejected Neuhoff's arguments concerning jury instructions and sufficiency of the evidence.]*

**Indiana Court of Appeals**

**February 16, 1999**

*The Facts*

Officer Terry Nickell and Officer Pete Tressler went to

App. 102.27.4

**Melton v. State**

\_\_\_\_ N.E.2d \_\_\_\_

[No. 16A04-9809-CR-446]

Kathy Melton's home after receiving an anonymous tip that Melton and her husband had drugs there. When they arrived, Melton answered the door and allowed the officers to enter.

After speaking with Melton for a moment, while she was sitting at her kitchen table, the officers asked her if they could search the home. Melton stood up from the table and responded "where do you want to begin?" *[citation omitted]*

The officers then searched Melton's son's bedroom and her bedroom, eventually finding marijuana in Melton's bedroom.

They later searched her purse and found cocaine. Melton was charged with dealing in marijuana, a class C felony, possession of marijuana, a class D felony, and possession of

III. Whether the scope of Melton's consent extended to the entire search conducted.

#### *The Ruling of the Court*

*[The Indiana Court of Appeals affirmed the trial court's ruling that the search was proper.]*

Melton contends that the trial court's decision to deny her motion to suppress is in error and violates both the Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Indiana Constitution. Both of these provisions provide "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." *[citation omitted]* We initially note our standard of review when reviewing a trial court's ruling on the validity of a search and seizure: we consider the evidence most favorable to the ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling. *[citation omitted]* If the evidence is conflicting, we consider only the evidence favorable to the ruling and will affirm if the ruling is supported by substantial evidence of probative value. *[citation omitted]*

Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. In cases involving a warrantless search, the State bears the burden of proving an exception to the warrant requirement. *[citation omitted]* A valid consent to search is an exception to the warrant requirement. *[citation omitted]* The theory underlying this exception is that, when an individual gives the State permission to search either his person or property, the governmental intrusion is presumably reasonable. *[citation omitted]*

Melton first contends that she should have been advised of her right to counsel before consenting to a search. Our supreme court has stated that a person in custody must be informed of the right to consult with counsel about the possibility of consenting to a search before a valid consent to a search can be given. *[See: Sims v. State, 413 N.E.2d 556 (Ind. 1980)]* Because Melton claims that she was entitled to receive a warning about consultation with counsel before consenting to a search, we must first determine whether her right to receive the warning had attached. This right can only be said to have attached if Melton was in custody when she consented to the search.

Neither federal nor Indiana constitutional jurisprudence has developed a "bright line" test for determining when someone has been subjected to a custodial interrogation. The rule for this determination asks whether a reasonable person in the same circumstances would believe that she is under arrest or not free "to resist the entreaties of the police." *[citation omitted]* For example, in *Pirtle v. State, 263 Ind.*

cocaine, a class D felony. Melton filed a motion to suppress with the trial court, which it denied. . . .

#### *The Legal Rules Involved*

*[The Court identified the issues as follows:]*

I. Whether the trial court erred in denying Melton's motion to suppress evidence where the State conducted a search of Melton's home, with her consent, but did not inform Melton of her right to counsel.

II. Whether Melton voluntarily consented to the search of her home and, if so,

16, 323 N.E.2d 634 (1975), our supreme court held that the defendant was in custody when asked for consent to search his home where the defendant was in jail and had been detained for more than twelve hours. *[citation omitted]* Generally, in cases where courts have held that a defendant was in custody implicating *Miranda* requirements, the facts have demonstrated "a degree associated with formal arrest." *[citation omitted]*

Here, Melton allowed the police officers to enter her home. She then led them into the kitchen where they questioned her. When asked whether they could search her home, Melton asked the officers "where [they] wanted to start" and led them around the house. *[citation omitted]* The officers informed her several times that she was not under arrest and Melton did not ask the officers to leave. Although Melton testified that she felt intimidated, her subjective belief is not controlling, as we employ an objective standard. The facts do not demonstrate that Melton was in police custody during the investigation and search. Therefore, it was not necessary for the officers to advise Melton of a right to consult with counsel before obtaining a valid consent to search.

Next, Melton contends that her consent to search was not valid. A valid consent to search is an exception to the warrant requirement unless it is procured by fraud, duress, fear, or intimidation, or where it is "merely a submission to the supremacy of the law." *[citation omitted]* In determining whether consent was valid, we must consider the totality of the circumstances. *[citation omitted]* The record discloses that the police received an anonymous tip that Melton and her husband had a large quantity of marijuana and crack cocaine in their home. Believing that they lacked probable cause to obtain a search warrant, the police went to Melton's home to question her. The officers asked Melton if they could enter her home and she allowed them to enter, taking them into the kitchen to talk. According to Officer Nickell, when they asked Melton whether they could search her home she "said all right, and she got up, she stood up and walked around the table . . . and she came around to my right and she said all right and asked me where I wanted to start." *[citation omitted]* Nickell then told Melton that "she doesn't have to let us search, but . . . normally, the parents do cooperate with us." *[citation omitted]* The officers then searched Melton's son's bedroom and found no contraband. After searching the first bedroom "[Melton] asked where next, and [Nickell] said I'd like to start with her [Melton's] room and then [Melton] led [Nickell] into her room." *[citation omitted]* In Melton's bedroom the officers found several bags of marijuana.

During the visit, the officers told Melton several times that she was not under arrest. At no point during the search

did Melton ask the officers to stop searching. Moreover, Melton assisted in the search, opening dresser drawers and moving items within the drawers at the officers' request. The officers also informed Melton before the search that they were there because they had received a report regarding marijuana. Melton contends that she was intimidated and felt that she could not leave her home or refuse the search. However, her contentions do not outweigh the substantial evidence of voluntariness presented. Thus, it was reasonable for the trial court to find that Melton's consent was voluntary.

Lastly, Melton contends that, even if her consent to search were voluntary, she consented only to a search of her son's room and did not consent to a search of the rest of her home. The scope of authority to search is strictly limited to the consent given. Therefore, a consent search is reasonable only if it is kept within the boundaries of the consent. [citation omitted]

Following the search of Melton's son's bedroom, Officer Nickell and Melton stepped outside of the bedroom at which time Melton asked the officer "where next?" [citation omitted] Officer Nickell then stated that he would

like to search Melton's room and she led him to it. While in the bedroom, Melton stood right next to Nickell as he searched the dresser drawers where the marijuana was found.

Although Melton did not explicitly tell the officers that they could search the entire house, such express consent is not a requirement for a valid consent search. [citation omitted] "The circumstances surrounding the search may demonstrate that the party involved implicitly gave consent, by word or deed." [citation omitted] For example, in *Harper v. State*, 474 N.E.2d 508, 512 (Ind. 1985), the officer conducting a warrantless search of the defendant's home could not remember whether the defendant's spouse gave verbal consent to the search. [citation omitted] On appeal, our supreme court upheld the trial court's decision that the search was consensual because the wife was present during the search and acquiesced in it. [citation omitted] [footnote omitted] Similarly, here, Melton acquiesced in the search of her bedroom and the State did not step outside of the bounds of her consent. Therefore, the trial court did not err in denying her motion to suppress.

**App. 102.27.5**

***Bond v. United States***

\_\_\_\_ S.Ct. \_\_\_\_

[No. 98—9349]

**Supreme Court of the United States**

**April 17, 2000**

*The following is an edited version of the syllabus of the case prepared by the Reporter of Decisions.*

Border Patrol Agent Cantu boarded a bus in Texas to check the immigration status of its passengers. As he walked off the bus, he squeezed the soft luggage which passengers had placed in the overhead storage space. He squeezed a canvas bag above petitioner's seat and noticed that it contained a "brick-like" object. After petitioner admitted owning the bag and consented to its search, Agent Cantu discovered a "brick" of methamphetamine. Petitioner was indicted on federal drug charges. He moved to suppress the drugs, arguing that Agent Cantu conducted an illegal search of his bag. The District Court denied the motion and found petitioner guilty. The Fifth Circuit affirmed the denial of the motion, holding that Agent Cantu's manipulation of the bag was not a search under the Fourth Amendment.

*Held:* Agent Cantu's physical manipulation of petitioner's carry-on bag violated the Fourth Amendment's proscription against unreasonable searches. A traveler's

personal luggage is clearly an "effect" protected by the Amendment, see *United States v. Place*, 462 U.S. 696, 707, and it is undisputed that petitioner possessed a privacy interest in his bag. The Government's assertion that by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated is rejected. *California v. Ciraolo*, 476 U.S. 207, and *Florida v. Riley*, 488 U.S. 445, are distinguishable, because they involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection. Under this Court's Fourth Amendment analysis, a court first asks whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that "he [sought] to preserve [something] as private." *Smith v. Maryland*, 442 U.S. 735, 740. Here, petitioner sought to preserve privacy by using an opaque bag and placing it directly above his seat. Second, a court inquires whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." *Ibid.* Although a bus passenger clearly expects that other passengers or bus employees may handle his bag, he does not expect that they will feel the bag in an exploratory manner. But this is exactly what the agent did here. [citation omitted]

**App. 102.27.6**

***Wilson v. Layne***

\_\_\_\_ S.Ct. \_\_\_\_

[Cause No. 98-83]

**Supreme Court of the United States**

**May 24, 1999**

*The following is an edited version of the syllabus of the case prepared by the Reporter of Decisions.*

While executing a warrant to arrest petitioners' son in their home, respondents, deputy federal marshals and local sheriff's deputies, invited a newspaper reporter and a

photographer to accompany them. The warrant made no mention of such a media "ride-along." The officers' early morning entry into the home prompted a confrontation with petitioners, and a protective sweep revealed that the son was not in the house. The reporters observed and photographed the incident but were not involved in the execution of the warrant. Their newspaper never published the photographs they took of the incident. Petitioners sued the officers in their personal capacities for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (the federal marshals) and 42 U.S.C. § 1983 (the sheriff's deputies),

contending that the officers' actions in bringing the media to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights. The District Court denied respondents' motion for summary judgment on the basis of qualified immunity. In reversing, the Court of Appeals declined to decide whether the officers' actions violated the Fourth Amendment, but concluded that because no court had held at the time of the search that media presence during a police entry into a residence constituted such a violation, the right allegedly violated was not "clearly established" and thus respondents were entitled to qualified immunity.

*Held:* A media "ride-along" in a home violates the Fourth Amendment, but because the state of the law was not clearly established at the time the entry in this case took place, respondent officers are entitled to qualified immunity. *[citation omitted]*

(a) The qualified immunity analysis is identical in suits under §1983 and *Bivens*. See, e.g., *Graham v. Connor*, 490 U.S. 386, 394, n. 9. A court evaluating a qualified immunity claim must first determine whether the plaintiff has alleged the deprivation of a constitutional right, and, if so, proceed to determine whether that right was clearly established at the time of the violation. *[citation omitted]*

(b) It violates the Fourth Amendment rights of

(c) Petitioners' Fourth Amendment right was not clearly established at the time of the search. "Clearly established" for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. His very action need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be apparent. *[citation omitted]* It was not unreasonable for a police officer at the time at issue to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful. First, the constitutional question presented by this case is by no means open and shut. Accurate media coverage of police activities serves an important public purpose, and it is not obvious from the Fourth Amendment's general principles that the officers'

homeowners for police to bring members of the media or other third parties into their home during the execution of a warrant when the presence of the third parties in the home was not in aid of the warrant's execution. The Amendment embodies centuries-old principles of respect for the privacy of the home, which apply where, as here, police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant. *[citation omitted]*

It does not necessarily follow from the fact that the officers were entitled to enter petitioners' home that they were entitled to bring a reporter and a photographer with them. The Fourth Amendment requires that police actions in execution of a warrant be related to the objectives of the authorized intrusion. *[citation omitted]* Certainly the presence of the reporters, who did not engage in the execution of the warrant or assist the police in their task, was not related to the objective of the authorized intrusion, the apprehension of petitioners' son. Taken in their entirety, the reasons advanced by respondents to support the reporters' presence—publicizing the government's efforts to combat crime, facilitating accurate reporting on law enforcement activities, minimizing police abuses, and protecting suspects and the officers—fall short of justifying media ride-alongs. Although the presence of third parties during the execution of a warrant may in some circumstances be constitutionally permissible, the presence of these third parties was not. *[citation omitted]*

conduct in this case violated the Amendment. Second, petitioners have not cited any cases of controlling authority in their jurisdiction at the time in question which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. Finally, the federal marshals in this case relied on a Marshal's Service ride-along policy which explicitly contemplated media entry into private homes, and the sheriff's deputies had a ride-along program that did not expressly prohibit such entries. The state of the law was at best undeveloped at the relevant time, and the officers cannot have been expected to predict the future course of constitutional law. *[citation omitted]*

*[The U.S. Supreme Court affirmed.]*

App. 102.27.7

***Hanlon v. Berger***

\_\_\_\_ S.Ct. \_\_\_\_

[Per Curiam]

**Supreme Court of the United States**

**May 24, 1999**

*The following is an edited version of the full text of the decision.*

Respondents Paul and Erma Berger sued petitioners—special agents of the United States Fish and Wildlife Service and an assistant United States attorney—for damages under *Bivens v. Six Unknown Fed. Narcotics Agents* 403 U.S. 388 (1971). They alleged that the conduct of petitioners had violated their rights under the Fourth Amendment to the United States Constitution. *[citation omitted]*

Respondents live on a 75,000-acre ranch near Jordan, Montana. In 1993, a Magistrate Judge issued a warrant authorizing the search of "The Paul W. Berger ranch with appurtenant structures, excluding the residence" for evidence

of "the taking of wildlife in violation of Federal laws." About a week later, a multiple-vehicle caravan consisting of Government agents and a crew of photographers and reporters from Cable News Network, Inc. (CNN), proceeded to a point near the ranch. The agents executed the warrant and explain that "Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew ... accompanied and observed the officers, and the media crew recorded the officers' conduct in executing the warrant." *[citation omitted]*

Review of the complaint's much more detailed allegations to the same effect satisfies us that respondents alleged a Fourth Amendment violation under our decision today in *Wilson v. Layne* . . . . There we hold that police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home. We also hold there that because the law on this question before today's decision was not clearly established, the police in that case were

entitled to the defense of qualified immunity. *[citation omitted]*

Petitioners maintain that even though they may have violated the Fourth Amendment rights of respondents, they are entitled to the defense of qualified immunity. We agree. Our holding in *Wilson* makes clear that this right was not

App. 102.27.8

***Carr v. State***

**N.E.2d**

**[Cause No. 73S00-9709-CR-487]**

**Indiana Supreme Court**

**April 18, 2000**

*The Facts*

Firefighters were dispatched to the apartment of Shirley Sturgill in the late evening hours of October 6, 1990. Finding the door locked, they forced entry and extinguished a fire in Sturgill's bedroom. Sturgill's body was found naked on the bed. Both of her nipples had been bitten off and a toilet bowl brush protruded from her vagina. An autopsy was performed on the morning of October 8. The cause of death was ruled manual strangulation. The pathologist also observed bite marks on Sturgill's right and left thigh, and Dr. Donnell Marlin, a forensic odontologist, examined, photographed, and made models of the bite marks.

The investigation soon focused on Orville Jack Dobkins, who lived in an adjacent apartment and had visited Sturgill at approximately 9:00 p.m. on the evening of the murder. On October 24, Dobkins was arrested and charged with Sturgill's murder. The State also filed a request for the death penalty.

Dobkins provided dental impressions which were compared to the bite marks on Sturgill's body. Dr. Marlin issued a report on December 18, 1990, concluding that "within the bounds of a reasonable medical certainty, the teeth of Jack Dobkins match the various bite marks on the body of Shirley Sturgill." On May 15, 1991, Dr. Mark Bernstein examined the work of Dr. Marlin. Dr. Bernstein concluded that the comparisons offered "good supporting evidence to implicate Mr. Dobkins but could not alone prove, to a degree of reasonable medical certainty, that Dobkins made the bites."

The State dismissed the charges against Dobkins on May 16,

*[The Indiana Supreme Court affirmed the conviction.]*

Carr argues that the State violated his Fourth Amendment right to be free from unreasonable searches and seizures when it collected his dental impressions while he was anesthetized. *[footnote omitted]* In his brief, Carr characterizes the procedure as follows:

The procedure was so serious that Dr. Kenny recommended that it be carried out in a fully equipped surgical room with resuscitation equipment and personnel available. The Defendant was placed under full anesthetic rendering him fully unconscious, the throat of the Defendant was packed with material which blocked the airway, a nasal intubation procedure was used which allowed the Defendant to breath[e]. Without the nasal intubation procedure the Defendant could not have breathed on his own.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *[citation omitted]* Its "proper

clearly established in 1992. The parties have not called our attention to any decisions which would have made the state of the law any clearer a year later—at the time of the search in this case.

*[The U.S. Supreme Court vacated the judgment and remanded.]*

1991.

At the time of Sturgill's death, her daughter Angie Carr was married to Carr. By 1994 Angie and Carr had divorced and on August 3, 1994, Angie told Detective Bill Dwenger that Carr left their family's trailer at about noon on October 6, 1990, and did not return until late that night. When he returned, Carr took off his clothes, put them in the washing machine, and showered. Carr and Angie went to bed about forty-five minutes later. After lying in bed for a few minutes, Carr rose, walked to a gun cabinet, took out a rifle, and pointed it at Angie's head. Carr told Angie that he had "hurt" or "took care of" her mother. He said he would kill her and their daughters if she ever said anything. He then grabbed her by her hair, walked her to their daughters' bedroom, pointed the gun at the girls, and reiterated that he meant what he had said.

In 1993 police had submitted cigarette butts found in Sturgill's apartment to the FBI for DNA analysis. A 1995 report comparing DNA from saliva on one butt to Carr's concluded that the two matched at five loci. The probability of two unrelated Caucasians with this correlation was 1 in 4,500.

On February 16, 1996, a Shelby County Grand Jury indicted Carr for the murder of Sturgill and the arson of her apartment. The State later dismissed the arson count. After a ten-day trial in April of 1997, a jury convicted Carr of murder. Carr was sentenced to sixty years imprisonment.

*The Legal Rules Involved*

*[Carr raised six issues on his appeal, five related to trial procedure. The only issue relevant to police work was his contention that taking his dental impressions by administering anesthesia violated his 4<sup>th</sup> Amendment rights.]*

*The Ruling of the Court*

function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *[citation omitted]*. Carr does not deny that a voluntary dental impression is easily performed without resort to anesthesia or serious bodily intrusion. More drastic procedures, including anesthesia, were required in his case because of his refusal to comply with a valid search warrant for the dental impressions.

Carr contends that we should evaluate the constitutionality of the drastic procedures under the balancing test set forth by the United States Supreme Court to determine whether a surgical intrusion violates the Fourth Amendment. *See Winston v. Lee*, 470 U.S. 753, 761-62 (1985) (weighing the extent to which the procedure may threaten the safety or health of an individual and the extent to which it intrudes upon the person's dignitary interest in personal privacy and bodily integrity against the community's interest in fairly and accurately determining guilt or innocence). We think these factors are plainly inapplicable where the allegedly drastic and invasive procedure is necessitated by a defendant's

refusal to comply with a valid search warrant. If this were not the case, the law would create an incentive to refuse to comply with valid search warrants for the most basic of procedures in order to force a drastic procedure that might violate the Fourth Amendment.

As this Court has previously held, ordering a defendant to submit to the taking of dental impressions does not violate the Fourth Amendment when supported by probable cause. [citation omitted] Because the warrant was supported by

App. 102.27.9

**Lee v. State**

\_\_\_\_ N.E.2d \_\_\_\_

[No. 49A02-9811-CR-942]

**Court of Appeals of Indiana**

**September 20, 1999**

*The Facts*

On August 8, 1997, police began an investigation which ultimately led to Lee's arrest for Dealing in Cocaine, a Class A felony, Possession of Cocaine, a Class C felony, and Driving While Suspended, a Class A misdemeanor. In the course of the investigation, Detective Michael Turner of the Marion County Sheriff's Department obtained a search warrant for a bank safety deposit box registered to Dante Adams. An arrest warrant was issued for Adams after police found cocaine in the safety deposit box.

Police had information that Adams could be found at Lee's apartment and conducted surveillance of that apartment on August 25, 1997. Officers saw Lee and Adams leave the apartment. The officers gave pursuit, but lost Lee and Adams in traffic. The officers then returned to the apartment and resumed surveillance.

Shortly thereafter, Detective Turner obtained a warrant to search the apartment "for the following described property (person), to wit: 'Dante Adams' . . ." [citation omitted] Prior to the execution of that search warrant, Lee returned to the apartment. He left the apartment carrying several suitcases and drove away. Lee was stopped by officers for failing to signal a turn and was arrested because his driver's license was suspended.

At this point the police, utilizing the search warrant for Adams, searched the apartment. During this search, an officer found some cocaine in the pocket of a coat located in a closet. Lee was then arrested and charged. He filed a motion to suppress the cocaine found in his coat pocket. After a hearing, the trial court denied Lee's motion and Lee brought this interlocutory appeal.

According to an Agreed Statement of Factual Record for Interlocutory Appeal, "[w]hile officers were searching the apartment for Dante Adams, Officer Marshall Trimmer saw a quantity of cocaine in the pocket of a coat located in a closet." [citation omitted] Adams was described as being 5'10" tall and weighing 180 pounds. [citation omitted] As a result, although Adams could have been hiding in a closet, it is far less likely that he could have been hiding in the pocket of a coat.

App. 102.27.10

**Flippo v. West Virginia**

\_\_\_\_ S.Ct. \_\_\_\_

probable cause and the voluntary submission of dental impressions does not violate *Winston*, there is no Fourth Amendment violation in the more drastic procedures required to obtain Carr's compliance. . . .

[The court also found the defendant's other arguments to be without merit.]

*The Legal Rules Involved*

Carl Lee appeals the trial court's denial of his motion to suppress evidence. He challenges whether the search warrant pursuant to which the evidence in question was seized was supported by probable cause. However, we address *sua sponte* the following determinative issue: whether the trial court erred in denying Lee's motion to suppress evidence police found in the pocket of a coat in a closet when the warrant under which the evidence was obtained authorized only a search of an apartment for a particular person, *i.e.*, Dante Adams.

*The Ruling of the Court*

[The Indiana Court of Appeals **reversed** the trial court.]

In reviewing a motion to suppress, we do not reweigh the evidence. [citation omitted] Instead, we determine whether there was substantial evidence of probative value to support the trial court's order. [citation omitted] We look to the totality of the circumstances and consider all uncontroverted evidence together with conflicting evidence that supports the trial court's decision. [citation omitted] The State has the burden of proof in establishing a foundation for the admission of contested evidence. [citation omitted]

A court "may issue warrants only upon probable cause, supported by oath or affirmation, to search any place for . . . [a]ny person." [citation omitted] No warrant may be issued unless an affidavit is filed with the judge "particularly describing the person to be arrested[.]" [citation omitted] The particularity requirement restricts the scope of the search, authorizing seizure of only those things described in the warrant; a warrant which leaves the executing officer with discretion is invalid. [citation omitted] A warrant that authorizes an officer to search for particular items also provides authority to open closets, chests, drawers, and containers in which the items may be found. [citation omitted]

A search warrant for a person only allows a police officer to search areas which would be big enough to hide that person . . . . Thus, police officers would have been justified in opening the closet door and looking in. They were not justified in searching the pocket of a coat in that closet in hopes of finding a 180-pound man therein. The trial court improperly denied Lee's motion to suppress the evidence found pursuant to the warrant to search for Adams.

[No. 98-8770]

**United States Supreme Court**

**October 18, 1999**

### *The Facts*

One night in 1996, petitioner and his wife were vacationing at a cabin in a state park. After petitioner called 911 to report that they had been attacked, the police arrived to find petitioner waiting outside the cabin, with injuries to his head and legs. After questioning him, an officer entered the building and found the body of petitioner's wife, with fatal head wounds. The officers closed off the area, took petitioner to the hospital, and searched the exterior and environs of the cabin for footprints or signs of forced entry. When a police photographer arrived at about 5:30 a.m., the officers reentered the building and proceeded to "process the crime scene." [citation omitted] For over 16 hours, they took photographs, collected evidence, and searched through the contents of the cabin. According to the trial court, "[a]t the crime scene, the investigating officers found on a table in Cabin 13, among other things, a briefcase, which they, in the ordinary course of investigating a homicide, opened, wherein they found and seized various photographs and negatives." [citation omitted] [In a footnote, the court reported: *The photographs included several taken of a man who appears to be taking off his jeans. He was later identified as Joel Boggess, a friend of petitioner and a member of the congregation of which petitioner was the minister. At trial, the prosecution introduced the photographs as evidence of petitioner's relationship with Mr. Boggess and argued that the victim's displeasure with this relationship was one of the reasons that petitioner may have been motivated to kill her.*]

Petitioner was indicted for the murder of his wife and moved to suppress the photographs and negatives discovered in an envelope in the closed briefcase during the search. He argued that the police had obtained no warrant, and that no exception to the warrant requirement justified the search and seizure.

In briefs to the trial court, petitioner contended that *Mincey v. Arizona*, [citation omitted], rejects a "crime scene exception" to the warrant requirement of the Fourth Amendment. The State also cited *Mincey*; it argued that the police may conduct an immediate investigation of a crime scene to preserve evidence from intentional or accidental destruction, [citation omitted], and characterized the police activity in this case as "crime scene search and inventory." [citation omitted] The State also relied on the "plain view" exception, [citation omitted], noting only, however, that the briefcase was unlocked.

In denying the motion, the trial court said nothing about inventory or plain view, but instead approved the search as one of a "homicide crime scene":

"The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The

examination of [the] briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine." [citation omitted]

After hearing an oral presentation of petitioner's petition for appeal of this ruling, and with the full record before it, the Supreme Court of Appeals of West Virginia denied discretionary review. [citation omitted]

### *The Legal Rules Involved*

A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement, *Katz v. United States*, 389 U.S. 347, 357 (1967), none of which the trial court invoked here. It simply found that after the homicide crime scene was secured for investigation, a search of "anything and everything found within the crime scene area" was "within the law." [citation omitted]

This position squarely conflicts with *Mincey v. Arizona*, [citation omitted], where we rejected the contention that there is a "murder scene exception" to the Warrant Clause of the Fourth Amendment. We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, [citation omitted], but we rejected any general "murder scene exception" as "inconsistent with the Fourth and Fourteenth Amendments – . . . the warrantless search of *Mincey's* apartment was not constitutionally permissible simply because a homicide had recently occurred there." [citation omitted] *Mincey* controls here.

### *The Ruling of the Court*

[The United States Supreme Court **reversed** the conviction and **remanded** the case.]

Although the trial court made no attempt to distinguish *Mincey*, the State contends that the trial court's ruling is supportable on the theory that petitioner's direction of the police to the scene of the attack implied consent to search as they did. As in *Thompson v. Louisiana*, [citation omitted], however, we express no opinion on whether the search here might be justified as consensual, as "the issue of consent is ordinarily a factual one unsuitable for our consideration in the first instance." Nor, of course, do we take any position on the applicability of any other exception to the warrant rule, or the harmlessness vel non of any error in receiving this evidence. Any such matters, properly raised, may be resolved on remand. [citation omitted]

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment of the West Virginia Supreme Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

## Supreme Court of Indiana

October 4, 1999

### *The Facts*

On the evening of May 2, 1996, Doris Swindell's two sisters, her daughter, and her son-in-law discovered Swindell, age sixty-nine, dead in her trailer. The Anderson Police Department initiated an investigation which uncovered the following chain of events.

In the late afternoon of May 2, 1996, Dustin Trowbridge, age fourteen, went into the woods near his trailer and "huffed" clear enamel paint. Trowbridge then secretly entered Doris Swindell's trailer, hid in her bedroom, and watched Swindell through the window while she watered her lawn. When Swindell came inside Trowbridge beat her, choked her, forced her to the floor, and ultimately strangled her to death with the swimsuit she was carrying. Trowbridge moved Swindell to her bed and forced intercourse, though the forensic pathologist could not determine whether Swindell was dead or alive at the time. When he was done, Trowbridge threw a blanket over Swindell's body, went home, and took a shower. While Trowbridge was in Swindell's house, he took jewelry, \$155 cash, and car keys.

Trowbridge drove Swindell's car that evening, picked up and visited friends, and used Swindell's money to buy fast food, ice cream, and computer duster fluid to "huff" with his friends. At the end of the evening, Trowbridge parked the car in a business parking lot near the trailer park and walked home. Upon returning to his trailer, Trowbridge ate a steak dinner and then hid the various items he had taken from Swindell. Trowbridge watched as police began to arrive at Swindell's trailer and listened to his mother's fiancé's scanner to track developments.

Trowbridge lived with his mother, Marlene Frost, his mother's fiancé, Tim Gill, and two younger brothers. Gill was a police officer with the Town of Edgewood Police Department and arrived home from working second shift at around 11:15 p.m. on May 2, 1996. Gill knew there had been a homicide and, still in his police uniform, walked to the crime scene and inquired as to the investigation. Later that night, Trowbridge seemed nervous, questioned why there were so many police officers at the scene, and carried Gill's scanner around. Trowbridge also asked Gill whether the police could find fingerprints on a body. Gill began to suspect that Trowbridge might have information regarding the crime.

On the morning of May 3, 1996, Anderson Police Detective Terry Sollars interviewed residents of the mobile home park where Doris Swindell lived. Sollars did not stay long at Trowbridge's trailer, but noticed that Trowbridge became agitated and paced around after Sollars showed Gill, Frost, and Trowbridge photos of Swindell's car. Soon after Sollars left Trowbridge's trailer, Gill walked to where Sollars was standing with other officers and advised Sollars that he should question Trowbridge again and not rule him out as a suspect.

Sollars and three other detectives returned to Trowbridge's mobile home. Trowbridge briefly left the trailer with two detectives because he was uncomfortable responding to the detectives' questions in front of his mother.

While Trowbridge was outside telling the detectives that he had been "huffing" the night before, Gill and Frost told Sollars they were concerned because there was a knife in a

tackle box on the patio and Trowbridge had been hovering around the box. Frost was concerned that Trowbridge would become nervous and use the knife against the detectives, though she did not tell Sollars of her specific fear. Sollars, Frost, and Gill went to the tackle box and Gill stated that the tackle box was his. Sollars or Gill then opened the tackle box. Inside the tackle box, Sollars found the knife, as well as a roll of money and keys. Gill and Sollars walked to Swindell's mobile home and confirmed that the keys found in the tackle box fit Swindell's door.

Sollars returned to Trowbridge's home and placed Trowbridge in custody. Sollars then told Frost that Trowbridge was a suspect in Swindell's murder. Sollars requested and received a search warrant from a local judge and found additional evidence in Trowbridge's bedroom. The investigation also uncovered Trowbridge's fingerprints in Swindell's car and a statistically significant DNA match between Trowbridge and the semen in Swindell's body.

### *The Legal Rules Involved*

Dustin Trowbridge ("Trowbridge" or "Defendant") was convicted by a jury of murder, rape, robbery, burglary, criminal confinement, aggravated battery, theft, auto theft, and abuse of a corpse. Trowbridge also pleaded guilty to escape. He was sentenced to a term of one hundred and ninety-nine (199) years for all of his crimes. Trowbridge was fourteen years old at the time of the murder, but was waived into adult court.

In this direct appeal, Trowbridge argues that the trial court committed reversible error in not granting Defendant's Motion to Suppress on grounds that his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, § 11 of the Constitution of the State of Indiana were violated by the State. Trowbridge further argues that the evidence and confession were obtained as a result of an unlawful search and should be held inadmissible under the exclusionary rule. Finally, Trowbridge claims his confession was obtained as a result of a faulty waiver of his right to remain silent and violations of Indiana's juvenile waiver statute.

### *The Ruling of the Court*

*[The Indiana Supreme Court affirmed the trial court on all issues raised, but reversed Trowbridge's rape conviction and reduced his sentence to a total of ninety-seven (97) years.]*

Trowbridge contends the state violated his state and federal constitutional rights to be free of unreasonable search and seizure when Detective Sollars secured evidence from the tackle box without a search warrant. The Fourth Amendment to the United States Constitution prohibits police from conducting warrantless searches and seizures except under limited circumstances. *[citation omitted]* The language of the Indiana Constitution, Article I, § 11, mirrors the federal protection. *[citation omitted]* However, the tests for determining a rights violation differ for the state and federal provisions.

Federal Fourth Amendment law protects citizens, including juveniles, from warrantless searches of places or items in which the individual has an actual, subjective expectation of privacy which society recognizes as reasonable. *[citation omitted]* One exception to the federal

prohibition on warrantless searches exists where consent to a search is given by a third party who has common authority over the premises. *[citation omitted]*

Trowbridge argues he had a privacy interest in the tackle box that was violated when Gill (1) improperly consented to a search of Trowbridge's personal property in Trowbridge's absence, and (2) acted as a law enforcement officer in the Anderson Police Department's investigation of Swindell's murder. With respect to Trowbridge's asserted privacy

“[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person” who shares the authority. *[citation omitted]* Common authority depends on “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection . . . .” *[citation omitted]* Even if the third party who consents to a search does not have common authority over, or the requisite relationship to, the premises, the warrantless search is still valid if the officers reasonably believed the third party had common authority or the requisite relationship. *[citation omitted]* Detective Sollars reasonably believed that Gill had authority over the tackle box and could consent to its search.

Defendant's suggestion that Gill was acting as an agent of the government, and therefore the search of the tackle box violated Trowbridge's right to be free from a warrantless state search, is without merit. Gill had no official role in the Anderson Police Department's investigation of Swindell's murder. Gill's actions were not an extension of his occupation as a police officer for the Town of Edgewood Police Department. Gill's only involvement was that of a concerned, supervising adult in Trowbridge's home. Gill had lived with Trowbridge for over three years and was father to Trowbridge's stepbrother. He had a personal relationship with Trowbridge which, though strained at times, resulted in Gill knowing Trowbridge's character and juvenile history. Gill came to suspect, on his own accord and through conversations with Frost, that Trowbridge had information regarding the murder. Gill was off-duty and out of uniform the day of the tackle box search. The fact that Gill was wearing a police academy sweatshirt is immaterial.

Gill's suggestions to Detective Sollars that he further question Trowbridge and view the contents of the tackle box, and Gill's accompanying Sollars to test the keys on Swindell's trailer do not exceed actions to be expected of a concerned, supervising adult and responsible citizen.

Under the Indiana Constitution, the State must show that a search was reasonable in light of the totality of circumstances. *[citation omitted]* For the reasons cited above in our federal Fourth Amendment analysis, the search of the tackle box was reasonable in view of the surrounding circumstances.

Because the search of the tackle box and seizure of its contents was legal under both the Indiana and United States Constitutions, the derivative evidence and confession that flowed therefrom are not “fruits of the poisonous tree” subject to the exclusionary rule. The trial court properly admitted the evidence. The day after Swindell's murder, Trowbridge and Frost waived Trowbridge's right to remain silent and to receive assistance of counsel. After Trowbridge was placed into custody, he was transported to the

interest, Gill lived in the trailer with Frost and her children and, at the time of the search, Gill told Sollars that the tackle box belonged to him, not to Trowbridge. In addition, the tackle box was located outside, on the patio, in a common area. The tackle box was not in a place, such as Trowbridge's bedroom, where the officer might have suspected a privacy interest on Trowbridge's behalf. Gill requested the search of the tackle box at Frost's urging. Frost and Gill, as the adults of the household, observed the search of the tackle box.

Anderson Police Department where he and Frost were taken to an interrogation room. Detective Hay read rights to both Trowbridge and Frost, including Trowbridge's right to have one or both parents present and to consult them regarding the case. Hay confirmed with both Trowbridge and Frost that they understood their rights, and Trowbridge and Frost both signed a statement to that effect. Hay then informed Trowbridge and Frost they were entitled to a private conference and asked them each if they wanted to speak privately with each other. Hay offered to turn the tape off and leave the room. Trowbridge and Frost both declined Hay's offer of a private conference. Trowbridge and Frost both signed a waiver of Trowbridge's right to remain silent.

Trowbridge indicated that he preferred Frost leave the room during the interrogation. Hay told Frost that, despite Trowbridge's expressed preference, Frost was entitled to remain during the questioning if she so chose. Frost responded that she wanted to leave the room and confirmed she was doing so of her own free will.

Shortly after Frost left the interrogation room, Trowbridge asked Hay, “How is it on that paper? It said that my mom gave consent for me not to remain silent.” *[citation omitted]* Hay told Trowbridge that because he was a juvenile, his mom had to agree with him that it was alright for Trowbridge to speak to the police. Detective Collins then intervened and told Trowbridge that they were going to leave the room and give Trowbridge a “break” with his mom, an opportunity to speak to her in “confidence,” before they started questioning him. *[citation omitted]* Trowbridge and Frost were in the room together for four and one-half minutes when Frost left the room and the consultation was over. Trowbridge then gave a full confession to the murder of Doris Swindell.

Trowbridge argues that the waivers did not conform to Indiana's statutory requirements. . . . Trowbridge was fourteen years of age at the time of the confession. . . .

Trowbridge challenges the admissibility of his statements on four grounds. First, he contends that Frost did not knowingly and voluntarily waive the right because no one told her that Trowbridge was a suspect in Swindell's murder, she was ill and unable to think clearly, and she was compelled to cooperate and consent because she would be subject to a contempt of court citation for failing to comply with Trowbridge's house arrest order. Second, Trowbridge contends that Frost's interests were adverse to Trowbridge's by virtue of the house arrest order requiring Frost to report any violation to the authorities. Third, Trowbridge asserts that he did not knowingly or voluntarily join in Frost's waiver because the officers ignored Trowbridge when he indicated a desire to stop the interrogation. Finally, Trowbridge argues that he was denied an opportunity for meaningful consultation with his mother. The trial court denied Trowbridge's pretrial motion to suppress his confession. . . . Despite Trowbr

act of which the child is suspected. . . . Frost was aware of Swindell's murder, was concerned that her son had information about or was somehow involved in the murder, and should have appreciated that her son was in jeopardy of prosecution.

Trowbridge's claim that Frost was so physically ill and distraught that she was unable to think clearly is unsubstantiated by the record. Nothing in the record indicates that Frost's illness was debilitating or exceeded the nervousness, and physical manifestation thereof, natural for a parent concerned with her child's welfare. Frost communicated clearly with the officers, promptly answered the detective's questions regarding her rights, unambiguously rejected the offer to consult privately with Trowbridge, and plainly stated her desire to leave the room during the interrogation.

Trowbridge also argues that Frost cannot have waived Trowbridge's rights under the juvenile waiver statute because her waiver was coerced. Frost had signed a house was not an employee of the state. In contrast, in *M.R. v. State*, we did not find an adverse interest where a mother who waived her child's constitutional rights had brought the child to the police after he ran away in violation of probation. [citation omitted] The fact that Frost notified authorities regarding her concern about Trowbridge's involvement in the Swindell murder is insufficient to render her interests adverse. We find, under the totality of circumstances, that Frost's obligations under the house arrest contract did not render her adverse to Trowbridge's interests and her waiver was voluntary.

Trowbridge next claims that he did not knowingly or voluntarily join in the waiver of his rights because he indicated to Detective Hay that he wished to stop the interrogation. . . . Trowbridge's query regarding his mother's waiver did not amount to an indication that he wanted to stop questioning. Nevertheless, Detective Collins did cease the questioning at that point and gave Trowbridge and Frost an unsolicited opportunity to consult privately in spite of their earlier rejection of the offer. After the brief consultation, Trowbridge began his confession and never indicated a desire to terminate the session.

Only juveniles have the added statutory protection of a "meaningful consultation." [citation omitted] The requirement may be satisfied by "actual consultation of a meaningful nature or by the express opportunity for such consultation, which is then forsaken in the presence of the proper authority by the juvenile, so long as the juvenile knowingly and voluntarily waives his constitutional rights." [citation omitted] The facts surrounding Trowbridge's and Frost's "meaningful consultation" are virtually identical to those in our decision in *Carter*. [citation omitted] The police read rights to both Trowbridge and Frost. They acknowledged hearing the rights and understanding them. Trowbridge and Frost were presented with a waiver of

arrest contract on February 23, 1996 pursuant to Trowbridge's release from secure care to house arrest following prior unrelated delinquency proceedings. . . . Failure to notify Juvenile Probation of violations would have subjected Frost to a contempt of court citation. Trowbridge argues that the threat of a severe penalty for not complying with the house arrest contract compelled Frost to waive involuntarily Trowbridge's rights. However, the house arrest contract had expired in April, 1996 and Frost allowed Trowbridge to leave the house on the day of the murder because she knew the contract had expired. . . . Frost was not compelled by the house arrest contract to waive Trowbridge's rights.

Defendant next argues that Frost was an adverse party to his interests and could therefore not serve as the adult who waives his rights under the juvenile waiver statute. . . . Frost

rights form. They both acknowledged verbally that they understood the rights. Trowbridge and Frost willingly signed the form stating that they had been apprised of Trowbridge's rights. They "were given an opportunity to consult privately with each other immediately after the rights were read." [citation omitted] "They declined the opportunity to consult." [citation omitted] "They then signed the form again to indicate that they waived" Trowbridge's constitutional rights. [citation omitted] The facts of this case and *Carter* differ in that the police actually imposed a private consultation on Trowbridge and Frost after Trowbridge asked about his mother's waiver. Trowbridge and Frost were given two opportunities for meaningful consultation. They declined the first offer and later chose not to consult when left alone in the interrogation room expressly for that purpose. The protections of the juvenile waiver statute ensure that juveniles have the opportunity to engage in meaningful consultation with their parent or guardian regarding allegations, the circumstances of the case, and the ramifications of their responses to police questioning and confessions. Officers are unable, and cannot be expected, to force substantive communication between children and their parents.

. . . We find that under the totality of circumstances, the trial court properly determined that both Trowbridge and his mother knowingly and voluntarily waived Trowbridge's rights in full compliance with statutory requirements.

[The court also addressed the sentencing of the defendant, even though it was not brought up as an issue on the appeal. Basically, the court held that the defendant could not be guilty of both rape and abuse of a corpse. Based on the defendant's own admissions, the court concluded that the victim was dead at the time of the sexual act, and thus vacated the rape conviction.]

On the afternoon of December 18, 1990, the Balovski brothers were each found dead inside the Eli Tailor Shop from shotgun wounds to the head. A sawed-off shotgun later recovered from the defendant's apartment was found to have fired a spent casing recovered at the crime scene. The defendant gave a statement to police admitting the shooting of the Balovski brothers, and he made incriminating

**App. 102.27.12**  
***Peterson v. State***  
**674 N.E.2d 528**  
**Supreme Court of Indiana**  
**December 13, 1996**  
*The Facts*

admissions to an acquaintance.

On the evening of January 28, 1991, a shooting occurred during an armed robbery of an individual at the Gainer Bank branch in Southlake Mall in Merrillville. A suspect, Antoine McGee, was questioned by police in connection with the mall bank shooting incident. McGee indicated he was not responsible for the shooting and implicated the defendant. Based on this information, the police proceeded to the defendant's mother's apartment to look for the defendant. The police received consent from the mother and searched the apartment attempting to find the defendant. While in the defendant's bedroom, the officers seized a sawed-off shotgun found in the closet. *[footnote omitted]* The trial court determined the defendant had standing to challenge the search, but found the evidence was admissible because the defendant's mother had the right to consent to the search of her adult son's room, her consent was voluntary, and the shotgun was in plain view.

#### *The Legal Rules Involved*

The defendant presents numerous contentions grouped into three general issues: (1) whether a shotgun introduced into evidence was obtained by an unreasonable search and seizure and thus should have been suppressed; (2) whether the defendant's statements to police were properly admitted into evidence; and (3) whether the trial court erred in imposing the death penalty.

While the defendant had previously lived in the room which was searched, at the time of the search, the defendant had no control or ownership in the premises searched. On the day before the search, his mother had informed him that he could not live at the residence any longer, helped him pack his belongings, and took him to his girlfriend's house to stay with the understanding that he was to turn himself in for being AWOL from the Marines. Consequently, the defendant was no longer living at the apartment and thus had no expectation of privacy. *[citation omitted]* Even had the defendant continued to exhibit some control over the bedroom closet where the shotgun was found, such control was completely defined by, subordinate to, and dependent upon the will of his mother and her right to control the entire premises. *[citation omitted]* The apartment was leased to his mother and sister. His mother paid the rent. His mother had the sole determination as to whether or not he could reside at the apartment. His mother testified that she "often" searched the bedroom--including the closet where the evidence was located--looking for drugs the defendant may have hidden. His mother also allowed other persons to reside in the apartment and, significantly, the defendant's sister sometimes shared the bedroom at night, further diminishing any expectation of privacy he may have had. *[citation omitted]* In addition, the defendant is hard-pressed to claim a privacy expectation in light of the fact that no fewer than six separate individuals had keys to the apartment and the defendant's friend, Antoine McGee, exercised access and control over the defendant's bedroom when the defendant was not at the apartment. There is no reasonable expectation of privacy under these circumstances. . . .

*[The court provided an extensive discussion of the differences between federal and Indiana constitutional requirements for defendants to complain about searches of property other than their own, but the distinctions are more technical than*

The defendant contends these rulings are in error and violate both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. In reviewing the trial court's ruling on the validity of a search, we consider the evidence favorable to the trial court's ruling and any uncontradicted substantial evidence to the contrary to determine whether there is sufficient evidence to support the ruling. *[citation omitted]*

#### *The Ruling of the Court*

*[The Indiana Supreme Court affirmed the conviction and death sentence.]*

In addressing the defendant's claim of federal Fourth Amendment violations, we note that Fourth Amendment rights are personal and may not be vicariously asserted. *[citation omitted]* A defendant "aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person's premises has not had any of his Fourth Amendment rights infringed." *[citation omitted]* "In order to challenge a search as unconstitutional, a defendant must have a legitimate expectation of privacy in that which is searched." *[citation omitted]* In reviewing whether a privacy expectation exists under a Fourth Amendment analysis, this Court also looks to whether the defendant has control over or ownership in the premises searched. . . .

*practical. Under either constitution, a defendant cannot complain about the violation of someone else's rights.]*

As noted in our prior discussion, the defendant does not have standing to challenge the entry into his former bedroom and closet. He has shown no ownership, control, possession or interest in the premises searched. . . .

As to the seizure of the shotgun found in the closet, we must look to whether the defendant has established any ownership, control, possession or interest in it. In his confession, the defendant explicitly disclaimed ownership in the shotgun. However, this is not the end of our inquiry. "It is not necessary to decide whether or not the appellant in fact owned the [property seized]. . . . The right of possession is of sufficient interest in the subject matter of a search to entitle appellant to the protection of the constitution." *[citation omitted]* In his confession, the defendant admits he had the right to possess the shotgun as collateral until a debt was repaid. Under Section 11 of the Indiana Constitution, the defendant therefore has standing to challenge the seizure of the shotgun, and we will address the defendant's claim of insufficient evidence to support the trial court's finding that the shotgun was properly seized as contraband in plain view. *[Again the court discussed the differences between federal and Indiana constitutional law in reference to "plain view" seizures. Under federal cases, evidence or contraband in plain view can be seized without a search warrant. Under Indiana cases, plain view seizures are just not called searches. Either way, the evidence comes in.]*

The trial court admitted the shotgun after finding that the weapon was openly visible, that the officer had probable cause to believe that it was sawed-off, and that it was contraband. *[footnote omitted]* The location of the shotgun when first observed by police is an issue upon which the evidence is conflicting. Officer Borchert testified that the shotgun was in the duffel bag. However, Corporal Zenone

testified that the shotgun was not in the duffel bag but was leaning against the wall in the closet in plain view. Where the evidence is conflicting, this Court will consider only that evidence which tends to support the trial court's ruling and will uphold the trial court if the ruling is supported by substantial evidence of probative value. *[citation omitted]* Corporal Zenone's testimony that the weapon was visible satisfies our standard. Corporal Zenone did not have to pry into hidden places, and the weapon was not concealed. He simply made a discovery of that which was open to view. The trial court did not err in ruling that the shotgun was admissible.

The defendant contends that his confession should not have been admitted into evidence because it was the product of both an illegal arrest and an unreasonable delay in taking him before a magistrate. The defendant confessed to four shotgun murders, including the charged murders, approximately twenty-nine hours after his warrantless arrest by police. . . .

A warrantless arrest of the defendant is permissible when, at the time of the arrest, the arresting officer has probable cause to believe the defendant committed a felony. *[citation omitted]* "Probable cause exists when, at the time of the arrest, the arresting officer has knowledge of facts and circumstances which would warrant a man of reasonable caution to believe that the defendant committed the criminal act in question." . . . The arresting officer may base his belief that probable cause exists to arrest a person upon information received from another, although, generally, the reliability of an informant should be established before a finding of probable cause can be made. *[citation omitted]* Reliability is usually shown by (1) an informer's past record of reliability or (2) by extrinsic facts proving an informer's information reliable. *[citation omitted]*

The informant here, McGee, made statements to police which, while linking the defendant to the shooting, also demonstrated McGee's knowledge of facts indicating his

. . . . The record demonstrates the defendant's statements were the product of his own free will. He was fully informed of his pertinent constitutional rights on four separate instances, and he explicitly waived those rights each time. He visited with his mother during the period of incarceration prior to his confession and the record shows he was not promised anything in exchange for his statement, nor was he threatened in any way in order to coerce him into providing a statement. We find that the defendant's

**App. 102.27.13**

***Torres v. State***

**673 N.E.2d 472**

**Supreme Court of Indiana**

**November 20, 1996**

*The Facts*

The defendant entered a bar and asked John Padgett's fiancée if she would like to have a drink. When she indicated that she was there with her boyfriend, the defendant walked over to Padgett and an argument erupted between the men. The bartender asked the defendant to leave. Fifteen to twenty minutes later, as Padgett and his fiancée went outside of the bar, the defendant rushed over to Padgett and stabbed him in the chest with a knife. The defendant then went to the

reliability. . . . *[McGee described clothing, weapon, and vehicle linking Peterson to the robbery, and admitted his own involvement in the crime.]*

We find that McGee's statements admitting direct participation in events leading to the shooting, admissions which led to felony charges being filed, were sufficient to establish his trustworthiness for the purpose of probable cause to arrest. The fact that his statements also served to corroborate information previously obtained by the police provide further indicia of reliability. We find that the trial court's conclusion regarding the absence of probable cause for the defendant's arrest is not supported by substantial evidence of probative value. The arrest, although warrantless, was lawful.

The defendant further disputes the admissibility of his statements to police, including his confessions to the murders, on grounds that there was an unreasonable delay in bringing him before the magistrate after his warrantless arrest. . . .

It is uncontested that more than twenty-four hours elapsed between the time of the defendant's arrest and his presentation to a magistrate for a probable cause determination. We can find nothing in the record which would serve as a legitimate explanation for the State's failure to comply with the twenty-four hour time requirement. However, while the defendant urges that the remedy for violation of the twenty-four hour limit is "suppression of any statements made by the defendant," this suppression is only required if the statement is "found by the trial court to have resulted from the inherently coercive effect[] of prolonged detention." *[citation omitted]* A confession made during a period of illegal detention is not inadmissible solely because of the delay in presenting the arrestee to a magistrate. Such delay is only one factor to consider in determining the statement's admissibility. *[citation omitted]* It is only when the confession is the product of that detention that it must be suppressed. When the confession is the product of the defendant's free will, it is admissible. *[citation omitted]* improperly prolonged detention--standing alone--does not invalidate the trial court's finding of voluntariness. . . .

*[The Indiana Supreme Court also rejected the appellant's argument that the death penalty was unconstitutional. Even though the judge imposed the death sentence when the jury did not recommend death, the sentence is still proper because the judge followed all of the correct procedures.]*

apartment of his cousin, Charles Loera, who lived in the apartment next to his, and began washing the knife. He told Loera that he had just "cut someone." *[citation omitted]* The knife belonged to Loera and was later given to police. After going to his own apartment, the defendant changed out of his blood-stained clothes.

After changing clothes at his home, the defendant went to a pizza restaurant where he was identified by the bartender who had earlier removed the defendant from the bar. Two officers handcuffed him, read him the *Miranda* warning, began asking him about the crime, and asked for permission to search his house. The defendant gave them permission on the condition that he accompany them. Once there, they searched the defendant's residence and recovered a blood-stained T- shirt and pair of jeans. The police then asked

him to sign a consent form but he refused to do so.

#### *The Legal Rules Involved*

Following his trial to the court without a jury, the defendant was convicted of the August 23, 1993, stabbing murder of John Padgett. In this direct appeal, the defendant presents two issues: (1) whether there was insufficient evidence of the defendant's intent to commit murder; and (2) whether the trial court erred in denying a motion to suppress evidence. . . .

#### *The Ruling of the Court*

[The Indiana Supreme Court **affirmed** the conviction, but ruled that the trial court **should have suppressed** the evidence obtained in the consent search. Because there was enough evidence to convict anyway, the court called the admission of the evidence "harmless" error.]

It is well-settled that the use of a deadly weapon in a manner likely to cause death or serious bodily injury is sufficient evidence of intent to support a conviction for murder. [citation omitted] In the present case the defendant came back to the scene of the altercation bearing a knife, rushed up to Padgett and stuck a knife in his chest. The trial court could reasonably have found, beyond a reasonable doubt, that the defendant intentionally killed John Padgett. The evidence was sufficient to prove intent to murder.

After the court overruled the defendant's motion to suppress, trial counsel properly renewed his objection during trial to the admission of the items found at the defendant's apartment and thus preserved this issue for appeal. The defendant claims that the consent given was invalid in light of *Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975) and *Sims v. State*, 274 Ind. 495, 413 N.E.2d 556 (1980). *Pirtle* and *Sims* stand for the proposition that, under the Indiana Constitution, "a person in custody must be informed of the right to consult with counsel about the possibility of consenting to a search before a valid consent can be given." [citation omitted] Merely giving an arrestee the *Miranda* advisement before interrogation is insufficient to inform him of his right to consult with counsel before consenting to a search. [citation omitted] The burden at trial is upon the State to prove that a custodial defendant expressly authorized the search after being advised of his right to

consult counsel before consenting to the search. [citation omitted]

The State contends that the *Pirtle/Sims* advisement was not necessary because the defendant was not in custody at the time they asked for his consent. Arguing that the defendant was not in the police station at the time he was being questioned, the State concedes, however, that he was handcuffed, that the police had read him the *Miranda* rights, and that they had informed him that he was the suspect in a stabbing. To determine whether the defendant was in "custody" so as to require application of the *Pirtle/Sims* rule, we apply an objective test asking whether a reasonable person under the same circumstances would believe himself to be "under arrest or not free to resist the entreaties of the police." [citation omitted]

In addressing this question previously, we have looked to whether the police physically restrained the defendant or whether the defendant was "interrogated in a manner implicating the Fifth Amendment and necessitating the giving of *Miranda* warnings." [citation omitted] In this case, both factors were present. The police handcuffed the defendant upon the identification by the bartender and read him the *Miranda* warnings. We therefore find that the defendant was in custody and that the police improperly asked for and acted upon the defendant's consent to search without first advising him of his right to counsel in making the decision whether to give consent. . . .

However, not all error rises to the level of reversible error. [citation omitted] If the error committed by the trial court does not affect the outcome of the trial, we deem it harmless. [footnote omitted] Had the trial court correctly suppressed the evidence resulting from the improper search, it would have excluded the blood-stained T-shirt and jeans. However, the other evidence properly included the defendant's blood-stained shoes, which had been removed from the defendant's person and genetically matched the victim's blood. The court also had the undisputed testimonies of the State's witnesses, each of whom consistently identified the defendant as the man who had earlier argued with Padgett and later ran up to him and stabbed him with a knife. . . .

App. 102.27.14

***Figert v. State***

**N.E.2d**

**[No. 50S03-9709-CR-473]**

**Supreme Court of Indiana**

**October 23, 1997**

#### *The Facts*

As part of an ongoing undercover investigation, a police officer made several controlled purchases of crack cocaine from different men residing in, or at least conducting drug sales from, two of three manufactured homes in a place in

Marshall County known as "the Farm." The homes were located in a rural area in close proximity to each other in a "U" shape. Figert and Green lived in the third home. The probable cause affidavit did not allege that any sales were observed from the third home or that Figert or Green, or anyone meeting their description, sold drugs, or that the third home was a base of operations for drug trafficking. Besides mere proximity to the general area of the drug sales, the only fact the affidavit detailed as to the third home or Figert and Green was that "there are currently a large number of unidentified individuals living in and frequenting the three

trailers.” The affidavit also made clear that in one of the controlled buys the seller insisted on consummating the transaction outdoors and away from the homes to conceal it from his parents who lived there. The police officer who made the controlled drug purchases nonetheless concluded in the affidavit that he had “probable cause to believe that additional crack cocaine, paraphernalia, and evidence of crack cocaine dealing will be found” within the three trailers. . . .”

Based on the information contained in the affidavit, the trial court issued a warrant authorizing a search of “the three residences at 20831 Upas Road” for, among other things, cocaine and “any and all property related to narcotics trafficking.” Because some of the controlled purchases were consummated in automobiles driven by the suspects, the warrant also authorized a search of “the vehicles located within the curtilage” of the homes.

Several police officers, including the affiant, executed the warrant during the early morning hours of May 25, 1996. A search of Figert's and Green's home and Green's car uncovered incriminating evidence that led to their prosecution for drug-related offenses. Figert and Green filed separate motions to suppress. With respect to the home search, they both contended that the warrant was issued without probable cause because the supporting affidavit provided no basis to conclude that cocaine or related paraphernalia would be found in their home. After denying their motions to suppress, the trial court certified the following questions for interlocutory appeal: (1) “Whether the finding of probable cause for the issuance of a search warrant for all dwellings on the premises . . . was proper when the information used to formulate probable cause and the issuance of a search warrant was based on the activities of two residences that did not involve the [defendants'] residence”; and (2) “Whether the Court's finding that ‘the totality of the circumstances makes the entire premises suspect’ and thus ‘[a] substantial basis existed for a finding of probable cause to search all dwellings located at the farm’ was correct.” The Court of Appeals held that there was no probable cause for the issuance of the warrant as to Figert's and Green's home, but found that the “good faith” exception applied. On that basis, the trial court was affirmed. Judge Staton joined the majority on the first issue but dissented as to the good faith exception. Because the certified questions do not address the search of the car, the Court of Appeals did not deal with that issue. Nor do we. [footnote omitted]

#### *The Legal Rules Involved*

The parties appear to agree that the warrant was facially valid because it described with sufficient particularity the places to be searched and the things to be seized. [citation omitted] The problem both certified questions present is whether the information pleaded in the affidavit supported the finding of probable cause. Probable cause has long been

As the Court of Appeals noted, an exception to the requirement of probable cause to search each unit at one address has been recognized where the units are under the common dominion or control of the target of the investigation or, as the State puts it, are used as a “collective dwelling.” In that situation, some decisions have held that probable cause to search one unit or part of the premises supports a search of the rest. [citation omitted] However, there is an insufficient showing here of collective occupation

described as a fluid concept incapable of precise definition.

It is to be decided based on the facts of each case. [citation omitted] In deciding whether to issue a search warrant, “the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” [citation omitted] The duty of the reviewing court is to determine whether the magistrate had a “substantial basis” for concluding that probable cause existed. [citation omitted] “Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination” of probable cause. [citation omitted] “Reviewing court” for these purposes includes both the trial court ruling on a motion to suppress and all appellate court reviewing that decision. [citation omitted] In this review, we consider only the evidence presented to the issuing magistrate . . . .

#### *The Ruling of the Court*

[The Indiana Supreme Court **remanded** the case with instructions to **suppress the evidence** against Figert entirely and to **suppress the evidence** against Green that was taken from the home search.]

In addressing the probable cause question, the Court of Appeals correctly stated and applied several principles of search and seizure law. As a general proposition, a search of multiple units at a single address must be supported by probable cause to search each unit and is no different from a search of two or more separate houses. [footnote omitted] Accordingly, there must be a showing of probable cause to search Figert's and Green's home, not just the other homes.

We agree with the Court of Appeals that the determination that probable cause existed for searching the third home lacked a substantial basis. “The reasonable inferences drawn from the totality of the evidence,” [citation omitted], at most show that drugs were being sold from the first two homes by persons who lived in those homes or used them as a base of operations for drug trafficking. “Unidentified individuals,” who may or may not have been involved in the drug sales, were “frequenting the three trailers.” This all occurred in the general vicinity of the three homes, but does not support the conclusion that the third home or Figert and Green were necessarily involved. In short, the probable cause affidavit does not allege facts that would establish a fair probability that evidence of crime would be found in Figert's and Green's home. Other cases involving a lack of nexus between a controlled drug buy and the place to be searched have held the affidavit insufficient to establish probable cause. [citation omitted]

or control. The probable cause affidavit alleged that different persons lived in the first two homes and that the officer bought drugs from both occupants on separate occasions. The affidavit did not allege any connection between any of the controlled drug buys and the third home. Significantly, an effort was made to conceal the illegal activities from some of the occupants of the first two homes.

Thus, the facts cut against the view that the Farm was a collective drug-dealing operation and indicate that some of

the occupants may not have been aware of illegal activity.

If the officer who sought the warrant had information tending to show involvement by the third home in the drug sales, that information should have been offered when the warrant was issued. *United States v. Simpson*, 944 F. Supp. 1396, 1409 (S.D. Ind. 1996) ("single unit" exception could not sustain warrant where officers failed to present evidence to the issuing magistrate showing that multiple units were being used as single unit). In short, as all the judges of the Court of Appeals held, probable cause was not established by the affidavit.

As a final matter, the same search warrant was used in this case to search three separate residences occupied by different persons. Courts in other jurisdictions have viewed the use of a single search warrant for this purpose with disfavor, [citation omitted], as have some of our decisions [citation omitted]. Use of one warrant to search several dwellings, whether occupied by the same person or different parties, may confuse the determination whether probable cause existed to search each residence. *For that reason, where police seek a warrant to search multiple residences, the better practice is to obtain a separate warrant for each residence or place unless police proceed under a "collective dwelling" theory, in which case the facts supporting that conclusion should be set forth. In any event, facts alleged in an affidavit to establish probable cause to search each unit or residence in a multiunit dwelling are better set forth in a separate paragraph for each unit where feasible to avoid possible confusion. This case illustrates why these practices are preferred.* [emphasis added--ed.]

A majority in the Court of Appeals held that the evidence uncovered as a result of the search of Figert's and Green's home was admissible under the "good faith" exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This issue was not presented in the trial court in the motions to suppress and was not certified as a question for interlocutory appeal. However, we address the issue on the merits because it will likely arise on remand, the parties have discussed it in their briefs, and because we disagree with the Court of Appeals' conclusion that the evidence found in the defendants' home is admissible.

*Leon* held that where police officers rely in objective good faith on a warrant later found to be defective, so that suppression would not further the exclusionary rule's objective of deterring police misconduct, the Fourth Amendment does not require that the evidence be excluded.

However, the Supreme Court cautioned in *Leon* that certain police conduct would not qualify for the exception, including where the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." [citation omitted] Because the same officer here filed the probable cause affidavit and participated in the execution of the warrant based on the affidavit, we must decide whether the officer's reliance on the warrant was entirely unreasonable notwithstanding the magistrate's decision to issue the warrant.

The good faith exception necessarily assumes that police reliance on a warrant can be objectively reasonable despite the lack of probable cause. Emphasizing this point, the Court of Appeals majority reasoned from the premise

that "we would . . . emasculate the exception if, in practice, we equate the reasonableness of the officer's belief with the establishment of probable cause in the affidavit." [citation omitted] Equally critical, however, is that the good faith exception not "be so broadly construed as to obliterate the exclusionary rule." [citation omitted] In persuading the Court of Appeals that the exception was available here, the State pointed to four considerations that it claimed illustrated reasonable reliance on the warrant: (1) the homes were in close proximity in a "U" shape; (2) the homes were in a rural area; (3) the homes were owned by the same person and had the same address; and (4) a large number of unidentified individuals were living in and frequenting the three homes. Without further explanation, the Court of Appeals held that "the officers executing the warrant . . . could reasonably believe that probable cause to search a conclave consisting of the three trailers and accumulated junk cars located at a particular address had been established through the indicia presented by [the officer's] personal experiences and observations." [citation omitted]

We disagree. The first and the third of these factors apply to any multiunit rental facility. The second is irrelevant: Hoosiers who live in rural areas are entitled to no less protection against invasion of their homes. The fourth, assuming it applied to the third home, is in and of itself innocuous. Probable cause clearly existed with respect to the first two homes, and the totality of the circumstances established some suspicion or possibility of a joint drug-dealing enterprise at the Farm. But this is not enough.

The affidavit did not allege any facts linking the third home to the surrounding criminal activity. The lack of any nexus is a critical point in assessing the reasonableness of the officer's reliance on the warrant. [citation omitted] Objective good faith "requires officers to have a reasonable knowledge of what the law prohibits." [citation omitted] As Judge Staton observed in dissent, police officers are generally aware, or at least are charged with knowing, that probable cause is required to search a dwelling. Since 1905, the General Assembly has prescribed specific requirements for the form and content of probable cause affidavits in this state. [citation omitted] The most recent statute was enacted in 1981 in a major recodification of the criminal code. [citation omitted] Police compliance with the statute in the vast majority of cases has bred familiarity with so basic a requirement as a particularized showing of probable cause.

This is not a case involving the technical evidentiary questions that can arise in using hearsay to establish probable cause. Most Indiana appellate decisions upholding the admission of evidence under the good faith exception involved reliance on hearsay whose credibility was later found to be inadequately established. [citation omitted] In contrast, here the officer obtained the warrant primarily based on his own observations and firsthand knowledge. There is no technically flawed hearsay linking Figert's and Green's home to the drug dealing that in hindsight might make reliance on the warrant objectively reasonable. . . .

Our decisions have repeatedly recognized the State's substantial interest in combating the menace of the illegal drug trade. [citation omitted] The evidence found as a result of the illegal search here may be relevant and trustworthy -- indeed quite incriminating -- but as long as

the exclusionary rule is the law that is not the issue in a motion to suppress. It is all too common that illegal drugs are sold in close proximity to citizens who by all appearances, if not in fact, are not involved. If probable cause could be so easily imputed from one dwelling to another through overbroad application of the *Leon* exception, nothing would prevent searches of residences merely because of the fortuity of their proximity to illegal conduct. This would reduce the Fourth Amendment to an "empty promise." [citation omitted] Courts must be especially vigilant where the place to be searched is the home: "The Fourth Amendment protects the individual's

privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ." [citation omitted] The Fourth Amendment, which was framed against the backdrop of colonial-era abuses of the general warrant, [footnote omitted] compels a more specific showing of possible involvement in crime for the evidence to be admissible. [footnote omitted]

This case is remanded with instructions to grant defendant Figert's motion to suppress in its entirety and defendant Green's motion to suppress with respect to the home search, and for further proceedings . . . .

App. 102.27.15

*Haley v. State*

N.E.2d

[No. 66A03-9706-CR-223]

Court of Appeals of Indiana

July 2, 1998

*The Facts*

On May 13, 1995, Haley went to visit his wife at Tippecanoe State Park, where she had been camping in a tent since leaving their home several days earlier. Haley paid the campsite rental fee for the night.

At approximately 10:30 that night, three conservation officers entered the Park and were alerted by the Park's security guard of possible drug activity at Haley's campsite.

The officers drove to an adjacent campsite and observed the tent and its occupants from their vehicle for several minutes.

The tent had two "rooms," one of which was enclosed on three sides by screen, and the other was enclosed by traditional canvas. A zippered canvas flap separated the two "rooms," and that flap was tied back. The tent was lit by an electric lamp. Three men and two women were inside the tent. The officers observed one man and one woman in the screened area of the tent sharing a hand-rolled cigarette, and believed the cigarette to contain marijuana. They approached the tent and knocked on a bucket sitting outside the tent to announce their presence as they unzipped the flaps to the screened room. Haley was sitting in the back part of the tent, and when the officers entered, one officer noticed Haley put his hand under a blanket. The officer ordered Haley not to move and another officer drew his gun and pointed it at Haley. In Haley's hand was a 35mm film canister which contained an off-white powdery substance later determined to be methamphetamine. A further search of the tent revealed the remains of the cigarette butt in a can of beer and a quantity of a green leafy substance believed to be marijuana. The officers advised all five people of their *Miranda* rights. As the officers escorted all five people from the tent, Haley began to run, but stopped when the officers instructed him to. At the Park office, the officers advised Haley and the man and woman who had been seen smoking the cigarette that they were under arrest, and allowed the other two occupants of the tent to leave.

Haley was charged with possession of a controlled substance, a Class D felony, and resisting law enforcement, a Class A misdemeanor. Haley filed a motion to suppress the evidence obtained during the search of the tent and

testimony regarding that evidence, which was denied by the trial court. After a bench trial during which Haley again objected to the introduction of evidence from the search, Haley was found guilty of possession of a controlled substance as a Class A misdemeanor and resisting law enforcement, and sentenced to one year of imprisonment for each count, with six months suspended, the sentences to be served concurrently.

*The Legal Rules Involved*

Haley presents three issues for our review, which we consolidate and restate as whether the trial court erred in denying Haley's motion to suppress evidence seized during a warrantless search of a tent at a public campground.

*The Ruling of the Court*

[The Indiana Court of Appeals **reversed** the convictions for possession, holding that the search of the tent was improper, but **affirmed** the conviction for resisting.]

Haley contends that the trial court erred in denying his motion to suppress evidence obtained during the warrantless search of the tent. Haley contends that the State did not satisfy its burden of proof on the issue of probable cause and did not show that any exigent circumstances existed to justify the search.

The threshold question for us is whether the officers intruded upon an area in which Haley had an expectation of privacy protected under the United States and Indiana Constitutions. [citation omitted] Whether a person camping in a tent erected in a public campground is entitled to constitutional protection against unreasonable search and seizure is an issue of first impression in Indiana. Haley compares the tent to a hotel room, citing several Indiana cases holding that a person renting a hotel or motel room may have a legitimate expectation of privacy in the room. [citation omitted] Haley also cites several cases from other jurisdictions specifically holding that a person camping in a tent is entitled to constitutional protection. See *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993) (holding that a person can have an objectively reasonable expectation of privacy in a tent erected in a public campground); *People v. Schafer*, 946 P.2d 938, 941 (Colo. 1997) (determining that a camper has a reasonable expectation of privacy in a tent used for habitation); *Alward v. State*, 912 P.2d 243, 249 (Nev. 1996) (holding that choosing to make a tent as opposed to a hotel a temporary residence does not diminish the expectation of privacy). The State has made no argument regarding whether a person can have an

expectation of privacy in a tent.

*Mowrer* determined that the defendant had the same expectation of privacy in his hotel room as he did in his own home. Because he had spent the night in the room and had eaten a meal there just before his warrantless arrest, the room was clearly his "transitory home." Therefore, the officers could not enter the room to search or arrest without a warrant or exigent circumstances. *[citation omitted]* As a general proposition, we agree with Haley that the constitutional protections provided to those who rent hotel rooms should also extend to those who choose to make their "transitory home" a tent, if they have exhibited a subjective and reasonable expectation of privacy in that tent. Testimony at the suppression hearing indicated that Haley's wife had been using the tent as her residence for several days, but that Haley had paid the rental fee for the campsite on the night in question. *[citation omitted]* Haley had been at the campsite several times during the day and had been there for several consecutive hours prior to the officers' arrival. *[citation omitted]* Haley manifested a subjective intention to make the tent his "transitory home" at least for that night.

We turn, then, to Haley's contention that the warrantless search of the tent which uncovered the canister of methamphetamine was illegal. Initially, we note our

... The officers were able to see clearly into the tent and observe the occupants, and obtained probable cause to believe that the persons in the tent were engaged in illegal drug activity from their lawful view into the tent. Absent proof of some exception to the warrant requirement, however, this lawful view provided only probable cause to obtain a search warrant. *[citation omitted]*

Haley further argues that, assuming probable cause existed, as we have found, the State did not prove that any exigent circumstances existed to justify the search. The State asserts that the warrantless search which yielded the evidence which Haley seeks to suppress was justified because a marijuana cigarette was displayed in plain view by the occupants, because destruction of the evidence was imminent, and because the officers were entitled to make a search incident to arrest.

The State asserts that the officers' plain view of the marijuana cigarette negates the warrant requirement. We believe that the State has confused the doctrine of "plain view" with that of "open view," and has failed to consider what evidence is sought to be suppressed. The plain view doctrine applies when an officer, after lawfully intruding into a constitutionally protected area, inadvertently sees contraband in plain view and seizes it without a warrant. *[citation omitted]* The plain view doctrine, then, is an exception to the warrant requirement. *[citation omitted]* It is an exception, however, that is not applicable here. The State must first show that the officers were lawfully inside the tent before the plain view doctrine can be utilized, and in any event, the film canister which is the subject of Haley's

standard of review when reviewing a trial court's ruling on the validity of a search and seizure: we consider the evidence most favorable to the ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling.

*[citation omitted]* If the evidence is conflicting, we consider only the evidence favorable to the ruling and will affirm if the ruling is supported by substantial evidence of probative value. *[citation omitted]*

A warrantless search can only be justified by probable cause and one of the few, well-delineated exceptions to the warrant requirement, and the State carries the burden of proving that the action fell within one of the exceptions.

*[citation omitted]* Although an exception may justify proceeding without a warrant, it does not eliminate the need for probable cause. *[citation omitted]*

Haley first argues that the State did not prove that the officers had probable cause to engage in a warrantless search. In response, the State asserts that the activity the officers could clearly see inside the tent was consistent with use of drugs and constituted probable cause. Probable cause exists when facts and circumstances would lead a reasonable person to conclude that another was committing a criminal offense. *[citation omitted]*

motion to suppress was not in plain view.

As for the imminent destruction of evidence exception to the warrant requirement, the officers testified that the cigarette was burning down to a small butt, and they entered the tent to secure what remained of the cigarette as evidence. ... Testimony at the suppression hearing indicated that the occupants of the tent were not aware of the officers' presence until their entry into the tent. The only "destruction of evidence" was the consumption of the cigarette in the normal course. ... Possession of one cigarette of marijuana, which is the only offense for which the officers had probable cause prior to entering the tent, is a misdemeanor, and the officers had no cause to believe that they were in danger, as the occupants of the tent were not aware of the officers' presence, nor did they have cause to believe the occupants of the tent would "escape," as there was no indication that any of the occupants were intending to leave the campsite. If they were to attempt to leave, the officers had the tent under surveillance and could have acted at that time. The exigencies of this situation do not support a warrantless entry into the occupants' "home." ...

Haley does not make any argument with respect to his resisting law enforcement conviction other than to assert that it, too, was the fruit of the illegal search and seizure. We do not believe that the testimony concerning Haley's actions once removed from the tent is a "direct result" of the unlawful search. Therefore, we see no error in the trial court's denial of Haley's motion to suppress as far as it concerns this testimony.

opened it further to find a box which held a tube containing plastic bags. They removed the bags and found a white power inside. They called DEA who sent agents to examine the package. The Federal Express employees had placed the bags back in the tube and the tube back in the box. The DEA agents re-opened the package and performed field tests on the

**App. 102.27.16**

***United States v. Jacobsen***

**United States Supreme Court**

**104 S.Ct. 1652 (1984)**

Federal Express employees discovered a package which had been damaged by a forklift. After noticing it was torn, they

powder which tested positive and later proved to be cocaine.

The sender of the package was ultimately arrested and convicted of narcotics charges. He appealed and the Circuit Court of Appeals reversed the conviction. The United States Supreme Court reversed the Court of Appeals and upheld the conviction on the basis that there was no 4th Amendment violation because the package was originally opened by private persons, not by government agents.

"The initial invasions of respondents' package were

**App. 102.27.17**

***California v. Hodari D.***

**United States Supreme Court**

**111 S.Ct. 1547 (1991)**

The defendant was a young man standing with a group on the street when police officers arrived on the scene. The defendant and the others began to run away. An officer observed the defendant throw an object to the ground. The officer picked up the object which was a rock of crack cocaine. The defendant was convicted of the narcotics charge and he appealed. The United States Supreme Court upheld

**App. 102.27.18**

***Florida v. Bostick***

**United States Supreme Court**

**111 S.Ct. 2382 (1991)**

Bostick was a passenger on a bus in Florida where sheriff's deputies boarded the bus at a rest stop and asked to search Bostick's bag. They discovered a quantity of cocaine that Bostick was carrying north. Bostick was convicted on the narcotics charges. The officers had no probable cause to believe he was carrying contraband, but rather they were conducting random searches of bus passengers along a known route for drug smugglers. The officers were armed, but did

"... The present case is analytically indistinguishable from *Delgado*. Like the workers in that case, Bostick's freedom of movement was restricted by a factor independent of police conduct--i.e., by his being a passenger on a bus....

In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. This formulation follows logically from prior cases and breaks no new ground. We have said before that the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have

**App. 102.27.19**

***Oliver v. United States***

**United States Supreme Court**

**104 S.Ct. 641 (1984)**

Oliver was growing marijuana on his farm in Kentucky. State troopers entered his land, crossed a hill and observed marijuana growing in a field. They seized the marijuana and arrested Oliver. Oliver complained that his privacy had been violated because the police were trespassers on posted land, and because the officers had to go some distance on his land to see the marijuana. The United States Supreme Court upheld the conviction.

"[T]he rule of *Hester v. United States* . . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities

occasioned by private action. Those invasions revealed that the package contained only one significant item, a suspicious looking tape tube. Cutting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder. Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character."

the conviction, holding that the seizure of the cocaine did not violate the 4th Amendment, since the defendant could have no expectation of privacy in an object that he had thrown away.

"In sum, assuming that [the officer's] pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied."

nothing more than ask permission to search Bostick's belongings. The United States Supreme Court upheld the conviction, ruling that the search was based on consent given by the defendant.

"We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus."

communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' ... Where the encounter takes place is one factor, but it is not the only one. And, as the Solicitor General correctly observes, an individual may decline an officer's request without fearing prosecution. [*citation omitted*] We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure...."

conducted out of doors in fields, except in the area immediately surrounding the home. . . . [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is

not an expectation that 'society recognizes as reasonable.'"obtaining a warrant, the vehicle could just drive

**App. 102.27.20**

***Florida v. Wells***

**United States Supreme Court**

**110 S.Ct. 1632 (1990)**

Florida state troopers arrested Wells on suspicion of driving under the influence and transported him to a breathalyzer station. They also impounded his vehicle and conducted an inventory of the contents. In the trunk, officer found some marijuana cigarettes and a locked suitcase. They opened the suitcase and found a large plastic bag of marijuana. The United States Supreme Court reversed the conviction, ruling that although the impoundment of the vehicle was proper, the Florida Highway Patrol did not have a written policy governing inventories of impounded vehicles. If they had

away.

such a written policy, then the marijuana would have been admissible.

"Our view that standardized criteria, [citation omitted], or established routine, [citation omitted], must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.' [citation omitted]."

**App. 102.27.21**

***California v. Acevedo***

**United States Supreme Court**

**111 S.Ct. 1982 (1991)**

"The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause. The Court in *Ross* put it this way: 'The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.' [citation omitted] It went on to note: 'Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.' [citation omitted] We reaffirm that principle. In the

case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana.

That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment....."

"Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile.... We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."

## Appendix 103 Interrogations

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**App. 103.1****The Privilege Against Self-Incrimination**

The 5th Amendment to the U.S. Constitution provides: "no person shall be compelled in any criminal case to be a witness against himself."

The purpose of the amendment is to ensure the reliability of testimony. If a witness, and particularly a defendant-witness, is compelled to testify, then the evidence obtained might not be true because the testimony is not a product of the free will of the witness. The amendment also is intended to guard against the use of torture or other forms of coercion by the police in order to obtain confessions. Further, the amendment is consistent with the concept that the government must prove the guilt of the accused beyond a reasonable doubt; the accused cannot be compelled to produce evidence to prove his innocence.

The privilege against self-incrimination is a personal privilege, that is, it can be asserted only by individual human beings. Corporations, partnerships and other associations do not enjoy the privilege. Further, there is no privilege to refuse to incriminate another person; only *self*-incrimination is prohibited. Note, however, that an attorney may assert the privilege on behalf of his client.

**App. 103.1.1****Asserting the Privilege**

The privilege against self-incrimination may be asserted by a witness in any governmental proceeding where testimony under oath might lead to incriminating evidence to be used in a future prosecution. Whenever the witness is questioned by government agents [grand jury, pre-trial hearings, legislative hearings, custodial interrogations by the police, criminal trials], the witness may assert the privilege.

In the case of custodial interrogations, a person has the absolute right to remain silent and not talk to the police at all. If the person chooses to talk to the police, he may terminate the interrogation at any time.

In cases where the person is a witness under oath, there is generally no right to remain silent [since such witnesses are typically under subpoena and will be held in contempt of court if they fail to appear or if they appear and refuse to testify]. However, any witness under oath in any kind of government proceeding, may refuse to answer any particular question the answer to which might tend to incriminate the witness. Thus, the witness under oath must either answer each question asked or must claim the 5th Amendment privilege against self-incrimination.

In the case of criminal defendants, the criminal defendant has the absolute right *not to testify at all*, and the prosecution cannot call the defendant as a witness [thus making him refuse to testify by asserting the privilege in open court], nor can the prosecution even *comment* on the defendant's failure to testify.

**App. 103.1.2****The Nature of Self-Incrimination**

Courts interpret "self-incrimination" very broadly; when the answer to a question might "furnish a link in the chain of evidence needed to prosecute" the witness may refuse to answer on 5th Amendment grounds [*Hoffman v. United States* (1951)].

The only ways in which witnesses may be ordered to answer the question anyway after an assertion of the privilege are: (1) if the judge determines there is no possible way in which the answer could be incriminating; or (2) the prosecution has granted the witness immunity from prosecution; or (3) the statute of limitations has run on the particular crime in question so that the witness could not be prosecuted for it.

Note carefully that only "testimonial" evidence is covered by this privilege. Thus, the seizures of certain items of evidence from the person of the defendant are not compelled testimony and are not protected by the privilege. For example, police may compel medical personnel to draw a blood sample from a suspect to provide evidence of intoxication. Police may compel a suspect to stand in a line-up, to try on certain clothing, to give a voice exemplar or a handwriting exemplar, to submit to the scraping of the fingernails, to allow himself to be fingerprinted and photographed, and otherwise to give real or physical evidence. None of these evidence collection methods are governed by the 5th Amendment privilege against self-incrimination. Note, however, that the 5th Amendment due process clause might be invoked to prohibit the use of such evidence if the method of evidence collection "shocks the conscience" of the court (because it was gathered by particularly violent means or because it was gathered by unreasonably intrusive means from the body of the suspect). Further, books, documents, papers and the like enjoy only a limited protection from the 5th Amendment. The mere production of a document does not require compelled testimony, and therefore is outside the privilege. Thus, documentary evidence is usually available (under a "subpoena duces tecum") without a 5th Amendment challenge.

**App. 103.1.3*****South Dakota v. Neville* [459 U.S. 553 (1983)]**

South Dakota has an implied consent statute which gives the suspect the choice of submitting to a blood alcohol test or a license revocation. The refusal to submit to the test is admissible as evidence of guilt at trial.

Neville was arrested by the police for driving while intoxicated. He was offered a blood-alcohol test and warned that he would have his license revoked if he refused. He was not warned, however, that the refusal could be used against him during trial. Neville refused to take the test. During his trial, Neville moved to exclude the refusal evidence, claiming that it violated his 5th Amendment right to protection against compulsory self-incrimination.

The Supreme Court held that admission of evidence of refusal to take the test was not a violation of the 5th Amendment. The refusal was not an act coerced by the police officer, but a choice made by the suspect. "The simple blood-alcohol test is so safe, painless, and commonplace that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.... We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."

**App. 103.1.4*****Ohio v. Reiner* [No. 00-1028, decided March 19, 2001]**

United States Supreme Court

Per Curiam.

The Supreme Court of Ohio here held that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination. Because our precedents dictate that the privilege protects the innocent as well as the guilty, and that the facts here are sufficient to sustain a claim of privilege, we grant the petition for certiorari and reverse.

Respondent was charged with involuntary manslaughter in connection with the death of his 2-month-old son Alex. The coroner testified at trial that Alex died from "shaken baby syndrome," the result of child abuse. He estimated that Alex's injury most likely occurred minutes before the child stopped breathing. Alex died two days later when he was removed from life support. Evidence produced at trial revealed that Alex had a broken rib and a broken leg at the time of his death. His twin brother Derek, who was also examined, had several broken ribs. Respondent had been alone with Alex for half an hour immediately before Alex stopped breathing. Respondent's experts testified that Alex could have been injured several hours before his respiratory arrest. Alex was in the care of the family's babysitter, Susan Batt, at that time. Batt had cared for the children during the day for about two weeks prior to Alex's death. The defense theory was that Batt, not respondent, was the culpable party.

Batt informed the court in advance of testifying that she intended to assert her Fifth Amendment privilege. At the State's request, the trial court granted her transactional immunity from prosecution pursuant to Ohio Rev. Code Ann. §2945.44 (1999). She then testified to the jury that she had refused to testify without a grant of immunity on the advice of counsel, although she had done nothing wrong. Batt denied any involvement in Alex's death. She testified that she had never shaken Alex or his brother at any time, specifically on the day Alex suffered respiratory arrest. She said she was unaware of and had nothing to do with the other injuries to both children. The jury found respondent guilty of involuntary manslaughter, and he appealed.

The Court of Appeals of Ohio, Sixth District, reversed respondent's conviction on grounds not relevant to our decision here. The Supreme Court of Ohio affirmed the reversal, on the alternative ground that Batt had no valid Fifth Amendment privilege and that the trial court's grant of immunity under §2945.44 was therefore unlawful. 89 Ohio St. 3d 342, 358, 731 N.E. 2d 662, 677 (2000). [Footnote: \_Ohio Rev. Code Ann. §2945.44 (1999) states in pertinent part: "In any criminal proceeding ... if a witness refuses to answer or produce information *on the basis of his privilege against self-incrimination*, the court of common pleas ... unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if ... [the prosecuting attorney so requests and] ... [t]he court ... informs the witness that by answering, or producing the information he will receive [transactional] immunity ... ." (Emphasis added.) ] The court found that the wrongful grant of immunity prejudiced respondent, because it effectively told the jury that Batt did not cause Alex's injuries.

The court recognized that the privilege against self-incrimination applies where a witness' answers "could

reasonably 'furnish a link in the chain of evidence' \_" against him, *id.*, at 352, 731 N. E. 2d, at 673, quoting *Hoffman v. United States*, 341 U.S. 479 , 486 (1951). *Hoffman*, it noted, requires the trial court to determine whether the witness has correctly asserted the privilege, and to order the witness to answer questions if the witness is mistaken about the danger of incrimination. *Ibid.* The court faulted the trial judge for failing to question sufficiently Batt's assertion of the privilege. It noted that the Court of Appeals, in finding a valid privilege, failed to consider the prosecutor's suggestion that Batt's testimony would not incriminate her, and Batt's denial of involvement in Alex's abuse when questioned by the Children's Services Board. The court held that "Susan Batt's [trial] testimony did not incriminate her, because she denied *any* involvement in the abuse. Thus, she did not have a valid Fifth Amendment privilege." 89 Ohio St. 3d, at 355, 731 N. E. 2d, at 675 (emphasis in original). The court emphasized that the defense's theory of Batt's guilt was not grounds for a grant of immunity, "when the witness continues to deny any self-incriminating conduct." *Ibid.*

The Supreme Court of Ohio's decision that Batt was wrongly granted immunity under §2945.44 (and consequently, that reversal of respondent's conviction was required) rested on the court's determination that Batt did not have a valid Fifth Amendment privilege. In discussing the contours of that privilege, the court relied on our precedents. We have observed that "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 467 U.S. 138 , 152 (1984). The decision at issue "fairly appears ... to be interwoven with federal law," and no adequate and independent state ground is clear from the face of the opinion. *Michigan v. Long*, 463 U.S. 1032 , 1040—1041 (1983). We have jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law. See *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 , 816 (1986) ("[T]his Court retains power to review the decision of a federal issue in a state cause of action."); *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U.S. 281 , 293—294 (1908).

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5. As the Supreme Court of Ohio acknowledged, this privilege extends not only "to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman*, 341 U.S., at 486. "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.*, at 486—487.

We have held that the privilege's protection extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer." *Id.*, at 486. That inquiry is for the court; the witness' assertion does not by itself establish the risk of incrimination. *Ibid.* A danger of "imaginary and unsubstantial character" will not suffice. *Mason v. United States*, 244 U.S. 362 , 366 (1917). But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's "basic functions ... is to protect *innocent* men ... 'who otherwise might be ensnared by ambiguous circumstances.' \_" *Grunewald v. United States*, 353 U.S. 391 , 421 (1957) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551 , 557—558 (1956)) (emphasis in original). In *Grunewald*, we recognized that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth. 353 U.S., at 421—422.

The Supreme Court of Ohio's determination that Batt did not have a valid Fifth Amendment privilege because she denied any involvement in the abuse of the children clearly conflicts with *Hoffman* and *Grunewald*. Batt had "reasonable cause" to apprehend danger from her answers if questioned at respondent's trial. *Hoffman, supra*, at 486. Batt spent extended periods of time alone with Alex and his brother in the weeks immediately preceding discovery of their injuries. She was with Alex within the potential timeframe of the fatal trauma. The defense's theory of the case was that Batt, not respondent, was responsible for Alex's death and his brother's uncharged injuries. In this setting, it was reasonable for Batt to fear that answers to possible questions might tend to incriminate her. Batt therefore had a valid Fifth Amendment privilege against self-incrimination.

We do not, of course, address the question whether immunity from suit under §2945.44 was appropriate. Because the Supreme Court of Ohio mistakenly held that the witness' assertion of innocence deprived her of her Fifth Amendment privilege against self-incrimination, the petition for a writ of certiorari is granted, the court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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### App. 103.2

#### The Nature of Compulsion

The 5th Amendment prohibits *compelled* self-incrimination; thus, voluntary statements which incriminate are perfectly

acceptable under the constitution. Compulsion is easy to find in the case of physically or psychologically coercive interrogations by the police, but the issue has also been raised in other contexts:

**(1) Required records** -- records which are required to be kept by statute in a legitimate administrative scheme are not protected by the 5th Amendment (for example, pharmacists are required to keep records of sales of narcotics).

**(2) Tax returns** -- the 5th Amendment does not protect persons who fail to file tax returns even if the income of the taxpayer is from illegal sources. Taxpayers may, however, leave blank parts of the tax return form which ask for information which might tend to incriminate.

**(3) Registration** -- statutes which require certain persons to register with the government are permissible unless they fall within the *Albertson v. Subversive Activities Control Board* (1965) standard. Under *Albertson*, a statute requiring registration (in this case, of Communists) is constitutionally invalid if it (a) is directed at a specific group, (b) which group is suspected of criminal activity, (c) and which inquires into an area of law permeated with criminal statutes. This *Albertson* standard has caused the court to invalidate a firearms registration tax, an excise tax on gambling, and reporting requirements of the Marijuana Tax Act. On the other hand, the court has upheld a statute requiring drivers involved in accidents to leave their names at the accident scene because that did not carry a substantial risk of self-incrimination.

In any event, a person who is legitimately required to register with or report information to the government must either comply with the requirement or invoke the 5th Amendment privilege. There is no right to give false information.

#### App. 103.3

##### Asserting the Privilege

The government may not penalize persons for the exercise of a constitutional right. Thus, a city may not fire police officers who refuse to answer questions by asserting the 5th Amendment during an investigation of police corruption.

Likewise, a unit of government may not take away government contracts or prohibit a person from holding office just because that person invoked the 5th Amendment privilege in an investigation. Similarly, a prosecutor may not comment on the defendant's failure to testify at his trial (and the defendant has a right to demand that the judge instruct the jury that they may draw no adverse inference from the defendant's failure to testify).

#### App. 103.4

##### Prosecutorial Immunity

The privilege against self-incrimination does not exist if there is no possibility of incrimination. Thus, a witness may voluntarily answer a question and waive the privilege. Or a witness may be compelled to answer a question about a crime when the statute of limitations has run so that no prosecution can take place. Or a witness can be compelled to testify if the government has granted *immunity* to the witness.

There are two types of immunity: transactional immunity and use or derivative use immunity. Transactional immunity is a promise to the witness that there will be no prosecution *at all* arising from the subject matter of the testimony. Use or derivative use immunity is a promise to the witness that *no use* will be made of the results of the testimony (but there is no promise not to prosecute). Use immunity allows a prosecutor to compel a witness to testify in a proceeding against another defendant while preserving the ability to prosecute the witness as well; normally, the prosecutor will already have sufficient evidence to prosecute the witness and does not need whatever evidence might arise from the compelled testimony.

Note that immunity granted by one jurisdiction prevents the use of the compelled testimony by any other jurisdiction (that is, it is not permitted for a state to grant immunity and compel testimony and then for the federal prosecutor to use that testimony in a federal prosecution against the witness). Immunized testimony may not be used to impeach a witness in a later proceeding.

#### App. 103.5

##### Contempt

If a witness under oath is asked a question and refuses to answer on 5th Amendment grounds, the judge must then determine if the claim of privilege is proper. If the judge determines that there is no way in which the answer could incriminate (either because of a factual analysis of the possibilities, because of a grant of immunity, or because of the running of the statute of limitations), then the judge will order the witness to answer. If the witness answers, but tells

a lie, the witness then can be prosecuted for perjury (assuming, of course, that there is sufficient evidence to prove the corpus delicti of the offense). If the witness still refuses to answer, the witness is then in contempt of the court, and the judge may order the witness held in jail until the witness is willing to answer the question. Although the witness can stay in jail, at least theoretically, forever, this procedure usually is followed by a writ of habeas corpus to allow an appellate court to review the propriety of the trial judge's ruling quickly.

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#### **App. 103.6 Police Interrogations**

Police interrogations have always been a 5th Amendment problem because they occur outside judicial supervision. The due process clauses of the 5th and 14th Amendments impose a fundamental requirement upon the use of confessions and other admissions resulting from police interrogations: such statements must be *voluntary*, that is, the product of a "free and unconstrained choice" on the part of the suspect who confesses to the police. This requirement is designed both to ensure the trustworthiness of the evidence of guilt and to control possible police misconduct. In the not too distant past, physical torture of some suspects by the police to obtain confessions was not uncommon in the United States. Even where physical torture was not used, police practices in the past included severe psychological coercion. Suspects might be compelled to go without sleep for long periods of time, might be denied food or water, or might be denied the use of the rest room for prolonged periods. At times, suspects might be threatened with harm to family members or be tricked by false statements or insincere promises made by the interrogators.

It was not until *Brown v. Mississippi* (1936) that the U.S. Supreme Court applied to the states the long-standing federal rule that *coerced confessions are inadmissible* for any purpose in a criminal trial. The admission of an involuntary confession demands that an appellate court reverse the conviction no matter what other evidence heard at trial might tend to prove guilt. No defendant can have a fair trial if the jury hears an involuntary confession of guilt.

##### **App. 103.6.1**

##### ***Brown v. Mississippi* [297 U.S. 278 (1936)]**

A deputy sheriff and other officers went to Brown's home and requested him to accompany them to the house of the murder victim. While there, Brown was accused of the murder which he denied. Police then hanged him from a tree limb, let him down and hanged him again. He still denied his guilt. Police then tied him to a tree and whipped him, but was later released. Several days later, the same deputy returned to Brown's house and arrested him. On the way to the jail, the deputy again beat Brown. The deputy said he would continue beating Brown until he confessed. Brown confessed and was held in jail.

Two other suspects were taken to the same jail. There they were made to strip by the same deputy and were laid over chairs where they were whipped with a leather strap with a buckle on it. These suspects finally confessed, and the officers left, saying that if the suspects changed their story they would be whipped again.

The next day the three were brought before the sheriff, and they confessed to the crime. Trial began the next day. The suspects testified that the confessions were false and were obtained by torture. Rope marks were clearly visible on the suspects, and none of the participants in the beatings denied what had happened.

The suspects were convicted of murder and sentenced to death.

The Supreme Court reversed the Supreme Court of Mississippi, vacating the convictions on grounds that physical brutality and torture by law enforcement officers coerced the confessions in violation of due process of law.

"Because a State may dispense with a jury trial it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination--where the whole proceeding is but a mask--without supplying corrective process."

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#### **App. 103.7 Controlling Police Misconduct**

The court perceived that, although American police agencies had largely abandoned physical coercion, the police still used psychologically coercive means to obtain incriminating statements from suspects. Often, suspects were "led down the path" by their interrogators because the suspects were ignorant of their rights, were isolated from outside help during the interrogation, and were coerced by the very nature of the interrogation.

By the early 1960's, the Warren court was ready to decide the next round of Supreme Court cases on interrogation. There was some early confusion, however, because the court was not quite sure whether to deal with police interrogations as a 6th Amendment right to counsel problem or as a 5th Amendment privilege against self-incrimination

problem. The earliest cases focused on the 6th Amendment.

#### **App. 103.7.1**

##### ***Massiah v. United States* [377 U.S. 101 (1964)]**

U.S. Customs received a tip that Massiah, a merchant seaman, was transporting narcotics from South America aboard a ship. Officers searched the vessel and found 300 pounds of cocaine. Massiah was indicted for possession of narcotics aboard a United States vessel.

While he was out on bail, one of Massiah's accomplices agreed to inform for Customs by allowing officers to install a transmitter under the front seat of his car and then engaging Massiah in a conversation. His incriminating statements were admitted over Massiah's objection at trial and he was convicted.

The Supreme Court reversed the conviction. "We hold that the petitioner was denied the basic protections of the guarantee [of the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.... In this case, Massiah was more seriously imposed upon...because he did not even know that he was under interrogation by a government agent."

*Massiah v. United States* set the standard for police questioning of the *accused* criminal: a statement taken by the police from an accused criminal who is questioned without his lawyer being present is inadmissible. Note, however, that the person questioned must be an *accused* criminal (which means that he must have been formally charged with a crime either by indictment or by information). The *Massiah* rule thus applies only to situations where the police question a person after he has been formally charged with a crime and is awaiting trial. *Massiah* does not apply to mere suspects.

#### **App. 103.7.2**

##### ***Escobedo v. Illinois* [378 U.S. 478 (1964)]**

The next major case to deal with this problem was *Escobedo v. Illinois* which sent the court down a false path. The court held that Escobedo's confession was inadmissible because the investigation had focused on him, he had been taken into custody, he had requested and been denied an opportunity to consult with his lawyer, and his lawyer was present and available to consult. However, there had been no indictment or information; Escobedo was not an *accused*. Since the 6th Amendment right to counsel had never before been extended to a person who was not yet an *accused* criminal, this decision caused considerable confusion. The confusion was resolved two years later by *Miranda*.

Escobedo was arrested without a warrant and interrogated about a murder. On the way to the police station, officers told Escobedo that he had been named as the murderer and that he should confess. Escobedo said that he wanted to speak to an attorney. Shortly after Escobedo arrived at the police station, his lawyer arrived and asked permission from various police officers to speak with his client. The lawyer was refused access to his client. Escobedo also asked several times during the interrogation to speak to his attorney and was told that the attorney did not want to see him. Escobedo later admitted to some knowledge of the murder and finally admitted to being the murderer. Escobedo was convicted of murder.

The Supreme Court reversed the conviction because Escobedo had been denied his right to a lawyer at the police interrogation after he had asked to see his lawyer. "We hold, therefore, that, where, as here, the investigation is no longer a general inquiry into unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

#### **App. 103.7.3**

##### ***Miranda v. Arizona* [384 U.S. 436 (1966)]**

In *Miranda*, the court abandoned the path chosen in *Escobedo* only two years before and chose to deal with police interrogations as 5th, not 6th, Amendment problems. The *Miranda* decision (actually there were four cases decided all at the same time and Miranda's name was first on the list) addressed the general problem of procedural safeguards necessary for pre-trial interrogations of suspects by the police.

Miranda was arrested at his home and taken to a police station for questioning about a rape and kidnapping. Miranda was 23 years old, poor, and had completed only half of the ninth grade. The officers interrogated him for two hours and obtained a written confession. Miranda was convicted of rape and kidnapping. The Supreme Court reversed the convictions and adopted mandatory warnings for future custodial interrogations by the police.

The court, in its lengthy opinion, analyzed the history of police interrogation techniques and determined that

custodial police interrogations were, by their very nature, coercive. Thus, in order to preserve the suspect's 5th Amendment right against self-incrimination, it was necessary to adopt some method of controlling this perceived "misconduct" on the part of interrogators. The court held that (in both federal and state trials) any statement of the accused could not be used in evidence if it was the result of a "custodial interrogation" of the defendant by government agents unless the defendant had been warned of his rights under the 5th Amendment and waived those rights before questioning began. The warning of rights required by the *Miranda* decision must be given *before* a custodial interrogation and must include:

- (1) a warning of the suspect's right to remain silent;
- (2) a warning that anything the suspect says can and will be against him at trial;
- (3) a warning that the suspect has the right to the assistance of a lawyer;
- (4) a warning that if the suspect cannot afford to hire a lawyer, the government will provide one for him.

Most police agencies also give the additional warning that the suspect can stop answering questions any time he chooses. Typically the warning given by the police will include a question such as, "Do you understand these rights as I have read them to you?" and "Do you wish to waive these rights?" Also typically, the *Miranda* warnings will be printed on a waiver form which the suspect will be asked to read and sign before questioning begins. In many jurisdictions, *Miranda* warnings are also printed in Spanish in order to advise Spanish-speaking suspects prior to questioning.

#### **App. 103.7.4**

##### **Consequences of Miranda Violations**

If *Miranda* warnings are not given to suspects prior to custodial interrogation, the net result is that any statements given by the suspect will not be admissible at trial (even if the statement is entirely voluntary). Note well that *Miranda* applies only to interrogations by government agents. Thus, interrogations by private security guards (assuming they are not also deputized) would not require warnings.

Warnings need be given only prior to *custodial interrogations*. Thus, if a suspect is not in custody, no warnings need be given prior to questioning. Likewise, if a suspect is in custody but is not being questioned, no warnings need be given. The problem, of course, is that situations might occur where police officers obtain information from suspects under circumstances later interpreted by a court to be a custodial interrogation but which at the time are believed not custodial by the officers. Accordingly, most police agencies routinely give *Miranda* warnings prior to any questioning of suspects and along with any arrest procedure in order to avoid possible future conflicts in court (even though there might be no technical requirement for the warnings in some cases).

#### **App. 103.7.5**

##### ***Brewer v. Williams* [430 U.S. 387 (1977)]**

On Christmas Eve, a young girl disappeared from the YMCA building in Des Moines. A short time later Williams, a mental hospital escapee and a religious fanatic, was seen leaving the YMCA with a large bundle wrapped in a blanket. A teenaged boy who helped him told police that he had seen "two legs in it and they were skinny and white." Williams's car was found the next day 160 miles east of Des Moines. Clothing belonging to the missing girl and a blanket like the one used to wrap the bundle were found at a rest stop between Des Moines and Davenport, where the car was found. Assuming that the girl's body could be found between the YMCA and the car, a massive search was organized. Meanwhile, Williams was arrested by Davenport police and was arraigned. Williams's lawyer was informed by the police that Williams would be returned to Des Moines without being interrogated. During the trip, an officer talked to Williams, telling him not to answer but just to think about the situation: a snowstorm was on the way which would hide the body, and the parents could not even give their child a Christian burial. As Williams and the officer neared the town where the body was hidden, Williams agreed to take the officer to the child's body. The body was found in a ditch.

At the trial, a motion to suppress the evidence was denied and Williams was convicted of first-degree murder.

The Supreme Court reversed the conviction, holding that the police officer's statement to Williams about a "Christian burial" was an interrogation which required *Miranda* warnings, especially since the police knew that his lawyer was waiting for him to arrive at the jail.

"There can be no serious doubt ... that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as--and perhaps more effectively than--if he had formally interrogated him. Detective Leaming was fully aware before departing from Des Moines that Moines by [lawyer] McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much information as possible. Indeed Detective Leaming conceded as much when he testified at Williams's trial."

#### **App. 103.7.6**

##### ***Nix v. Williams* [104 S.Ct. 2501 (1984)]**

This is the latest (and final) version of the famous "Christian burial" case which has been in the courts since 1968. Williams murdered a little girl in Iowa on Christmas Eve in 1968. Police mounted an enormous manhunt which ultimately led to the capture of Williams. Williams, however, refused to tell officers where he had left the girl's body. One of the officers who was transporting Williams to jail spoke to him, specifically telling Williams that he should not answer but merely "think about it." The officer then suggested that a little girl who had been taken from her family and murdered on Christmas Eve deserved a "Christian burial" and that an approaching snow storm might make it impossible to find the body. Williams then led the officers to the body. No *Miranda* warnings had been given.

Williams ultimately had two trials, both resulting in convictions. At the second trial, the prosecution did not use any statements made by Williams. Williams appealed again on grounds that the body would not have been discovered if he had not been "coerced" by the "Christian burial" speech.

The court upheld the conviction, adopting an "inevitable discovery" exception to the exclusionary rule. A review of the facts of the case revealed that the search parties would inevitably have discovered the body even if Williams had never told officers anything, and that therefore, even though the statements of the officer in the police car did constitute an unlawful interrogation of Williams, he was no worse off than if the interrogation had not occurred because the evidence would have been discovered anyway, and from an independent source, the search parties.

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### App. 103.8 Custodial Interrogation

"Custody" does not mean "arrest" (although an arrested person is certainly in custody). Rather, custody is a broader concept which is generally interpreted to mean any situation where a suspect's freedom of movement has been restricted by the police to the extent that the suspect believes he is not free to leave the police presence. Certainly people who are formally under arrest are in "custody." People who are specifically (and truthfully) informed that they are free to leave the police presence are certainly not in "custody." In between these two extremes, courts will examine the totality of the circumstances of each case to determine whether or not the suspect is in custody -- the key element is whether or not the suspect's freedom of movement has been restricted by the police.

"Interrogation" occurs when police officers ask questions of a suspect. Thus, if a suspect volunteers a statement to the police spontaneously (that is, the statement is not in response to questioning), no interrogation has occurred. No particular type of questioning, however, is required. The real inquiry of the court is whether or not the actions of the police are designed to elicit an incriminating response from the suspect in custody.

#### App. 103.8.1

##### ***Rhode Island v. Innis* [446 U.S. 291 (1980)]**

Police arrested Innis for killing a taxi driver. The officers advised Innis of his *Miranda* rights and did not converse with him. When supervisors arrived at the scene, Innis was again advised of his *Miranda* rights. He replied that he understood his rights and wanted to speak to an attorney. Innis was placed in a police car. On the way to the police station, two of the officers engaged in a conversation between themselves concerning Innis's shotgun, which had not been recovered. When one of the officers expressed concern that children from a nearby school for the handicapped might find the weapon and hurt themselves, Innis interrupted, telling the officers to return to the scene so that he could show them where he threw the weapon in a vacant lot. Upon returning to the scene, Innis was again advised of his *Miranda* rights. He again stated that he understood his rights but wanted to remove the gun before one of the children found it. He then led the police to the shotgun. Innis was convicted of robbery, kidnapping, and murder.

The Supreme Court affirmed the convictions, holding that Innis had not been interrogated, but rather that the officers were merely conversing among themselves when Innis interrupted them.

"Here there was no express questioning of respondent; the conversation between the two officers was, at least in form, nothing more than a dialogue between them to which no response from respondent was invited. Moreover, respondent was not subjected to the 'functional equivalent' of questioning since it cannot be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from respondent. There is nothing in the record to suggest that the officers were aware that respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children, or that the police knew that respondent was unusually disoriented or upset at the time of his arrest. Nor does the record indicate that, in the context of a brief conversation, the officers should have known that respondent would suddenly be moved to make a self-incriminating response."

### App. 103.9

### Resumption of Questioning

If after advisement of his rights, the suspect chooses to remain silent or to consult an attorney, no questioning may take place. Whether the police may attempt to resume questioning at a later time depends on the nature of the first attempt.

If the suspect merely chose to remain silent, questioning may be resumed at a later time if (a) the police immediately stopped questioning upon the suspect's indication of a desire to remain silent, (b) the questioning resumed only after the passage of a significant period of time, (c) new *Miranda* warnings were given, and (d) the later interrogation was in reference to a crime that was not the subject matter of the first interrogation.

If the suspect says he wanted to speak to an attorney, all questioning must stop immediately and may not resume until his attorney is present. Questioning of the suspect may be resumed only if the attorney is present, or if the suspect himself initiates the new questioning by requesting to talk to the police.

#### App. 103.9.1

##### ***Edwards v. Arizona* [451 U.S. 477 (1981)]**

Edwards was arrested under a warrant. At the police station, he was read his *Miranda* rights and indicated that he understood them and would answer questions. Police told him that an accomplice had made a sworn statement implicating him, and Edwards offered to "make a deal," but later changed his mind. He said that he wanted to speak to an attorney before making the deal. At that point questioning ceased.

The next morning, two other officers went to the jail and asked to see Edwards. Edwards told the jailer that he did not want to speak to the officers. The jailer told him that he had no choice. Edwards was again informed of his *Miranda* rights. He indicated that he would talk but first wanted to hear the taped statement of his accomplice. After listening to the statement, Edwards made an inculpatory statement. Edwards was convicted of several crimes.

The Supreme Court reversed his convictions because the police initiated a second interrogation without the presence of an attorney after Edwards had already asked to talk to an attorney.

"When an accused asks for counsel a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

"We think it clear that Edwards was subjected to custodial interrogation on January 10 within the meaning of *Innis* and that this occurred at the insistence of the authorities. His statement, made without having access to counsel, did not amount to a valid waiver and hence was inadmissible."

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### App. 103.10 Waiver of Rights

A suspect may waive his *Miranda* rights by voluntarily answering police questions after having been warned of his rights. Although police routinely seek a written waiver of rights from the suspect, such a written waiver is not legally required (but it does make proof of waiver easier for the prosecutor).

#### App. 103.10.1

##### ***Patterson v. Illinois* [487 U.S. 285 (1988)]**

Patterson was in custody when police informed him that he was being charged with murder. Patterson indicated he was willing to discuss the crime with the police. He was interrogated twice and, on both occasions, was read a *Miranda* waiver form. He initialed each of the five specific warnings on the form and then signed it each time. He then gave incriminating statements. He was convicted of murder.

The Supreme Court affirmed the conviction, holding that a valid *Miranda* waiver serves to waive both the 5th and 6th Amendment rights to counsel.

"This Court has never adopted petitioner's suggestion that the Sixth Amendment right to counsel is 'superior' to or 'more difficult' to waive than its Fifth Amendment counterpart. Rather, in Sixth Amendment cases, the court has defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular stage of the proceedings in question, and the dangers to the accused of proceedings without counsel at that stage.... *Miranda* warnings are sufficient for this purpose in post-indictment questioning context, because, at that stage, the role of counsel is relatively simple and limited, and the dangers and disadvantages of self-representation are less substantial and more obvious to an accused than they are at trial."

**App. 103.11**  
**Cases of Interest**

**App. 103.11.1*****Carter v. State***\_\_\_\_\_  
**N.E.2d** \_\_\_\_\_**[Cause No. 48S00-9603-CR-240 ]****Supreme Court of Indiana****October 10, 1997***The Facts*

The victim and Carter lived in the same apartment complex in Anderson, Indiana. On the afternoon of her death the victim asked Carter for help with a flat tire on her bicycle. According to Carter's confession, he intended to help her find a bicycle pump so she could fix the tire. The two went to his apartment together. While she watched television in his mother's bedroom, Carter entered the room with his trousers off. He retrieved a steak knife from a night stand and told the victim that if she did not take off her clothes, he would kill her. She laughed in response. Carter then dropped the knife, approached her, took off her clothes, and attempted sexual intercourse but failed to penetrate. After telling the victim to put her clothes on, Carter donned his trousers and at some point changed his shirt and put the steak knife into his pocket. He then led the victim out the back door of the apartment, telling her not to tell anyone what had happened. Finally, he took her by the arm to a nearby wooded area.

When she screamed Carter killed her.

The victim's body was discovered in the early hours of the next day. Police had investigated her disappearance and were aware that a neighbor had seen the victim with a "big black kid" at about the time she was last seen. Carter and his friend Clifton Jones fit this description and were questioned by the police both before and after discovery of the body. In his first statement to police, Carter claimed to have been with Jones at the time of the killing. The police learned, however, that Jones was out of town and could not have been with Carter. On September 13, the police picked up Carter and Jones after school and brought them to the police station for questioning. Both mothers were called to the station. After Carter's mother, Marchal Armstead, arrived and met for several minutes with Carter, the two were given a waiver of rights form. A detective read the rights aloud and they both signed the waiver form acknowledging the reading. They then refused an offer to consult privately with each other, and signed the waiver form again, this time formally acknowledging waiver of Carter's rights. Shortly after the questioning began, Carter asked to speak with the detectives alone and Armstead agreed to leave the room. The interview continued without Armstead and eventually Carter

confessed. At trial, in addition to the confession, the evidence indicated that Carter's tennis shoes were stained with human blood. DNA tests showed a 99.9% probability that the blood was the victim's. An expert determined that pubic hair found on the victim's body was similar in characteristics to a sample of Carter's pubic hair. Ink impressions taken from the bloody pair of Carter's shoes were consistent with an imprint on the victim's arm.

*The Legal Rules Involved*

Fourteen year old Kevin L. Carter was charged with murder and was waived into adult court where, after a mistrial, a jury convicted him as charged. He was sentenced to sixty years in prison. On this direct appeal, Carter presents four issues:

I. Was his confession properly admitted?

. . . .

*The Ruling of the Court*

*[The Indiana Supreme Court affirmed the conviction but remanded for resentencing for technical reasons.]*

At both the first and second trial, Carter's motion to suppress the confession was denied. The motion presents two related issues: voluntariness of the waiver of *Miranda* rights and voluntariness of the confession. . . .

As to the waiver issue, Indiana Code §31-6-7-3 sets out additional specific requirements for a valid waiver of Indiana state or federal constitutional rights by a juvenile. Under the relevant part of the statute, these rights may be waived only:

(2) by the child's custodial parent . . . if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver. IC § 31-6-7-3(a)(2) (1993). *[footnote omitted]*

Carter asserts that the waiver was involuntary. The standard of appellate review of a trial court's ruling as to the voluntariness of a waiver is made with regard to the totality of the circumstances considering only evidence favorable to the state and any uncontested evidence. *[citation omitted]*

Relevant circumstances include the child's physical, mental, and emotional maturity; whether the child or parent understood the consequences of the child's statements;

whether the child and parent had been informed of the delinquent act; the length of time the child was held in custody before consulting with his parent; whether there was any coercion, force, or inducement; and whether the child and parent were advised of the child's right to remain silent and to the appointment of counsel. [citation omitted]

Applying these factors to the facts of this case, we conclude that Carter's waiver was voluntary. Carter and Armstead were presented with a waiver of rights form. They both acknowledged verbally or by nodding that they understood each right after each was read aloud by a detective. They both signed the form indicating that they had been informed of Carter's rights.

They were given an opportunity to consult privately with each other immediately after the rights were read. [footnote omitted] They declined the opportunity to consult. They then signed the form again to indicate that they waived Carter's constitutional rights. There is no allegation or evidence in the record of coercion, force, or inducement. There is no evidence that Carter or Armstead did not know or understand what they were doing.

The only concern as to the waiver arises because of uncertainty as to whether Armstead was aware at the time she signed the waiver that Carter was a suspect. It is clear that Carter and Armstead were aware of the girl's murder.

The second issue is the voluntariness of the confession. In effect, Carter contends that his confession was involuntary because it was induced by an implied promise. Carter argues that Detective Copeland, Carter's interrogator, impermissibly led Carter to believe that if he confessed he would be tried as a juvenile. We conclude that Carter's confession was voluntarily given. ...

After Carter and Armstead waived their *Miranda* rights, the police began a videotaped interview of Carter with Armstead present. During the interview, Carter indicated that he wanted to talk to the police outside his mother's presence. She agreed to leave the room and the interview continued. At first, Carter stated that he saw a man in a green car talking with the victim near her house, and that the man drove the car and stopped outside her front door. Copeland asked why Carter was reluctant to relay this information with Armstead present. Carter said he was scared to talk to the police because the man in the car might have seen him. Copeland said there was nothing to be scared of, that Carter should tell the truth because people thought that Carter might have committed the murder, and that no one else had seen a green car. Then Carter said:

Carter: Can I ask you a couple of questions?

Copeland: Okay, go ahead.

Carter: Just so I'll know. What would happen to this guy?

Copeland: It depends. He would probably get some help more than anything else, especially if he's young. Because we get into that area where kids make mistakes. Some kids make big mistakes, but they're still mistakes. See? The law is set up so that you're not considered an adult until you're 18. So until you're 18, the law looks at you a lot differently, you see. It considers you a child first and then your actions--

Carter: So, if like he was older he would go to jail?

Copeland: If he was older he would be in big, big, big trouble. Now I'm telling you, if he was younger, he's in trouble too.

Carter: Yeah, and he'd go to like juvenile hall or something?

Copeland: Well, that's a possibility, you see. It depends on his age. Now, are we talking about a young kid here?

Carter: Yes.

Copeland: Okay. Who are we talking about?

Carter: Me.

Carter then provided a detailed confession of the crime.

There is substantial evidence available that would permit the trial court to decide, under the totality of the circumstances, that the impact of the above exchange did not influence Carter so as to overcome his will. Perhaps most importantly, there is no evidence that Copeland, either expressly or by implication, directly promised Carter that he would be tried as a juvenile.

Copeland said: "The law is set up so you're not considered an adult until you're 18." This general statement is not accurate in this context. [footnote omitted] It is a comment about the legal system and not a personal promise to Carter regarding his status. Compare *Pamer*, 426 N.E.2d at 1374-75 (distinguishing between a direct promise of immunity in exchange for a confession, one rising "to the

level of a guarantee," with a "mere exhortation") with *Ashby*, 265 Ind. at 321, 354 N.E.2d at 196 (a direct representation that defendant would receive a "ten flat" sentence instead of a life sentence rendered confession involuntary).

More significantly, any potential the statement had to mislead Carter was vitiated by the exchange that followed. Carter interrupted Copeland to ask if an older culprit would go to jail. Copeland answered that an older man would be in "big, big, big trouble" but that a younger person would be in "trouble too." Carter asked: would the younger man go to juvenile hall?

Although Carter had not been charged or told that he was a suspect, the reading of rights after being unexpectedly brought to the police station is a clear indication that the rights should be taken seriously. More importantly, a suspect's parent or guardian need not be aware that her ward is a suspect for there to be an effective waiver. *Tingle*, 632 N.E.2d at 352-53 (neither juvenile defendant nor his custodian were informed of the possible offenses to be charged, or that defendant could be charged as an adult, but that fact alone was not enough to overturn trial court's finding of voluntariness); *Smith v. State*, 580 N.E.2d 298, 301 (Ind.Ct.App. 1991) ("[parent's] own failure to appreciate the fact that her son was in jeopardy of prosecution even though he had not been identified" is by itself, insufficient to render a waiver involuntary). In addition, Carter and Armstead were told of the right to remain silent and the right to counsel. Carter was alone at the station for no more than an hour before consulting with Armstead. Carter does not argue, nor does the record show, that at the time of waiver, Carter was physically, mentally, or emotionally immature for someone of his age. In light of all of the above factors, we cannot say that the trial court's conclusion to admit the confession was unsupported by the totality of the circumstances.

Copeland responded: "Well, that's a possibility. . . . It depends on his age."

Here, Copeland said only that going to juvenile hall was a possibility. The suggested possibility of treatment as a juvenile is less aggressive than some of the statements that have been held not to render a confession involuntary. For example, in *Ortiz v. State*, 265 Ind. 549, 552, 356 N.E.2d 1188, 1192 (1976) a police officer told the defendant that if he confessed, the officer would "see what he could do" and "could probably talk to the prosecutor and make a deal." There was sufficient evidence to support the trial court's conclusion that the defendant's confession was voluntary. [citation omitted] Similarly, in *Ward v. State*, 408 N.E.2d 140, 143 (Ind. Ct. App. 1980), an officer's promise to "help . . . in every way he could" was held to be too vague and indefinite to undermine the voluntariness of the confession. And, in *Love v. State*, 272 Ind. 672, 676, 400 N.E.2d 1371, 1373 (1980), an officer who told the juvenile defendant that if he did not confess he might go to adult prison and that his "cooperation might help in assisting him" was held not to promise that the defendant's cooperation would guarantee leniency or assure the defendant of trial as a juvenile.

In addition, as we noted in *Jackson v. State*, 269 Ind. 256, 260, 379 N.E.2d 975, 977 (1978), although an accused must be aware of the probable consequences of his act, "not every misapprehension concerning the extent and nature of criminal liability to which a confession may expose the accused vitiates the voluntariness of the confession." Officer Copeland made clear to Carter that the person who committed the murder would be "in trouble" regardless of age. In *Jackson*, the accused juvenile and his parents were not told that first degree murder was outside the jurisdiction of the juvenile court. The defendant was under the impression that he would be tried as a juvenile, but he was told, and the rights form he signed confirmed, that his confession could be used against him in both juvenile and adult proceedings. [citation omitted] The form Carter and Armstead signed informed them that any statement could be used "in court." If Carter was under the misapprehension that he would be tried in juvenile court, it was not because of any promise by the police or because of language on the rights waiver form. Finally, Carter initiated the dialogue. Cf. *Coppock v. State*, 480 N.E.2d 941, 944 (Ind. 1985) (defendant initiated discussion that led to the alleged promise, tending to show that "the subject [of the promise] was not used as a coercive tool to overbear [defendant's] will to resist."). There is no evidence of coercion by Detective Copeland, nor can his response to Carter's question be considered, under the circumstances, as unfairly teasing Carter to confess, or inducing him to make an unreliable statement. In sum, the evidence indicates that Carter wanted to tell the police something and that the police did not induce him into making an involuntary statement. There is substantial evidence of probative value for the trial court to have properly admitted the confession.

#### App. 103.11.2

##### *Michigan v. Harvey* 110 S.Ct. 1176 (1990)

"In *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Court established a prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right--even if voluntary, knowing, and intelligent under

traditional standards--is presumed invalid if secured pursuant to police-initiated conversation. We held that statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case-in-chief. The question presented in this case is whether the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony. We hold that it may do so."

#### App. 103.11.3

##### *New York v. Quarles* 467 US.649 (1984)

A woman told officers she had just been raped by an armed man. She gave a description and said that he had just entered a nearby supermarket. Police drove the woman to the supermarket and one officer entered while the other called for backup. The officer in the supermarket saw Quarles, who matched the description, and chased him through the store.

The officer ordered Quarles to halt and place his hands over his head. The officer then frisked Quarles and found an empty shoulder holster. After handcuffing Quarles, the officer asked him where the gun was. Quarles nodded at some empty boxes and said, "the gun is over there." The gun was found in the boxes, Quarles was arrested. Officers then read him his *Miranda* rights. Quarles said that he would answer questions without an attorney present and he admitted that he owned the gun. He was convicted of the rape.

The Supreme Court affirmed the conviction, holding that responses to questions from the police which are motivated

by a real concern for public safety are admissible even though the suspect was in custody and had not yet been given his warnings.

"We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives -- their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect."

#### App. 103.11.4

##### *Berkemer v. McCarty*

##### 468 U.S. 410 (1984)

An Ohio trooper followed McCarty for about two miles,

observing him weave in and out of lanes. He then stopped the car and ordered McCarty out. McCarty had trouble standing, and the trooper performed field sobriety tests on McCarty, but he almost fell. The trooper decided to charge him with an offense. At the scene, and without telling McCarty that he had decided to take him into custody, the trooper asked McCarty if he had been using intoxicants. McCarty replied that he had shortly before the stop. The trooper decided to charge him with an offense. The trooper formally arrested McCarty and transported him to jail.

At the jail, McCarty was given an intoxilyzer test, but he showed no blood alcohol. The trooper continued his questioning in order to fill out his standard alcohol influence report form. McCarty again answered that he had been drinking. When the trooper asked if the marijuana he had been smoking had been treated with any other chemicals, McCarty wrote on the report form: "No ang[el] dust or PCP in the pot. Rick McCarty." McCarty had never been advised of his *Miranda* rights. McCarty was convicted of operating a motor vehicle under the influence of alcohol and/or drugs.

**App. 103.11.5**

***Oregon v. Elstad***

**470 U.S. 298 (1985)**

Officers went to the 18-year-old burglary suspect's home to execute an arrest warrant. Elstad's mother answered the door and let the officers into her son's room. One officer waited with Elstad while the other explained his arrest to the mother. The officer said that Elstad was involved in the burglary, to which he responded, "Yes, I was there." Elstad was then taken to the police station where he was advised of his *Miranda* rights for the first time. Elstad indicated that he understood his rights and wanted to talk. He then made a full statement which was typed, reviewed and read back to Elstad for corrections. Elstad and the officer then signed it. Elstad was convicted of first-degree burglary.

The Supreme Court affirmed the conviction, holding that if a confession is made after proper *Miranda* warnings and waivers, it will be admissible even if there was a prior, unwarned admission from the suspect (so long as the

**App. 103.11.6**

***Duckworth v. Eagan***

**109 S.Ct. 2875 (1989)**

Appellant, when first questioned by Hammond police in connection with a stabbing, made exculpatory statements after having signed a waiver form that provided that if he could not afford a lawyer, one would be appointed for him "if and when you go to court." Twenty-nine hours later, he

The Supreme Court affirmed the conviction, holding that *Miranda* warnings need not comply word-for-word with the language of the original case so long as the warnings used convey the basic ideas required to advise suspects of their rights.

"We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask when he will obtain counsel. the 'if and when you go to court' advice simply anticipates the question. Second, *Miranda* does not require that attorneys be producible on call, but only that the

**App. 103.11.7**

***Moran v. Burbine***

**106 S.Ct. 1135 (1985)**

Burbine was taken into custody after a tip concerning a

The Supreme Court reversed the conviction, holding that (1) police officers need not give *Miranda* warnings to suspects as a result of routine traffic stops, and (2) police officers must give *Miranda* warnings to suspects who are taken into custody as a result of routine traffic stops.

"In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights ... his responses cannot be introduced into evidence to establish his guilt.... [Ohio] asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, [Ohio] argues, his responses should be admissible against him. We cannot agree.... We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda* regardless of the nature or severity of the offense of which he is suspected or for which he was arrested."

unwarned admission was voluntary).

"Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also made voluntarily. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring the use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver."

was interviewed again and signed a different waiver form.

He confessed to the stabbing and led officers to the site where they recovered evidence. His two statements were admitted at trial, and he was convicted of attempted murder.

He appealed, arguing that the first waiver form did not comply with the requirements of *Miranda*, and that therefore his confessions should not have been admitted.

suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. The Court in *Miranda* emphasized that it was not suggesting that 'each police station must have a "stationhouse lawyer" present at all times to advise prisoners.' If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. Here, respondent did just that."

burglary. Detectives read Burbine his *Miranda* rights, but he refused to sign the waiver. Other detectives had obtained statements from other burglary suspects connecting Burbine to a murder. Those detectives then came to the police station

to question Burbine about the murder. At the same time, Burbine's sister had telephoned the public defender to arrange representation for her brother on the burglary charge, unaware that he was a murder suspect. A public defender called the police station, but the person who answered the telephone told the public defender that Burbine was not being interrogated. Burbine was not aware that his sister had obtained counsel for him or that the attorney had tried to contact him.

Less than an hour later, the police brought Burbine to an interrogation room and conducted the first of several interviews about the murder. Prior to each session, Burbine was read his *Miranda* rights, and on three occasions, Burbine signed the written form acknowledging that he understood his right to the presence of an attorney and specifically indicating that he did not want an attorney called or appointed for him before he gave his statement. At least twice during the interrogations, Burbine was left alone in a room where he had

**App. 103.11.8**

***Smith v. State***

**580 N.E.2d 298 (1991)**

"Mrs. Smith was accurately informed of the circumstances leading to her son's arrest. The record is devoid of any evidence of coercion, force, or inducement on the part of the police. As a sixteen year-old high school student entering his senior year, Smith was relatively mature as a juvenile. The Smiths were advised of Smith's right to remain silent and his right to an attorney. Those rights were effectively waived. Thus, the only factor weighing against the voluntariness of

**App. 103.11.9**

***Patton v. State***

**588 N.E.2d 494 (1992)**

"The U.S. Supreme Court has emphasized that 'admissions and confessions of juveniles require special caution.' [citation omitted] In 1972, this Court held that a juvenile's statement or confession could not be used against him unless both he and his parents or guardian were informed of his rights to an attorney and to remain silent. *Lewis v. State* (1972), 259 Ind. 431, 288 N.E.2d 138. Further, 'the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights.' [citation omitted] The legislature codified *Lewis* in 1979. Indiana Code §31-6-7-3 (West 1979) provides that a child's parent, guardian, custodian or guardian *ad litem* may waive any rights guaranteed to the child, provided: that person knowingly and voluntarily waives the rights; that person has no interest

**App. 103.11.10**

**Other Cases of Interest**

***Chappel v. State***

**591 N.E.2d 1011 (Ind.1992)**

If a suspect is not in custody, (but is being interrogated and is free to leave the police presence) he doesn't need *Miranda* warnings.

***Colorado v. Connelly***

**107 S.Ct. 515 (1986)**

If they really want to confess (by approaching a police officer and beginning to talk), you don't have to stop

access to a telephone which he apparently did not use. Eventually, Burbine signed three written statements fully admitting the murder. He was convicted of first degree murder. The Supreme Court affirmed the conviction, holding that Burbine's waiver of his rights was valid.

"[W]e have no doubt that respondent validly waived his right to remain silent and to the presence of counsel. The voluntariness of the waiver is not at issue. As the Court of Appeals correctly acknowledged, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. [citation omitted] Indeed it appears that it was respondent, and not the police, who spontaneously initiated the conversation that led to the first and most damaging confession. [citation omitted] Nor is there any question about respondent's comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them..."

the confession is Mrs. Smith's own failure to appreciate the fact that her son was in jeopardy of prosecution even though he had not been identified. The trial court was well within its discretion to find this factor standing alone insufficient to render the confession involuntary. *Jackson, supra*."

"In any event, it strains credulity to say that the police's statement that Smith had not been identified and their request for cooperation lulled Mrs. Smith into thinking that Smith's full confession would not prejudice his case. The trial court did not abuse its discretion in finding the confession voluntary."

adverse to the child; meaningful consultation has occurred between that person and the child; and the child knowingly and voluntarily joins with the waiver..."

"As previously indicated, both the adult and child must knowingly and voluntarily waive the child's rights. To determine whether a waiver of rights was knowingly and voluntarily made, the court considers all the circumstances of the waiver. [citation omitted] Patton was seventeen years old at the time of the statement; his mother had been with him from the moment the police arrived at their home; there was no evidence of coercion, force, or inducement. Patton and his mother were repeatedly advised of his rights; Patton and his mother had already been through the waiver process once that evening before making the statement at issue; and they did not appear confused or ask any questions about his rights. Patton and his mother voluntarily and intelligently waived his rights, and we see no error in the admission of his statement."

***Hicks v. State***

**609 N.E.2d 1165 (Ind.App.1993)**

If a suspect is in custody, but not being interrogated, you don't need to give *Miranda* warnings.

***Maine v. Moulton***

**106 S.Ct. 477 (1985)**

The second coming of *Massiah*: you can't interrogate a suspect after he has been formally accused and is represented by counsel. them or warn them.

***Michigan v. Jackson***

**106 S.Ct. 1404 (1986)**

If they have requested an attorney at arraignment, you can't interrogate without the presence of counsel.

***Colorado v. Spring***  
**479 U.S. 564 (1987)**

You don't have to tell them everything you know about what you are investigating (as when the suspect thinks he is being interrogated about one crime, but you are investigating others).

***Connecticut v. Barrett***  
**479 U.S. 523 (1987)**

Just because he won't sign a statement without an attorney doesn't mean he won't give an oral statement without an attorney (but be careful; if he asks for an attorney at the interrogation, all questioning must stop.)

***Arizona v. Mauro***  
**107 S.Ct. 1931 (1987)**

If suspects want to talk to family members while you are present and obviously recording what they say, let them.

***Stubbs v. State***  
**560 N.E.2d 528 (Ind.1990)**

Preliminary investigative questioning at a DWI stop is not custodial interrogation that requires *Miranda* warnings.

***Smith v. State***  
**602 N.E.2d 1043 (Ind.1992)**

You have to warn them they don't have to talk, but you don't have to warn them that they can stop talking (although many departments give the warning anyway).

***Rainey v. State***  
**557 N.E.2d 1071 (Ind.App.1990)**

Even when the police have to injure a resisting suspect to make an arrest, the interrogation following proper *Miranda* warnings and waivers is not coercive.

## Appendix 104

# Rules of Evidence

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### App. 104.1 Introduction

The law of evidence is a particular method of finding the truth in a particular circumstance: the trial in a court of law. The purpose of a trial is to find the truth by applying the law of evidence.

When we have a trial, it means that the government (through the institution of the court) is asked to resolve a dispute. In the case of civil lawsuits, the dispute is typically between private parties. In a criminal trial, the dispute is between the government (through the institution of the prosecuting attorney) and the individual defendant whom the government is seeking to punish. In either kind of case, the process is basically the same. Both sides to the dispute will allege certain facts to be true. Both sets of alleged facts cannot be true (since if the parties to the dispute could agree on the truth of the facts, there would be no need to have an evidentiary trial in the first place). It becomes that task of the court to determine which of the alleged facts are indeed true. This is accomplished by the evaluation of the evidence presented to the court.

Our system of proof, however, does not allow all possible items of evidence to be introduced in the courtroom. Our law of evidence provides very specific rules to govern the admissibility of evidence to prove facts in court. It is the job of the judge to apply the law of evidence to decide which items of evidence will be allowed in court to attempt to prove facts. It is up to the jury (or the judge if there is no jury) to determine whether or not facts are true based upon their evaluation of the weight and sufficiency of the evidence offered as proof.

**The judge is the TRIER OF LAW.**

**The jury is the TRIER OF FACT.**

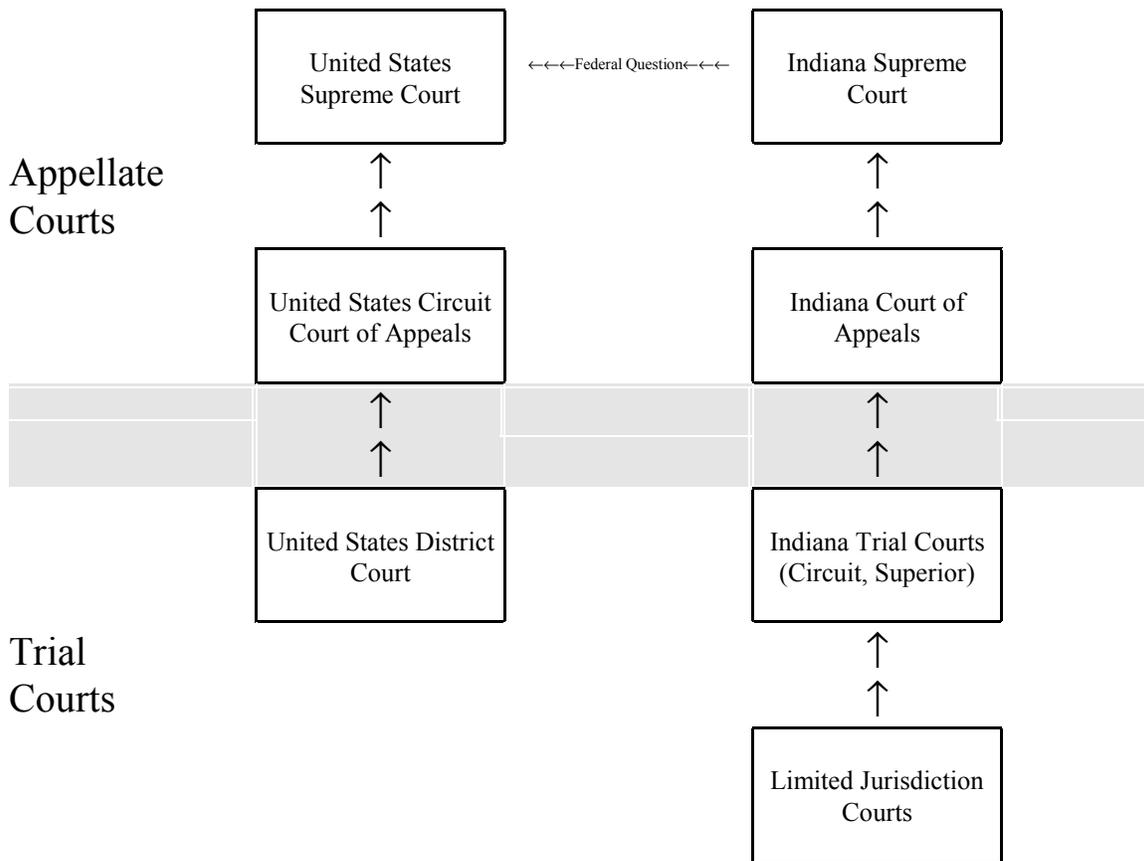
### App. 104.2 The Adversary System of Justice

Our system of justice is *adversarial*, which means in effect that we resolve legal disputes by choosing up sides and fighting. Although we might pursue the analogy to physical fighting (and in fact, in medieval times there was literal trial by combat), the kind of fighting we encounter in modern law practice is a ritualistic and formalistic kind. Rather than have a system in which courts function to inquire into the truth of legal matters, we instead have a system where the courts remain neutral, disinterested, and passive. The *parties* to any legal dispute must themselves provide the evidence and the arguments necessary to convince the court that their cause is just and that their version of the facts is true. In such

a legal system, the determination of truth depends upon the persuasive powers of the attorneys for each disputant.

In religion, we find the truth through faith; you either believe or you do not. In science, we find the truth by empirical inquiry and experimentation, and by the replicability of results. In the law, we find the truth by voting on it: the *legal* truth is whatever the jury believes to be true.

FEDERAL AND STATE COURTS



**App. 104.3  
Court Procedures**

**As a litigant, I should dread a lawsuit beyond almost anything short of sickness and death.**

**Judge Learned Hand**

The party who begins a lawsuit is called the *plaintiff*. The party who is 'sued' is called the *defendant*. In a criminal case, the government (either state or federal) is the plaintiff who brings a lawsuit (in the form of a criminal prosecution) against an individual defendant who is accused of having committed a crime. In civil (that is, non-criminal) cases, the plaintiff is merely the party who has some complaint or who seeks some legal solution to a dispute. The civil defendant is the party against whom the complaint is brought. Thus, a civil case might involve one spouse suing the other for dissolution

of the marriage relationship, or it might be one businessman suing another to enforce the terms of a contract. A person injured in a traffic accident might become the plaintiff in a suit against the driver of the other vehicle in order to ask the court to compel the defendant to pay for the damage caused by his negligent driving. Whatever the problem the court is asked to resolve, one thing is true in our legal system: courts do not begin lawsuits. Only plaintiffs can begin lawsuits, and courts will take no action of any kind until someone complains to them and asks for relief.

Further, courts do not have investigative staffs and they do not ordinarily conduct independent investigations. If information is to be brought to the attention of a court, it is up to the person who will benefit from that information to produce it in the courtroom. Courts will assist in this process by issuing a summons or a subpoena. A summons is simply a notice that the person named in the document is supposed to appear in court (usually because that person has been named as a defendant in a lawsuit). A subpoena is a notice that the person named in the document is *ordered* to appear in court on pain of arrest for failure to appear (usually because that person is needed as a witness in a lawsuit).

When a lawsuit is filed, the plaintiff (whether it is in a criminal or a civil case) must meet three basic conditions before a court can take any action. First, the plaintiff must pick the proper court, one that has *jurisdiction* (that is, the legal power to hear and decide the case) over the subject matter of the lawsuit.

Second, the plaintiff must ensure that the defendant or at least the defendant's property are brought before the court. This is called *in rem* or *in personam* jurisdiction. *In rem* jurisdiction means that the court has power over 'things', for example, a parcel of land within the state which could be sold to pay for the plaintiff's damages even if the defendant actually appears himself within the state. *In personam* jurisdiction means that the defendant is physically present in the courtroom and the court has power over him directly. Criminal trials cannot even begin until the defendant is physically present in the courtroom. Third, the plaintiff must clearly state his complaint and tell the court what it is he wants done. This is called 'pleading' and it is required in order to inform the court just what the plaintiff wants and to inform the defendant just what it is he must defend against. Once these three conditions are met, the trial process may begin.

In both state and federal courts, there are a number of pretrial procedures available to the participants in a lawsuit. Most cases, civil and criminal, are settled by negotiation without a trial. In criminal cases, this is referred to as "plea bargaining." Many people are critical of plea bargaining, but in fact about 90% of criminal cases are resolved by having the defendant plead guilty to some offense, either by allowing a plea to a lesser offense than the one actually committed or by guaranteeing the sentence to be received in exchange for a guilty plea. Clearly, if the plea bargain results in a ridiculously light punishment for an obviously guilty defendant, then the system is wrong. However, properly conducted plea bargaining has two benefits: (1) it ensures that guilty parties will receive punishment which might not occur if the case went to trial; and (2) it reduces the workload of the courts to a tolerable level. If *all* criminal cases went to trial, we simply would not have enough judges and courtrooms to handle the load; we would be required (because of the constitutional requirement for a "speedy trial" in criminal cases) to release most criminal defendants because we could not bring them to trial within a reasonable time. The problem is even worse in civil cases which might take literally years to come to trial after the original complaint is filed. In civil cases, most disputes are resolved by "settling out of court" and often cases are filed just to induce the defendant to come to terms.

In order to speed up the process of dispute-resolution and to encourage pretrial settlement of cases, a number of procedures have evolved over the years. The easiest resolution to the problem, of course, is for the defendant simply to plead guilty (in a criminal case) and take his punishment or to admit liability (in a civil case for money damages) and to pay the plaintiff what he owes. This result, however, is rather rare without some inducement (such as a reduced sentence or a diminished bill for damages). If the matter cannot be resolved by the guilty plea or the confession of liability, then the case must proceed toward trial.

Before the trial actually begins, both sides to the controversy might make extensive pretrial "motions" (that is, requests for the court to do something such as grant more time to prepare the case or compel the plaintiff to be more specific in his complaint). In civil cases, the defendant files his "answer" to the complaint of the plaintiff and typically files a "motion to dismiss" as well.

Other pretrial procedures include "discovery" whereby the opposing parties are supposed to disclose to one another the basic information that supports their case. Witnesses to be used at trial must be identified, and evidence to be used must be disclosed to the other side. Often, there will be "depositions" taken (that is, sworn interrogations of witnesses outside of the courtroom) in order to prepare for the trial. Finally, there will be a pretrial conference with the judge and the attorneys for both sides in order to agree to the ground rules for the conduct of the trial. If after all of this, the parties still cannot come to agreement on the resolution of the dispute, then the trial will commence. Our legal system is an 'adversary' system. This means that our legal procedure is based on the idea of 'choosing up sides' or 'combat' whereby each party to a dispute is responsible for the production of evidence and for argument which supports his own legal position. The judge's role is that of neutral referee who does not ordinarily make an independent inquiry into the facts of the case and who does not favor one side or the other in the dispute. The judge functions as the 'trier of law', that is, the one who decides what rules of law apply to the admission of evidence and the resolution of the dispute. The jury

(when there is one) functions as the 'trier of facts,' that is, the one who listens to the evidence and decides what facts are true. In the absence of a jury (as in the majority of cases), the judge performs both functions. If, as a result of pretrial discovery, deposition and conferences, there are no facts in dispute (that is, if both sides to the lawsuit agree on the facts of the case), then the judge can make a decision on the basis of what *law* applies. If facts are not in dispute, then no witnesses need be heard, no other evidence viewed and no jury called. If facts are in dispute, then there must be an evidentiary trial.

In an evidentiary trial, both sides to the dispute allege certain facts to be true. For example, the prosecutor might allege that the defendant was present at the crime scene and actually shot his victim with a handgun. The defendant may allege that he was in some other city when the crime was committed and that he never has fired a handgun in his life.

Obviously, both of these sets of alleged facts cannot be true. It is the function of the jury to discover the truth by evaluating the evidence presented by both sides. The jury must decide which of the alleged facts are indeed true; the jury is the trier of fact. It is the function of the judge to regulate the admissibility of items of evidence used to prove these facts and to instruct the jury on the rules of law governing the case; the judge is the trier of law.

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#### **App. 104.4 Trial Procedures**

When a jury trial begins, the first order of business is to select the members of the jury. In both the federal and Indiana systems, citizens are selected at random from registered voters to create a pool of potential jurors or "jury panel." From this jury panel, the potential jurors for each individual case are drawn at random. These jurors are then subjected to a procedure in the courtroom called "voir dire" ("look-speak" in medieval French) to determine their suitability to serve as jurors. Jurors must simply be able to understand the nature of the case and to evaluate the evidence in order to render a fair and impartial verdict. Thus, anyone chosen for the jury panel who had a personal stake in the outcome of the trial or who was related to any of the parties or attorneys or who was biased in any way against a party because of race or religion or other non-rational reason or who had already made up his mind about the truth of facts before hearing the evidence would clearly be ineligible to serve on the jury. Such persons are excused from jury service in that particular case for "cause." Other jurors might be excluded by "peremptory challenge" by the attorneys for both sides. These peremptory challenges are allowed to excuse otherwise eligible jurors at the option of the parties in order to get a completely fair jury acceptable to both sides in the case. Once voir dire is completed (by the exhaustion of the limited number of peremptory challenges and by the selection of the proper number of eligible jurors), the jury is sworn in or "empanelled," and the trial can commence.

Typically, the plaintiff's attorney (the prosecutor in a criminal case) makes an opening statement, explaining the case to the jury. Following that, the defense attorney might also make an opening statement or might choose to wait until the opening of the defense case for an opening statement to the jury. At the end of opening statements, the "plaintiff's case" begins. This merely means that the attorney for the plaintiff will call a series of witnesses to the witness stand and ask them questions. All evidence is admitted by the testimony of witnesses. Verbal testimony, such as eyewitness accounts of observations or the opinions of expert witnesses, must obviously come from the questioning of witnesses. However, even physical items of evidence (guns, fingerprints, photographs and the like) must also first be "authenticated" or verified by a witness before the judge will allow them to be shown to the jury. When the attorney who called the witness asks the questions, it is referred to as "direct examinations." When the direct examination is finished for the witness, the opposing attorney can then ask questions of that same witness. This is referred to as "cross-examination." Once the plaintiff's attorney has completed the examination of witnesses and the admission of physical items of evidence, he or she will tell the court that the plaintiff "rests." This is just the traditional way of informing the court that the plaintiff is finished with the presentation of evidence and has nothing else to present.

The defense attorney will then usually move to dismiss the case on grounds that the plaintiff has failed to prove the theory of the case outlined in the original complaint. If the judge grants the motion, then the case is over and the defendant wins. Usually, however, the motion is overruled (since it is usually made in the first place just to preserve a record of the motion in case of appeal). The defense attorney then proceeds with the defendant's case. The defendant has the option of presenting no evidence at all, but this is normally a foolhardy choice. More likely, the defense attorney will call a series of witnesses and ask them questions (and the plaintiff's attorney will cross-examine these witnesses). When the defense attorney has finished calling witnesses and producing physical evidence, he or she will inform the court that "the defense rests" which, of course, simply means that the defense has no more evidence to present either.

Following the completion of the plaintiff's and defendant's "case in chief" (that is, the main body of evidence to be presented in court), each party is entitled to make closing statements or arguments to the jury. This is the final attempt to persuade the jury directly of the facts in the case. Both attorneys also submit "jury instructions" to the judge (and the

judge may write his or her own instructions as well).

Jury instructions are statements of the law which are read to the jurors to inform them of the law which applies to the case before them. The jurors do not get to decide the law; the judge and only the judge is the trier of law. However, once the jury has performed its function of deciding the facts of the case, the jury instructions allow them to apply the law to those facts and render a verdict. For example, the judge might instruct the jury that if they find as a matter of fact that the defendant took the personal property of another person without permission and did not intend for the owner ever to get the property back, then the jury must find the defendant guilty of theft. Thus, the jury may not decide on the definition of theft (because the judge tells them what it is), but the jury does decide whether the facts which constitute a theft exist in the individual case. Once the jury has been instructed, they then go into secret session to deliberate and render a verdict.

Juries deliberate in secret and they must reach an agreement before a verdict (that is, the decision of the jury) can be delivered. When the jury reaches agreement, they return to the court and report their decision.

The judge receives the verdict of the jury. In civil cases the judge usually has the power to ignore the verdict if it is not rationally supportable by the evidence presented at trial. In criminal cases, of course, a verdict of not guilty is binding, no matter how guilty the judge might believe the defendant to be. In any event, the judge then enters his or her judgment and order and the case is resolved. The judgment of the court is the final determination of the case (guilty or not guilty in a criminal case; liable or not liable in a lawsuit for money damages). The order of the court is the description of the exact disposition required (the sentencing of a criminal to prison; the order to the Sheriff to seize and sell property to satisfy a debt).

Often, the losing party in a lawsuit is unhappy (because he or she is going to prison, or has been ordered to pay someone else a sum of money, or is required to refrain from certain conduct), and accordingly wishes to "appeal" the judgment and order of the trial court. This appeal goes to a "higher" court (in the sense that the higher court has the power to order the trial court to change its judgment), but successful appeals are not available just for the asking. The judgment of the trial court will be final and forever binding *unless there was some error of law at the trial*. These higher courts are called "appellate" courts, and they hear cases only on issues of legal error.

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#### App. 104.5

##### Appellate Procedure

Appellate courts do not hear new evidence, do not re-examine the facts, and do not re-try the case. The function of the appellate court is to review the transcript of the trial for legal errors, to consider the appellate "briefs" (that is, persuasive, written arguments) of the attorneys for both sides, and to hear oral arguments from attorneys for both sides. In the absence of any errors of law, the appellate court will affirm the trial court decision (even if the higher court might not like the result). Appellate courts have no juries; decisions are made by judges alone.

Although losing parties to lawsuits are generally entitled to one appeal, any further appeals are at the discretion of the appellate courts. The U.S. Supreme Court and the Indiana Supreme Court (with a few constitutionally required exceptions) may select the cases they wish to hear. If the cases presented to them are not sufficiently important or do not involve real constitutional or legal issues, the higher level courts will simply refuse to hear them. A properly conducted trial in a properly run courtroom is supposed to produce a final legal decision; appellate courts are extremely reluctant to disturb the decisions of trial courts and will intervene only in instances of legal errors made at the trial level.

#### App. 104.6

##### Rules of Evidence

Over the centuries, the common law judges developed rules of evidence to govern the admissibility of proof offered by each side to a lawsuit. Only in the Twentieth Century have these rules been formalized and regularized by the adoption of formal rules of evidence or evidence codes by the states and the federal government. The Federal Rules of Evidence were adopted in 1975. About 80% of the state courts have also adopted evidence codes or formal rules of evidence.

The Indiana Rules of Evidence were adopted by order of the Indiana Supreme Court and became effective on January 1, 1994. The Indiana rules (like the rules of most other states) are nearly identical to the federal rules. Judges, as the triers of law, must apply these rules to decide whether or not each item of evidence offered in court will be admitted (that is, whether or not the jury will be allowed to see or hear the evidence or even know that it exists).

Because so few cases actually go to trial (less than 10% of criminal cases, and typically less than 1% of civil cases), one might ask why it is necessary for the death investigator to know the basics of the rules of evidence. The reason is simple: investigators are usually the very people who gather the evidence in the first place. Detectives interview witnesses and suspects and conduct surveillances of criminal activities. Forensic technicians gather scientific evidence,

physical and biological samples, and take photographs and measurements. If the criminal justice professionals fail to gather adequate evidence, fail to gather evidence properly, or violate the rights of the accused when gathering evidence, the defendant will be encouraged to go to trial (hoping for an acquittal because of the weak evidence presented by the state) rather than pleading guilty. The more you know about the law of evidence, the more effective you can be in securing guilty pleas to ensure the appropriate punishment of criminals without the great public expense (and risk of failure) inherent in a trial.

#### **IRE 101 SCOPE**

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in this rule.

**(a) General Applicability.** These rules apply in all proceedings in the courts of the State of Indiana except as otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court. If these rules do not cover a specific evidence issue, common or statutory law shall apply. The word "judge" in these rules includes referees, commissioners and magistrates.

**(b) Rules of Privilege.** The rules and laws with respect to privileges apply at all stages of actions, cases, and proceedings.

**(c) Rules Inapplicable.** The rules, other than those with respect to privileges, do not apply in the following situations:

**(1) Preliminary Questions of Fact.** The determination of questions of fact preliminary to the admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

**(2) Miscellaneous Proceedings.** Proceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims and grand jury proceedings.

#### **IRE 102 PURPOSE AND CONSTRUCTION**

The rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

#### **IRE 103 RULINGS ON EVIDENCE**

**(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

**(1) Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

**(2) Offer of Proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

**(b) Record of Offer and Ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

**(c) Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

**(d) Fundamental Error.** Nothing in this rule precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

#### **IRE 104 PRELIMINARY QUESTIONS**

**(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the Rules of Evidence, except those with respect to privileges.

**(b) Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**(c) Hearing of Jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the presence and hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

**(d) Testimony by Accused.** The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

**(e) Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

#### **IRE 105 LIMITED ADMISSIBILITY**

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.

#### **IRE 106 REMAINDER OF RELATED WRITING OR RECORDED STATEMENT**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

**App. 104.7.1****Standards of Proof**

"Proof" is the cumulation of evidence which persuades the trier of fact that alleged facts are indeed true. It is the creation of the requisite degree of belief in the mind of the trier of fact (that is the jury, or the judge if there is no jury) that the proponent's case should prevail.

In civil trials, proof requires merely a "preponderance of the evidence," that is, sufficient evidence to persuade the trier of fact that an alleged fact is probably true when compared to the evidence against its truth. Said another way, the preponderance of the evidence standard simply means that the evidence indicates that the alleged fact is, more likely than not, true.

In administrative cases, the standard of proof is usually "evidence on the records as a whole." This simply means that courts reviewing administrative determinations (*e.g.*, licensing suspensions, personnel hearings, and the like) will just require some record of evidence which sufficient to support the administrative determination as a reasonable conclusion of the facts of the case.

In criminal cases, proof of guilt must be "beyond a reasonable doubt." This is an extremely high standard of proof, but is not absolute. It is not a requirement for absolute proof or 100% certainty. Rather, it imposes a moral duty on the trier of fact to be certain of guilt (and not just use a "probably guilty" or "more likely than not guilty" standard). Other issues in criminal trials, however, (*e.g.*, the voluntariness of a confession, the legality of a search) need be proved only by a preponderance of the evidence.

**App. 104.7.2****The Two Burdens**

The "burden of proof," that is, the requirement of proving alleged facts to be true, is actually composed of two separate concepts:

**1. The Burden of Persuasion.** Each party to a lawsuit bears the burden of persuasion on all essential issues. Simply put, the winner in a lawsuit meets the burden of persuasion and the loser does not. This burden never shifts and is a fundamental characteristic of our adversary system of justice: one party must win and the other must lose.

**2. The Burden of Going Forward with the Evidence.** The general rule is that the burden of proof follows the burden of pleading. This means that the party who alleges a certain fact in issue to be true has the obligation of producing evidence to prove the truth of that fact. Thus the plaintiff must produce evidence to establish the truth of all the allegations in the complaint, and the defendant must produce evidence to establish the truth of all affirmative defenses. Thus, the prosecution must introduce evidence to prove the corpus delicti of the crime charged and the identity of the defendant as the perpetrator. The criminal defendant must introduce evidence to prove lack of capacity to establish an affirmative defense of insanity. Once the proponent has introduced sufficient evidence to establish a prima facie case, however, the burden of going forward with the evidence "shifts" to the other party. This means that if the other party does not wish the trier of fact to believe that the alleged fact of the proponent is true, then the other party must produce contrary evidence to rebut this belief.

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**App. 104.8****The Concept of Relevance**

Because our legal system is based upon a search for a rational solution to legal disputes, an effort is made to present to the trier of fact only those things which have a logical bearing upon the dispute. Therefore, only 'relevant' evidence is admissible.

Federal Rule 401 states the general law of relevance. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the case more probable or less probable than it would be without the evidence.

Some writers have distinguished "relevance" from "materiality"; that is, evidence which is "immaterial" is that offered to prove a fact which is not in issue. For example, if both defense and prosecution agree that the alleged crime was committed in Ft. Wayne, evidence offered to prove that the crime was committed in Ft. Wayne is immaterial. Evidence which is offered to prove a fact in issue but which has no tendency to prove or disprove that fact is said to be "irrelevant." For example, if there was a dispute over whether the crime was committed in Ft. Wayne or in Huntington, evidence that the defendant possessed a sweatshirt which said "Visit Ft. Wayne" on the front would be irrelevant (since it does not help us decide whether or not the criminal acts took place in Ft. Wayne). The modern tendency is to lump both immaterial evidence and irrelevant evidence under the single term "relevance."

**App. 104.8.1****Direct Evidence**

Evidence which does not depend on any inference for its relevancy other than the credibility of the witness is said to be direct evidence. Generally, so-called "eyewitness" testimony is direct evidence.

Suppose a person is on trial for murder by shooting the victim. A witness testifies that he saw the defendant shoot the victim. This is direct evidence of the fact in issue (*i.e.*, did the defendant shoot the victim or not?), and depends for its relevance only on whether the witness is telling the truth or not.

**App. 104.8.2****Circumstantial Evidence**

When evidence depends for its relevancy upon both the credibility of the witness *and* some inference to be drawn from the evidence, it is referred to as circumstantial evidence.

Problems of logical relevance relate only to circumstantial evidence. For example, suppose the defendant was seen running away from the crime scene. Evidence of flight would be circumstantial evidence of the defendant's consciousness of guilt. The relevance of the evidence depends upon the validity of the inference that people who run away from crime scenes are more likely guilty of the crime than people who stay at the crime scene.

**App. 104.8.3****Conditional Relevancy**

Federal Rule 104(b) states the general rule for circumstantial evidence. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit it upon the finding of the fulfillment of the condition of fact.

For example, a pistol found at a crime scene may be admitted into evidence if there is also evidence connecting up the pistol with the alleged crime. Just any old pistol will not do; it must have some connection with the alleged offense which will make the guilt of the accused more or less likely in order to be relevant. If the pistol is introduced into evidence, but there is no connecting evidence introduced, the evidence of the pistol must be stricken from the record (and in a criminal case, probably would result in a mistrial).

**App. 104.8.4****Excluding Otherwise Relevant Evidence**

The judge and only the judge determines what evidence shall be admitted and what evidence excluded. The judge may choose to exclude otherwise relevant evidence if the "probative value of the evidence is substantially outweighed by the probative dangers." This means that the judge might exclude otherwise admissible evidence if it would tend to be unfairly prejudicial, would confuse the issues, or would mislead the jury. Such evidence might also be excluded if it would cause undue delay, waste the court's time, or needlessly present merely cumulative evidence.

For example, in a homicide prosecution, the government might wish to introduce 50 full-color slides of the autopsy. The defendant might argue that such a demonstration would be cumulative and would prejudice the jury. The judge might exclude the photos (despite their obvious relevance) and require in their place a couple of black and white photos which depict the nature of the wounds and the apparent cause of death. (Also, the judge probably does not want the jury to throw up in the jury box.)

For example, the trial judge may refuse to allow a dozen witnesses to testify as to the same events after two or three witnesses have given identical testimony. There simply is no need for such cumulative evidence.

**IRE 401 DEFINITION OF "RELEVANT EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**IRE 402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE**

All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.

**IRE 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR UNDUE DELAY**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

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**App. 104.9**  
**Inferences and Presumptions****App. 104.9.1****Inference**

An "inference" is a deduction or conclusion of fact made by the trier of fact (*i.e.*, the jury) from the evidence presented in court. "Inference" describes the process of reasoning by which the jury make conclusions about the significance of the evidence.

*Example:* The ultimate fact in issue in a criminal homicide trial is whether or not the defendant killed his wife. The truth of this fact in issue must be inferred by the jury from the evidence presented at trial (*e.g.*, the police found blood matching the wife's on the husband's shirt; there were signs of a struggle at the crime scene where the wife's body was found; there were bruises on the wife's throat which indicated manual strangulation; a neighbor testified that he heard the defendant and his wife arguing on the night of the killing; and so forth). From the cumulation of these individual items of evidence, the jury may *infer* that the defendant, in fact, killed his wife.

*Example:* The fact in issue in a drunken driving prosecution is whether the defendant was under the influence of alcohol at the time of his arrest. The arresting officer testifies that he observed the defendant drive his car over the center line and then swerve and hit the curb. The officer further testifies that when he stopped the defendant; the defendant's clothing was in disarray; his eyes were bloodshot; his speech was slurred; he smelled of alcoholic beverage; he dropped his driving license when handing it to the police officer; he was unable to walk in a straight line when asked to do so; and he vomited in the back seat of the police car on the way to jail. From these facts, testified to by the arresting officer, the jury may *infer* that the defendant was, in fact, intoxicated.

The drawing of inferences from the evidence is a matter for the discretion of the trier of fact (that is, the jury). When either side in the lawsuit offers evidence, it is up to the judge to decide whether it is "relevant" (that is, whether it is sufficiently related to the dispute so that an inference could be drawn from it). Once the judge admits the evidence, however, it is up to the jury to decide on what inference, if any, it to be drawn from it. Stated another way, the judge must first decide (as a matter of law) whether *any inference could be drawn* from the offered evidence; the jury must then decide *what inference, if any, will be drawn* from the evidence admitted by the judge. The inference drawn by the jury must be logical, rational and reasonable. The judge retains the power to ignore the inference of the jury (by directing a verdict, by granting a judgment notwithstanding the verdict, or by granting a new trial) if that inference is irrational. Note carefully, however, that an irrational finding of "not guilty" in a criminal case will still result in an acquittal; the judge lacks the power to find a criminal defendant guilty against a verdict of acquittal.

#### App. 104.9.2

##### Presumption

A "presumption" is a deduction or conclusion of fact which the law *requires* to be made upon proof of particular facts in evidence. In the absence of sufficient contrary evidence, the trier of fact *must* make the required deduction as a matter of law. The most obvious presumption which operates in criminal proceedings is the technical presumption that the defendant is innocent until the prosecution proves him guilty.

Presumptions are simply procedural devices used by courts because such presumptions are either highly probable, are practically convenient, or serve some public policy. For example, a common presumption is that a properly addressed and stamped letter which was put in the U.S. Mail was in fact delivered. The probability that the letter was delivered (based upon ordinary experience that relatively few letters are not delivered by the U.S. Postal Service) is so high that the court will "presume" that it was delivered in the absence of contrary evidence. This is certainly simpler than requiring the testimony of the (possibly) hundreds of Postal Service employees who handled the letter between the mailing and the ultimate delivery.

Most court recognize that presumptions can arise either from statutory enactments or from consistent judicial practice. In either event, presumptions arise when the proponent of the evidence offers proof of some "basic fact" which then leads to the "presumed fact."

Basic Fact	Presumed Fact
A letter was properly addressed, stamped, and placed in the U.S. Mail.	The letter was delivered.
A person has been missing (that is, has been without contact with family, job or usual	The missing person is dead.

associates) for 7 years.	
A defendant in a criminal prosecution is under the age of seven years.	The defendant is incapable of forming a <i>mens rea</i> .
A person was in possession of certain goods.	The person is the owner of the goods.

For any presumption to arise, the party who wishes the benefit of the presumption must introduce sufficient evidence in court to establish the existence of the "basic fact." Once the basic fact is established by evidence, the "presumed fact" becomes true by operation of law without the necessity for further evidence. Note, however, that if the basic fact is *disputed*, then the jury must make a finding of whether or not the basic fact is, indeed, true. Unless the jury is convinced of the truth of the basic fact, there is no basis for the presumption. If the basic fact is established (either because it is not disputed or because the jury does not believe any contrary evidence), then the *effect* of the presumption depends on whether it is a "conclusive" or a "rebuttable" presumption.

When a presumption is created by statute, the presumption must have some rational connection between the basic fact and the presumed fact. To allow "nonrational" presumptions in criminal cases would constitute a violation of constitutional due process of law. For example, a statutory presumption that any person proved to be in possession of marijuana will be presumed to have knowledge that the substance was unlawfully imported into the United States would violate due process: the presumption is not rationally connected to the basic fact proved (possession of marijuana) because there is a large domestic production of the substance. The same presumption applied to possession of opium might be constitutionally permissible: there is virtually no domestic production of opium, and accordingly it is rational to presume that opium in the possession of a person in the United States has been unlawfully imported.

#### App. 104.9.3

##### Conclusive Presumptions

"Conclusive" presumptions are presumptions which may not be legally contradicted. A conclusive presumption may not be attacked by contrary evidence nor by logical dispute. Such presumptions are rare and are almost always the result of public policy decisions. The clearest example in criminal law is the common law conclusive presumption that a child under the age of seven years cannot commit a crime because the child lacks the capacity to form a *mens rea*. This presumption means that a child under seven cannot be prosecuted for a crime no matter what the crime and no matter how cognizant of moral guilt the child might seem to be. The court simply cannot hear any evidence to the contrary, and must find that the child is not guilty upon proof of chronological age below seven years.

#### App. 104.9.4

##### Rebuttable Presumptions

Rebuttable presumptions are conclusions which the trier of fact must draw until disproved by contrary evidence. There are a large number of such presumptions, and the list of presumptions varies from jurisdiction to jurisdiction.

In the absence of contradictory evidence, the trier of fact is bound by the presumption. Thus, when the basic fact is proved and the other side fails to introduce rebuttal evidence, the presumption is legally "true."

When contradictory evidence is introduced, however, different jurisdictions deal with the problem in different ways.

A minority of states take the position that the jury should simply weigh the presumption against the contrary evidence to see what effect each should have. This view treats presumptions as substantive evidence. The majority of states, however, take a different view.

Most jurisdictions agree that a presumption is not itself evidence, but rather is a deduction which the jury must make in the absence of rebuttal evidence. Some courts take the approach that the presumption is destroyed as soon as contrary evidence is introduced (the "bursting bubble" theory). Thus, the jury must decide between the offers of proof on the issue without reference to the previous presumption. Other jurisdictions (including the Federal Rules) take the approach that presumption does not just disappear, but rather that the other party must produce enough rebuttal evidence to actually *persuade* the jury that the rebuttal evidence and not the presumption is true. Some other jurisdictions use (believe it or not) both approaches. The "bursting bubble" theory applies to those presumptions not based on public policy considerations (*e.g.*, a writing was executed on the date it bears; property received from another person was in fact owed by that person). Presumptions based on public policy considerations (*e.g.*, a child born during wedlock is legitimate;

official duties have been regularly performed) are left to the jury to choose between the presumption and the rebuttal evidence.

As a practical matter, it probably makes no real difference what theoretical approach is taken by the court. Realistically, the jury is going to have to choose to believe either the presumption or the contrary evidence. In the absence of contrary evidence, the jury will be *instructed* by the court that the presumption is true.

In criminal cases, the use of presumptions is limited by the constitutional requirement of due process that the accused be proven guilty "beyond a reasonable doubt." Thus, where a presumed fact would establish guilt or would constitute an element of the *corpus delicti* or would negate a defense, the presumption alone cannot overcome evidence creating a reasonable doubt. For example, most jurisdictions have a presumption that a person in possession of contraband (*e.g.*, narcotics, counterfeit money, automatic weapons) has knowledge of the illegality of that possession. If a defendant offers rebutting evidence which indicates a lack of knowledge of possession (*e.g.*, that the police planted the contraband on him, or that he was driving a friend's car without knowing it carried contraband), then the judge cannot submit the case to the jury on the basis of the presumption of knowledge of possession.

### IRE 301 PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

## App. 104.10 Judicial Notice

### App. 104.10.1

#### Definition

Judicial notice is a substitute for evidence. The process of judicial notice allows the court to accept certain facts as true without formal proof. When the judge takes judicial notice of a fact, that fact is true (at least for the purposes of the present trial) and no contrary evidence is admissible. The jury is bound to believe as the truth whatever the judge declares to be true.

Judicial notice is not an arbitrary announcement on the part of the judge. Rather, it is a formal part of the judicial proceedings on the record. Neither the judge (nor the jury) may take "notice" of anything that is outside the record of the trial, nor may the judge or jury substitute their personal knowledge for the evidence which appears in the record.

Judicial notice may be taken at any stage of the proceeding, either during the trial or by the appellate court. Appellate courts may even take notice of matters which the trial court should have "noticed" but did not.

### App. 104.10.2

#### What May Be Noticed

Judicial notice is traditionally discretionary with the trial judge. The common law rule was that, except for noting all applicable laws, the judge did not *have* to take notice of anything. Most common law cases involved circumstances under which courts were permitted to take notice of facts without formal proof. The common law rule permitted judges to take judicial notice only of "facts of common, everyday knowledge which are accepted as indisputable by persons of average intelligence and experience in the community."

In many jurisdictions today, judicial notice is mandatory as to certain kinds of facts (while remaining within the discretion of the trial judge as to other facts). The Federal rules and most state systems require notice of all federal and state laws, federal and state rules of procedure, the meaning of the English language, and "indisputable matters" (*e.g.*, the boiling point of water). The Federal rules, in fact, refer to matters of law as "legislative facts" which are not the subject of judicial notice at all but rather are simply part of the reasoning process of the court.

Judges are permitted to take notice *sua sponte* (that is, on their own motion), and are required to take notice in response to a request by one of the parties, of the laws of other states or countries; the administrative rules, regulations and orders of state and federal agencies; state and federal court records; matters of common knowledge locally (*e.g.*, the location of a street); and "verifiable facts" (that is, matters which are not reasonably subject to dispute and which are capable of immediate verification by resorting to sources of indisputable accuracy such as encyclopedias or almanacs).

In some jurisdictions, courts must notice the reliability of certain kinds of scientific evidence as verifiable facts, for

example, the accuracy and reliability of fingerprint technique, ballistics examinations, radar to measure speed of vehicles, breathalyzer measurements of blood alcohol, and the like.

### App. 104.10.3

#### Judicial Notice in Criminal Cases

Matters which are beyond any reasonable dispute (*e.g.*, January 11, 1991 is a Friday) may be judicially noticed in criminal cases as well as civil cases. Judicial notice, however, cannot be used to establish the truth of any essential element of the crime. Due process requires that the government establish the *corpus delicti* without the assistance of the court. For example, in a felony theft prosecution where an element of the offense is the value of the property stolen, the court could not take notice of the apparent market value of the goods to establish that element of the *corpus delicti*.

#### IRE 101 JUDICIAL NOTICE

(a) **Kinds of Facts.** A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either, (1) generally known within the territorial jurisdiction of the Trial Court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(b) **Kinds of Laws.** A court may take judicial notice of law. Law includes, (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, and (5) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to be Heard.** A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Timing of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing the Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. 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.

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## App. 104.11 The Qualification of Witnesses

### App. 104.11.1

#### Witness Competency

"Competency" of a witness simply refers to whether or not the witness will be allowed to testify; the term has nothing to do with the intelligence or relative mental capacity of a witness. A "competent" witness is one who is allowed to testify; an "incompetent" witness is simply one who is not qualified to testify. The competency of the witness is a matter of law to be decided by the trial judge; the weight of the testimony and the credibility of each witness are matters of fact to be determined by the jury.

### App. 104.11.2

#### Common Law Rules of Competency

At common law, a number of potential witnesses were completely disqualified from giving any testimony at all. Any person having a financial interest in the outcome of the case (that is, the parties to the lawsuit and their spouses) could not testify at all. Atheists could not testify (since one had to believe in God to take an oath). Convicted felons could not testify at all (even though they might have been available as witnesses during the brief time between their conviction and their hanging). Children "of tender years" could not be witnesses. Mentally deranged persons could not testify. Some courts even disqualified witnesses who were not of European ancestry. As a result of these restrictive common law rules of witness competency, the very witnesses who might know the most about the case were excluded from the witness stand.

Modern practice recognizes the futility of excluding witnesses on common law grounds. Because the purpose of a trial is to find the truth, it seems sensible to maximize the potential for truth-finding by allowing the testimony of anyone who might have relevant information about the issues of the trial. Accordingly, the modern rules of evidence recognize that *all persons are competent witnesses unless they are specifically disqualified by some other rule of evidence*. The old common law disqualifications are sometimes preserved to "impeach" witnesses (that is, call their credibility into question), but these old grounds no longer disqualify witnesses. Completely non-rational disqualifications (*e.g.*, race or religious belief) have been abolished totally.

### App. 104.11.3

#### Minimum Requirements for Witness Competency

The general rule of witness competency is that any person of any age may testify as a witness in court so long as the court is satisfied of that person's capacity *to perceive, to recollect, and to testify*.

Most state courts require that the trial judge make a preliminary determination of three factors: (1) the potential witness must be capable of expressing himself so as to be understood by the jury [either directly or through an interpreter]; (2) the potential witness must be capable of understanding his legal duty to tell the truth; and (3) the potential witness must have personal knowledge and recollection about the particular matters upon which he is called to testify [except, of course, where opinion testimony is permitted]. The Federal Rules are even more liberal: the potential witness is disqualified only if he lacks first hand knowledge. In federal practice, the lack of expressive ability and lack of understanding of the duty to tell the truth goes only to the weight of the testimony and not its admissibility. Thus, the absolute minimum requirement for witness competency is *first hand knowledge*.

The "first hand knowledge rule," simply stated, is that before a witness may testify to a fact, there must be a showing that the witness was (1) in a position to have observed the fact; and (2) in fact, observed it. Accordingly, children may be permitted to testify so long as they meet the minimum requirements for competency. Mentally incompetent persons may be competent witnesses if they meet minimum requirements. Convicted felons and prison inmates may be competent witnesses so long as they meet the minimum requirements. Atheists, so long as they are otherwise qualified, are competent witnesses. The obligation to tell the truth under oath no longer requires religious belief, but rather an understanding of the consequences of perjury.

In any event, if a witness is believed *not* to be competent by opposing counsel, counsel must raise an objection to the competency of the potential witness at the time the witness is called to testify. Failure to object *waives* any future complaint about the competency of the witness. The testimony of the witness may be heard by the jury and may serve as evidence to support the verdict, even if the witness is technically incompetent, if the opposing side does not object in a timely and specific fashion.

#### **IRE 601 GENERAL RULE OF COMPETENCY**

Every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly.

#### **IRE 602 LACK OF PERSONAL KNOWLEDGE**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

#### **IRE 603 OATH OR AFFIRMATION**

Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered.

#### **IRE 604 INTERPRETERS**

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.

#### **IRE 615 SEPARATION OF WITNESSES**

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 case.

### **App. 104.12**

#### **Examination of Witnesses**

The trial judge is in control of the examination of witnesses in that he is free to regulate the method of examination. The attorneys for either side in the dispute, however, are the actual interrogators. Generally, if either party requests it, the judge must exclude all witnesses from the courtroom so that they cannot hear the testimony of other witnesses.

The examination of witnesses is referred to as either "direct" examination or "cross" examination. Direct examination occurs when a party calls a witness and asks him questions. Cross examination occurs when the other party asks questions of the same witness. Thus, direct examination is the questioning of "your" witness by "your" attorney. Cross examination is the questioning of "your" witness by "their" attorney. Direct examination also is the questioning of "their" witness by "their" attorney, and cross examination is the question of "their" witness by "your" attorney.

#### **App. 104.12.1**

##### **Direct Examination**

Witnesses are called to the witness stand, given an oath to tell the truth, and then are asked a series of questions. Generally, "narrative" questioning is not allowed (*e.g.*, "Please tell the court everything you know about the incident.").

With narratives, it is too hard to determine which parts of the testimony might be objectionable before the answer is given. Witnesses may not be asked questions which call for conclusions or opinions [except, of course, when opinion testimony is permitted under the rules]. For example, a direct examiner might properly ask: "Did you see the defendant strike the victim?", but could not ask: "And did all the other witnesses see the defendant strike the victim, too?" The first question calls for the first hand knowledge of the witness, and is thus permissible. The second question is objectionable because it calls for the witness to give an opinion or reach a conclusion as to what the other witnesses saw. Similarly, a question such as: "Did you or did you not see the defendant fire the gun?" would be permissible because it calls for the first hand knowledge of the witness. The question: "Why did the defendant fire the gun?" is clearly improper because it asks the witness to draw a conclusion about the state of mind of the defendant rather than just to report what the witness saw. Repetitive or cumulative questions are also prohibited (such as a series of similar questions designed to emphasize some fact); the objection to this kind of questioning is that the question has been "asked and answered."

"Leading" questions are also generally prohibited on direct examination. There are two kinds of leading questions: (1) a permissible kind of leading question is one which merely suggests the answer desired by the examiner ["You saw the defendant take the money, didn't you?"]; (2) an always impermissible kind of leading question is one which suggests a fact which is not yet in evidence and which traps the witness into an admission of the fact ["Have you stopped beating your wife?" where there is no evidence of wife beating]. The first type of leading question merely suggests a desired answer; the second type actually puts words into the witness' mouth.

Although generally prohibited on direct examination, sometimes the judge will tolerate leading questions on direct as to preliminary matters ["Your name is John Jones and you live at 123 Elm Street; isn't that right?"]; in order to jog the memory of a witness [Don't you remember that you said . . .?]; in order to deal with a timid witness or a young child; and in order to deal with a hostile witness [that is, a witness who is adverse to the interests of the party calling him].

Traditionally, a party has not been allowed to "impeach his own witness." This reaches back to common law times when the party who called a witness "vouched" for his veracity. Thus, if by calling a witness the party assured the court that the witness would tell the truth, it would be inconsistent to allow that same party then to suggest, by asking impeaching questions, that the witness is not truthful. The witness "belongs" to the party who calls him, and that party may not impeach him. Exceptions to this rule may be found where the witness is one required by law, where the witness is the adverse party himself [or someone closely associated with him such as a spouse or business partner], or where the witness becomes "adverse" on the witness stand [by showing bias or animosity toward the calling party]. When impeachment is allowed on direct examination, it follows the same rules as on cross examination [see below].

#### App. 104.12.2

##### Cross-Examination

The adversary system of justice relies upon cross examination as the method for testing the credibility and accuracy of testimony. The right to cross examine the witnesses called by the opposing party in any court proceeding is an essential element of due process of law. Further, in criminal cases, the right to cross examination is guaranteed by the confrontation clause of the Sixth Amendment. If one party is prevented from cross examining a witness who has already testified on direct (for example, by the sudden death of the witness), the direct testimony must be struck from the record. The result is the same if the witness testifies on direct, and then refuses to testify on cross examination or claims some privilege. Cross examination is essential to fairness in a trial.

On cross examination, the examiner may ask any kind of question which would be proper on direct examination, plus leading questions. Thus the cross examiner may ask questions of the witness which are suggestive of the desired answer. There are some kinds of questions, however, which are improper and objectionable on cross examination:

Question	Objection
"Have you stopped beating your wife?"	Assumes facts not in evidence.
"Have you stopped beating your wife and her mother?"	Compound question.
"The accident was all your fault, wasn't it?"	Argumentative question.

"Did the defendant know his act was wrong?"	Conclusionary question (calls for opinion or conclusion).
"Were you at the crime scene?/Yes/You were right at the scene?/Yes/When you were at the house, the crime occurred?"	Cumulative question (has been "asked and answered").

Most courts restrict the "scope" of cross examination to matters put in issue on direct examination. If the cross examiner wants to bring up other issues, he must call the witness as his own and examine him directly. A minority of jurisdictions (but including the federal courts) allow "wide open" cross examination on any relevant topic, subject to the discretionary control of the trial court.

Following cross examination, there may be "redirect" examination to allow the opposing party a chance to explain or rebut testimony given on cross. Courts which restrict the scope of cross examination also tend to restrict the scope of redirect to matters raised on cross examination. There can also be "recross" examination following redirect. Redirect and recross generally follow the same rules as for direct and cross examination.

#### **IRE 611 MODE AND ORDER OF INTERROGATORIES AND PRESENTATIONS**

**(a) Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of cross-examination.** Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

**(c) Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### **App. 104.11.3**

##### **Questioning by the Judge**

The trial judge may also wish to examine witnesses. The trial judge, either *sua sponte* [on his own motion] or at the request of either party, may call witnesses and question them just as any other witness in the case. The trial judge may use leading questions. Either party may object to the judge's questions, and either party may also cross examine a witness called by the judge. Usually the judge will call "expert" witnesses to advise the judge and jury on technical matters.

#### **IRE 614 CALLING AND INTERROGATION OF WITNESSES BY COURT AND JURY**

**(a) Calling by court.** The court may not call witnesses except in extraordinary circumstances or except as provided for court appointed experts, and all parties are entitled to cross-examine witnesses thus called.

**(b) Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.

**(c) Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

**(d) Interrogation by juror.** A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

#### **App. 104.13**

##### **Impeachment of Witnesses**

"Impeachment" of a witness means simply that the attorney examining the witness has asked a question or introduced some item of evidence which calls into question the credibility of the witness. Impeachment does not require that the testimony of the witness be stricken, or that the witness be removed. The jury will not even know that the witness has been "impeached" because the judge does not make a formal announcement. Rather, the term is simply technical language which refers to situations where counsel attempts to discredit the testimony of a witness by somehow suggesting that the witness is not telling the truth.

Whenever anyone takes the witness stand, that person's credibility is always at issue. Even if a witness is impeached, the jury may still choose to believe that witness' testimony. The weight and credibility of testimony is for the jury to decide. Impeachment is designed to provide the jury with a reason to disbelieve the testimony of the impeached witness.

Witnesses may be impeached (that is, their credibility may be called into question) in two basic ways: (1) by proving facts which contradict the testimony of the witness, or (2) by directly attacking the credibility of the witness himself.

Witnesses may be impeached by examination of the witness (that is, by asking him questions directly) or by the introduction of independent evidence to prove grounds for impeachment.

There are a number of grounds for impeachment, many of which go back to the old common law rules for disqualification of witnesses. Generally, there are four kinds of impeachment: (1) character impeachment, (2) bias impeachment, (3) capacity impeachment, and (4) inconsistent acts impeachment.

#### **App. 104.13.1**

##### **Character Impeachment**

The purpose of character impeachment is to suggest to the jury that the witness is the kind of person who might tell a lie under oath. This can be shown in a number of ways, the most obvious of which is to show that the witness has previously been convicted of a felony. Merely showing an arrest or indictment is not sufficient (or allowed), but proof of conviction of a felony (or any crime in some states) is sufficient to impeach a witness. The witness may simply be asked, "Have you ever been convicted of a felony?", or a certified copy of the record of conviction may be introduced as evidence. If the witness denies the conviction, then extrinsic proof must be introduced. Even felons who have been pardoned may be impeached by showing the original conviction. The court may exercise its discretion to prohibit the use of very old convictions to impeach (and the Federal Rules prohibit the use of felonies to impeach where the witness has been out of custody or supervision for more than 10 years). Juvenile offenses may not be used to impeach.

Witnesses may be impeached for bad character by showing misconduct which did not result in a felony conviction (*e.g.*, defrauding investors, cheating at cards, telling lies). Courts will limit this kind of impeachment, however, to acts which are clearly indicative of veracity (and not merely indicative of bad character in general). Likewise, witnesses may be impeached by showing their poor *reputation* for truthfulness in the community. The traditional rule has been that a witness may be called to testify to the impeached witness' reputation in the community (but not to testify as to an individual opinion of the witness' veracity). The more modern rule is to allow direct opinion evidence as to whether or not the impeached witness tells the truth.

#### **App. 104.13.2**

##### **Bias Impeachment**

Witnesses may be also impeached by asking them questions about (or by introducing independent evidence of) their hostility, adverse interests or bias. It is always proper to ask a witness (especially an expert witness) if he is being paid to give his testimony (thus suggesting bias and an economic interest in the outcome of the case). In criminal cases, it is always proper to ask the prosecution witness if there are any charges pending against him, whether he has been promised immunity from prosecution or a reduced sentence, or whether he is on probation, parole, or awaiting sentencing on other charges (thus suggesting that he will give testimony favorable to the prosecution in exchange for his own "deal"). It is also permissible to impeach for bias by showing that the witness is a relative of one of the parties, or that the witness is a friend or business associate of one of the parties.

#### **App. 104.13.3**

##### **Capacity Impeachment**

Witnesses may also be impeached by showing a lack of capacity to perceive or a lack of knowledge about the events to which they have testified. Certainly, proof that the witness is deaf, blind or otherwise perceptually impaired would be impeaching evidence. Likewise, demonstrating that the witness was asleep or intoxicated at the time the events about which he testified occurred would call into question his credibility because of lack of knowledge. It also possible to impeach by showing that the witness has a poor memory in general (thus suggesting he doesn't really remember the current matters either).

#### **App. 104.13.4**

##### **Inconsistent Statement Impeachment**

Finally, witnesses can be impeached by showing prior inconsistent statements or acts. The traditional rule is that a witness who is to be impeached by showing a prior inconsistent statement or act must first be allowed the opportunity to explain the apparent inconsistency. This rule required a formal foundation be laid to inform the witness of the exact nature of the inconsistency, to ask him whether he did the act or made the statement, and then evidence of the inconsistency could be received if the witness denied it (but it was inadmissible if the witness admitted the inconsistency).

The more modern practice is to hold it sufficient if the witness is given an opportunity to explain the inconsistency. The traditional approach also is that the prior inconsistent statement is hearsay, and therefore cannot be used as substantive evidence but merely to impeach. The more modern approach is to either define prior inconsistent statements as *not* being hearsay, or to call them hearsay and then admit them under an exception to the hearsay rule. Prior inconsistent statements

can be used against the defendant in a criminal case as long as the witness is present at trial and subject to cross examination.

There is a limitation on impeaching witnesses by "collateral matters." This simply means that impeaching evidence must bear some relevance to the credibility of the witness. For example, if a witness testified that he saw a crime being committed on the street when he was "walking home from church," he could not be impeached by showing that he was actually on his way home from a house of prostitution. Whether he was coming from a church or a house of prostitution is not relevant (and thus is "collateral") to whether or not he is telling the truth about what he saw on the street.

#### **App. 104.13.5**

##### **Rehabilitation of Witnesses**

Where a witness has been impeached on cross examination, the opposing counsel may attempt to "rehabilitate" the witness on redirect (that is, to restore the witness' damaged credibility). Just because there has been some rebuttal evidence or contradictory evidence introduced does not mean that a witness is subject to rehabilitation; only if the witness' credibility has been attacked is he in need of rehabilitation.

In general, the same kinds of evidence and questioning allowed for impeachment can be used for rehabilitation (*e.g.*, showing a *good* reputation for honesty and veracity, showing an absence of bias or adverse interest, explaining prior inconsistent statements). Note, however, that most courts will not permit the introduction of prior *consistent* statements to rehabilitate a witness who has been impeached by a showing of prior inconsistent statements: there is simply no way to tell which time the witness was lying.

#### **IRE 607 WHO MAY IMPEACH**

The credibility of a witness may be attacked by any party, including the party calling the witness.

#### **IRE 608 EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

**(a) Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

**(b) Specific instances of the conduct of a witness.** For the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on crossexamination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

#### **IRE 609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME**

**(a) General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

**(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of the intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

**(c) Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

**(d) Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

**(e) Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

#### **IRE 610 RELIGIOUS BELIEF OR OPINIONS**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced.

#### **IRE 613 PRIOR STATEMENTS OF WITNESSES**

**(a) Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

**(b) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

#### **IRE 616 BIAS OF WITNESS**

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is

admissible.

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### App. 104.14 Opinion Evidence

#### App. 104.14.1

##### The General Rule

The general rule is that *opinion evidence is not admissible*. It is the function of the trier of fact (that is, the jury) to draw inferences from factual evidence presented in court. Since an opinion is just an inference drawn by a witness from facts observed by the witness, to allow opinion evidence would invade the province of the jury. Witnesses are supposed to testify as to *facts within their personal knowledge* and not as to their personal inferences, deductions, opinions or conclusions drawn from those observed facts.

#### App. 104.14.2

##### The Exceptions to the General Rule

There are some circumstances where opinions or conclusions of witnesses are admissible (because, in theory, this is the best way to find the truth). In some cases, opinion testimony from "experts" is permitted even though the experts have no first hand knowledge of the case (because they *do* have some specialized knowledge which is helpful to the court). In some cases, "lay" (that is, non-expert) witnesses are allowed to give their opinions (usually for the sake of convenience). And there are some cases where both expert and lay witnesses are allowed to give opinions.

#### App. 104.14.3

##### Opinion Evidence by Lay Witnesses

Opinions given by lay witnesses may be permitted by the court when those opinions (1) are derived from the personal knowledge and observation of the witness, and (2) are the best evidence available, considering the facts in issue. The Federal Rules [F.R. 701] allow lay witnesses to express opinions when the trial judge finds that the opinions are "(a) rationally based on the perception of the witness; and (b) are helpful to a clear understanding of his testimony or to the determination of a fact in issue."

Before a lay witness may give an opinion in court (either state or federal), the trial judge must find three things:

(1) the witness has personal knowledge of the facts about which he is giving an opinion; (2) the matter is one about which persons normally and regularly form opinions [such as speed, color, sound, size, time, and so forth]; and (3) the opinion is the best way to get the matter before the jury [that is, the specific facts known to the witness are probably not as important as the opinion itself].

Lay opinion testimony is usually allowed in the following situations:

1. *Identity* -- a witness may identify another person in court (even though an identification is merely a witness' opinion). The witness may even make a less than positive identification (*e.g.*, the defendant "looks like" the man the witness saw; the witness "recognized his voice"). Lack of a positive identification merely goes to the weight of the testimony, not its admissibility.
2. *Handwriting* -- a lay witness may give an opinion as to handwriting if the witness was sufficiently acquainted with the person whose handwriting the sample purports to be. Note that this opinion is not based on a *comparison* of handwriting exemplars, but rather on the identification of a single handwritten document in which the witness recognizes the handwriting as belonging to an acquaintance. Comparison of handwriting exemplars generally requires expert testimony.
3. *Physical appearance or condition* -- a witness may give an opinion which describes the physical condition or appearance of another person (*e.g.*, drunk, irrational, upset, unconscious, angry). Such conditions are otherwise very difficult to describe, and thus it is convenient to allow opinion evidence. Opinions may also be given concerning the apparent age, apparent pain, and apparent state of health of another.
4. *Mental condition* -- lay witnesses may give opinions about the sanity or mental condition of an *acquaintance*.
5. *Measurements or dimensions* -- lay witnesses may give opinions which are estimates of measurements or dimensions (*e.g.*, weight, height, color, size, speed, sound, quantity, quality, length of time). These are matters about which all people of ordinary perception form opinions. The length of observation and the witness' apparent ability to give reliable estimates might go to the weight of the evidence, but not to its admissibility.
6. *Value* -- the *owner* of property is qualified to give an opinion (that is, estimate) of the value of the property (to establish, for example, the dollar value of stolen goods).

**App. 104.14.4****Expert Witnesses**

The trial judge must determine the admissibility of the testimony of a witness as an "expert" by finding three factors:

(1) the witness must have some special knowledge, experience, skill, education or other qualification which will assist the jury in understanding the facts of the case and rendering a verdict; (2) the witness will give opinion testimony on a subject that is beyond the understanding or competence of persons of ordinary education, training and experience; and (3) the witness will give an opinion based on matters perceived by the witness or made known to the witness where such matters are of a type that experts normally rely upon in forming an opinion. If the trial court is not persuaded that these three factors exist, then the proposed expert witness is incompetent (that is, is not allowed to testify). If the trial court (that is, the judge) is persuaded that these factors are present, the witness is qualified as an expert.

The trial judge can look at virtually any matters to determine if the proposed expert witness has the special knowledge, skill or experience to qualify as an expert, but generally the judge will examine the witness' qualifications in terms of his training and education, his experience, his membership in professional associations, and his familiarity with standard works and authorities in his field. Although educational achievement is useful in evaluating expertise, it is not critical. Thus, a proposed witness with a Ph.D. in automotive engineering and a third-grade drop-out who is a chief mechanic on a racing car at the Indianapolis 500 are probably both experts in the operating principles of the internal combustion engine.

Expert testimony is supposed to be limited to those matters upon which the jury could not reach a verdict without the assistance of the expert opinion. The expert is supposed to testify only on the topics within his field of expertise, and only on topics about which persons without his special knowledge, experience or education are uninformed.

Expert opinion is generally utilized to provide assistance to the jury on matters of the value of property (although the lay owner can also testify), the sanity of an individual (where insanity, for example, is a defense), the causation of an accident, the authenticity of handwriting, fingerprints, blood and bodily fluid identification, scientific test results (such as ballistics comparisons, neutron activation analysis, or fiber transfer tests). Expert opinion is improper where the jurors are competent to draw their own inferences on a given issue. In a criminal case, expert opinion is obviously proper on the "ultimate fact in issue," that is, the guilt of the accused.

An expert may base his opinion on facts within his personal knowledge (*e.g.*, a psychiatrist who examined the defendant), on facts made known to him before the trial (*i.e.*, his academic training or his own experience in the field), or on facts made known to him during the trial (*i.e.*, facts which he heard other witnesses testify to or facts which the attorney asks him to assume for a hypothetical question). Unless the expert is testifying from personal knowledge, most courts require that he disclose the basis for his opinion before he testifies. Modern practice does not require that the facts upon which the expert bases his opinion be themselves admissible into evidence.

The effect of an expert opinion depends upon whether the jury believes it or not. It is up to the jury to weigh the credibility of the expert, just as with any other witness. Likewise, expert witnesses can be cross examined and impeached just as any other witness. In addition to the traditional grounds for impeachment, experts may be impeached by showing a lack of expert qualifications, prior inconsistent statements in the present case (but not in past, similar cases), compensation received for testifying (although this question is normally asked on direct examination to prevent such impeachment), and contrary opinions of other experts in their textbooks and treatises.

**IRE 701 OPINION TESTIMONY BY LAY WITNESSES**

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

**IRE 702 TESTIMONY BY EXPERTS**

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

**IRE 703 BASES OF OPINION TESTIMONY BY EXPERTS**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

**IRE 704 OPINION ON ULTIMATE ISSUE**

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

(b) Witnesses may not testify to opinions concerning intent, guilt or innocence in a criminal case, the truth of falsity or allegations, whether a witness has testified truthfully, or legal conclusions.

**IRE 705 DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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**App. 104.15**  
**Hearsay Evidence****App. 104.15.1****The Hearsay Rule**

Hearsay is inadmissible. [But there are at least 31 exceptions to this rule.]

**IRE 802 HEARSAY RULE**

Hearsay is not admissible except as provided by law or by these rules.

**App. 104.15.2****Hearsay Defined**

Hearsay is an out of court assertion introduced in court to prove that the very thing asserted is true.

Note that *not all out of court statements are hearsay*. Such statements may not be "assertions" or they may not be introduced in court to prove the truth of the thing asserted. Unless the out of court statement meets *both* tests [that is, (1) the statement must be an assertion and (2) it must be offered to prove it is true], the out of court statement is *not hearsay*.

**IRE 801 DEFINITIONS**

The following definitions apply under this Article:

**(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

**(b) Declarant.** A "declarant" is a person who makes a statement.

**(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(d) Statements which are not hearsay.** A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose; or (C) one of identification of a person made shortly after perceiving the person; or

(2) Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth; or (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

**App. 104.15.3****Why the Rule Exists**

The trier of fact must evaluate evidence in terms of reliability, credibility and trustworthiness. When evidence derives from physical objects, animal behavior, or even from a scientific test by machine, the trier of fact can rely on the senses to observe and evaluate the evidence. When the evidence has a human source, however, factors other than mere observation come into play. Generally, the trier of fact must consider (1) the integrity of the person providing the information, (2) the perceptive abilities of that person, (3) the accuracy of the person's memory, and (4) the person's ability to communicate.

When the human source of evidence is present as a witness in the courtroom, the above-listed qualities can be tested by oath, observation, impeachment and cross-examination. In the absence of a courtroom appearance, these safeguards are missing and the litigant against whom the human-source evidence is introduced is denied the opportunity to confront the witness. Accordingly, the law of evidence very greatly disfavors the introduction of out of court statements as proof of the very thing asserted out of court.

**App. 104.15.4****The Declarant**

The source of an out of court statement, that is the human being who spoke the words, did the act, or wrote the document, is referred to as the "declarant." Accordingly, the reliability and trustworthiness of hearsay assertions depends upon the reliability and trustworthiness of the hearsay declarant.

**App. 104.15.5****The Assertion**

Distinguish between the "assertion" which is the out of court statement of the hearsay declarant and the "testimony" which is the report of the out of court assertion made by a witness. The witness and the hearsay declarant may be the same person, but usually the witness testifies in court to something that the hearsay declarant asserted out of court. Try to articulate the hearsay declarant's assertion as the beginning point of any hearsay problem analysis.

Be careful, also, to distinguish "multiple hearsay" or "hearsay on hearsay" or "totem pole hearsay." They all mean the same thing. An example of multiple hearsay might be found in a police report. Suppose that a police officer reads from his report made a year before at the scene of an auto crash. The officer has no present recollection of the investigation but knows that his report was accurate when made. The judge allows the officer to read his report into the record (under the "past recollection recorded" exception to the hearsay rule). Thus the report itself is hearsay (since it is an out of court assertion introduced in court to prove that what it asserts is true). Suppose the report contains a quotation from a witness who told the police officer that the driver of Car #1 said "I'm sorry I ran the red light." If this statement is introduced to prove that the driver of Car #1 ran the red light, then the original assertion itself is hearsay, the statement of the witness to the police officer is hearsay, and the officer's report of the witness' assertion of the driver's assertion is hearsay on hearsay on hearsay. In order for all of this to be admissible in court, each and every level of the assertion must be qualified under some exception to the hearsay rule.

**App. 104.15.6****What is "Out of Court"**

The term "out of court" as used in the law of hearsay means "out of *this present court*". Even sworn testimony in some other court is "out of court" or "extrajudicial" in the context of the present proceeding.

**App. 104.15.7****What is an Assertion**

An "assertion" for hearsay purposes can include all assertive written and oral communication plus non-verbal conduct intended as an assertion. For example, the spoken words "I am going to throw up!" are an assertion of a physical state indicating nausea. The written words in a letter, "I am going to shoot you tomorrow," are an assertion of an intent to kill.

The act of pointing at a suspect in a police lineup is an assertion that the person pointed to is the criminal.

**App. 104.15.8****What is the Purpose for which the Evidence Is Offered**

An out of court assertion (oral, written, or non-verbal) is hearsay *only* if it is offered in court to prove the truth of the very thing asserted. If the out of court statement is introduced in court *not* to prove it is true, but merely to prove that the statement was made, then such a statement is said to be "excluded" from the hearsay rule. There are three generally recognized *hearsay exclusions*: (1) state of mind, (2) prior statements, and (3) operative statements or verbal events.

**App. 104.15.9****Hearsay in Criminal Cases**

The Sixth Amendment guarantees the accused the right to confront his accusers. As a practical matter, this means that the criminal defendant has the absolute right to cross examine the witnesses against him. Despite this constitutional right, hearsay evidence which is covered by a recognized common law exception to the hearsay rule is admissible in criminal trials, despite the lack of cross examination. Several U.S. Supreme Court cases have held that states may also create *new* hearsay exceptions, and that evidence may be admitted under these exceptions in criminal trials without constitutional violations. Likewise, the Supreme Court has held (in *Chambers v. Mississippi*) that the prosecution may not exclude hearsay offered by the defendant if the effect of the exclusion would be to deny a fair trial.

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**App. 104.16****Documentary Evidence**

Note that all the evidentiary rules which apply to testimony (*e.g.*, privilege, hearsay, relevancy) also apply to documentary evidence. In addition to those rules, certain special rules also apply to writings (and related documentary evidence).

### App. 104.16.1 Authentication

The general rule is that before any writing or any secondary evidence of the content of a writing may be admitted into evidence, it must be authenticated (that is, a foundations must be laid to establish that the writing is a genuine writing and that it is what it purports to be). Authentication is not necessary, of course, if the adverse party admits the writing is genuine or if the adverse party fails to object. Authentication requires only a *prima facie* showing that the document is genuine and what it purports to be. If the authenticity of the document is disputed, it is up to the jury to decide, by a preponderance of the evidence, whether it is indeed genuine.

Authentication is required of official records as well as private writings. Usually, certified copies of official records (rather than the originals) are admitted into evidence. Such certified copies of official records are "self-authenticating" if: (1) the original record is a document authorized by and actually recorded pursuant to law; (2) the copy is a correct copy of the original; and (3) the certification of authenticity is made by the custodian of the record under signature and official seal. Any private document which is officially recorded (*e.g.*, mortgages, deeds) can be authenticated just by showing it has been officially recorded.

Parties who offer private writings into evidence must produce evidence to demonstrate that the document is genuine and is what it purports to be. There is no limit to the kinds of evidence which may be used to authenticate private writings, but the following are usually seen in the courtroom:

(1) *Testimony by an attesting witness* -- At common law, documents of legal significance were required to have attesting witnesses who could later testify in court as to the authenticity of the document. Modern law no longer requires this, but still permits the use of attesting witnesses if they exist. Authentication of wills in most jurisdictions still requires attesting witnesses.

(2) *Testimony of other witnesses* -- The testimony of any witness who saw the execution of the document or who heard the parties later acknowledge the document may be used for authentication.

(3) *Opinion testimony as to handwriting* -- A writing may be authenticated by evidence of the genuineness of the handwriting of the maker. Any lay person familiar with the maker's handwriting may so testify, or an expert witness may testify as to a comparison of the questioned handwriting with an admittedly genuine sample of the maker's handwriting.

(4) *Opinion testimony as to voice identification* -- A person familiar with the speaker's voice may authenticate a recording of that voice by giving his opinion.

(5) *Admissions* -- Evidence can be introduced to show that the adverse party had, in the past, admitted the authenticity of the document or had acted as if the document were genuine.

(6) *Authentication by content* -- A writing may be authenticated by showing that it contains matters which are unlikely to have been known to anyone other than the person who is claimed to have written it.

#### IRE 901 REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) **General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) **Testimony of witness with knowledge.** Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) **Non-expert opinion on handwriting.** Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) **Comparison by trier or expert witness.** Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) **Distinctive characteristics and the like.** Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) **Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 30 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by the Supreme Court of this State or by a statute as provided in the Constitution of this State.

**App. 104.16.2****Presumptions of Authenticity**

Some kinds of documentary evidence are in themselves sufficient to establish a *prima facie* case of authenticity:

- (1) Notarized documents.
- (2) Officially recorded documents.
- (3) "Ancient" documents (documents 10 to 30 years old, depending on the rules of the jurisdiction).

**IRE 902 SELF-AUTHENTICATION**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) **Domestic public documents.** The original or a duplicate of a domestic official record proved in the manner provided by Trial Rule 44(A)(1).
- (2) **Foreign public documents.** The original or a duplicate of a foreign official record proved in the manner provided by Trial Rule 44(A)(2).
- (3) **Official publications.** Books, pamphlets, or other publications issued by public authority.
- (4) **Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.
- (5) **Trade inscriptions and the like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (6) **Acknowledged documents.** Original documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.
- (7) **Commercial paper and related documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
- (8) **Presumptions created by law.** Any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or *prima facie* genuine or authentic.
- (9) **Certified domestic records of regularly conducted activity.** Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a domestic record of regularly conducted activity within the scope of Rule 803(6), which the custodian thereof or another qualified person certifies under oath (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. A record so certified is not self-authenticating under this subAppendix unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.
- (10) **Certified foreign records of regularly conducted activity.** Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a foreign record of regularly conducted activity within the scope of Rule 803(6), which is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. The record must be signed in a foreign country in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of that country, and the signature certified by a government official in the manner provided in Trial Rule 44(A)(2). The record is not self-authenticating under this subAppendix unless the proponent makes his or her intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

**App. 104.16.3****Doctrine of Completeness**

The traditional rule has been that a party presents his evidence as he chooses. Therefore, if a party chooses to present only a part of a writing, it is up to the adverse party to bring out the balance on cross examination or rebuttal. The modern trend, however, is to recognize a doctrine of "completeness" and to require a party who seeks to introduce only a part of a document or recorded statement to make the whole document or statement available in the interests of fairness.

**IRE 106 REMAINDER OF RELATED WRITING OR RECORDED STATEMENT**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

**App. 104.16.4****Best Evidence Rule**

It is the general policy of the law that when a party has a choice of proving his case by any of several types of evidence, the "best evidence" (that is, the strongest evidence) must be presented. Ordinarily, the only consequence of using "weaker" evidence is a weakening of that party's case before the jury. However, when documentary evidence is used, this general policy becomes a rule of law: the best evidence rule.

The best evidence rule is this: to prove the contents of a private writing, the original writing itself must be produced unless it is shown to be unavailable.

The reason for this rule is to prevent confusion (since slight variations in words or symbols can make a tremendous difference in meaning), and to prevent fraud or mistake which might arise from the use of oral testimony or copies to prove the content of writings.

As with any rule of evidence, this rule is waived if there is no objection. The rule, of course, does not apply to

official records. The rule also does not apply when the adverse party admits the contents of the writing.

The rule does apply, however, to any kind of printed or written documents of any type which are not official records. The Federal Rules expand the notion of writing to include photographs, x-rays, motion pictures, recordings in any form, and any form of data compilation (such as computer data bases).

It is possible to have more than one "original" writing if there are multiple copies of a document, all of which bear original signatures.

The best evidence rule does not apply when the party offering a copy of a writing can establish that the original is not available. The original is unavailable if: (1) it is lost or destroyed through no fault of the proponent; (2) it is unobtainable because it is in the custody of a party who is outside the jurisdiction of the court; (3) it is too voluminous (that is, so large that it cannot practicably be brought to court); or (4) it is the possession of the opponent. When secondary evidence is allowed, the courts generally prefer to receive, first, a copy of the original, or, second, oral testimony of the contents of the document.

#### **IRE 1001 CONTENTS OF WRITINGS, RECORDINGS OR PHOTOGRAPHS**

For purposes of this article the following definitions are applicable:

- (1) **Writings and Recordings.** "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
- (2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.
- (3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".
- (4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by facsimile transmission, or videotape, or by other equivalent techniques which accurately reproduces the original.

#### **IRE 1002 REQUIREMENT OF ORIGINAL**

To prove the content of a writing, recording, photograph or video tape, the original writing, recording, photograph or video tape is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this State or by statute.

#### **IRE 1003 ADMISSIBILITY OF DUPLICATES**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

#### **IRE 1004 ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS**

The original is not required, and other evidence of the contents of a writing, recording, or photograph, is admissible if:

- (1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
- (2) **Original not obtainable.** No original can be by any available judicial process or procedure;
- (3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, such party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and such party does not produce the original at the hearing; or
- (4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

#### **IRE 1005 PUBLIC RECORDS**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be given.

#### **IRE 1006 SUMMARIES**

The contents of voluminous writings, recordings, photographs, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

#### **IRE 1007 TESTIMONY OR WRITTEN ADMISSION OF PARTY**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by a written admission, without accounting for the nonproduction of the original.

#### **IRE 1008 FUNCTIONS OF COURT AND JURY**

Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule App. 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

### **App. 104.17 Real Evidence**

#### **App. 104.17.1 Introduction**

Real evidence (also called demonstrative evidence) consists of tangible objects or things which can be brought into the courtroom and which "speak for themselves." Firearms, knives, items of clothing, objects found at crime scenes and the like can be shown to the jurors who may examine the objects with their own senses. Jurors can directly perceive real evidence, as opposed to having to rely on descriptions given by witnesses.

The proponent of real evidence must first establish the relevance of the evidence by providing some foundational testimony (*e.g.*, there was a shooting, a gun was found near the victim, the item of evidence to be introduced is the very gun that was found). Once the foundation is established, the evidence becomes admissible. Not all real evidence is admissible, however, even if relevant. Real evidence is subject to the same limitations as any other form of evidence, and thus may be excluded if the trial judge determines that its probative value is outweighed by the probative dangers (such as the risk of confusing the jurors or consuming too much court time).

#### **App. 104.17.2 Exhibition of Injuries**

In a criminal case, the exhibition of the injuries received by the victim would be relevant, for example, in a battery or mayhem prosecution. However, if the injury is an especially gory wound or is located in an embarrassing part of the victim's anatomy, the trial court may exclude such an exhibition of injuries to avoid prejudicing the jury. Even if the injury is not particularly disgusting or embarrassing, the judge may still wish to control for the possibility that the victim will cry out or otherwise manifest pain to arouse the sympathy of the jury. The judge would especially wish to control for possible false demonstrations of pain which are not subject to cross examination.

In general, objects such as weapons are admissible, but trial judges tend to exclude evidence which might shock or inflame the jury (*e.g.*, bringing a corpse or parts thereof into the courtroom). Such evidence is admissible within the discretion of the judge, and when admitted, appellate courts will only rarely overrule the trial judge.

#### **App. 104.17.3 Graphic Depictions**

Any number of graphic depictions of reality are classified as real evidence (*e.g.*, photographs, movies, videotapes, audio tapes, x-rays, maps, drawings and so forth). The admissibility of such evidence is founded on a policy which encourages the utilization of reliable scientific methods of reproducing relevant facts where the facts themselves cannot be brought into the courtroom.

Since graphic depictions are merely reproductions or representations of real things, special authentication is required to assure the court, by the testimony of a witness, that the graphic depiction is indeed a faithful reproduction of the thing or person depicted. Authentication guards against two dangers: the possible introduction of an object other than one being testified about, and the possibility that the authentic object has undergone changes in conditions since the relevant time. The amount of authentication testimony will vary with the nature of the evidence involved. For example, although some jurisdictions require that the photographer actually authenticate a photograph by testifying as to camera angles, film speed and lighting, most jurisdictions allow any witness with first hand knowledge to authenticate a photograph by simply testifying that the photo accurately represents the person or object depicted. The court may, of course, exercise its discretion to exclude any photographs or other graphic depictions which would tend to offend, prejudice or inflame the jury (*e.g.*, multiple color photographs of autopsy results where a single black and white photo would do as well).

#### **App. 104.17.4 Evidentiary View**

A "view" is a special evidentiary procedure whereby the court transports itself to a particular place or object when that place or object cannot be conveniently moved into or depicted graphically in the courtroom. The judge, jury, parties and counsel must all be present at the view which is a formal procedure having the effect of evidence. It is sometimes beneficial, for example, for a jury in a criminal case actually to visit the crime scene to gain a full understanding of the physical environment.

#### **App. 104.17.5 Constitutional Limitations**

Note that the Fourth Amendment to the U.S. Constitution prohibits "unreasonable" searches and seizures by government agents. Any search or seizure (including an arrest which is a seizure of a person) which is done without a warrant is, by definition, "unreasonable" except where the person who is the object of the search has given consent or where there are "exigent circumstances" to excuse the failure to obtain a warrant. The judicial remedy for violations of this constitution requirement is to invoke "the exclusionary rule" to prohibit the introduction of otherwise relevant real evidence against a defendant whose constitutional rights have been violated by the police.

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#### **App. 104.18 Scientific Evidence**

Scientific test and experiments often provide a reliable means of finding the truth about certain facts in issue. The ultimate decision of admissibility of such evidence is within the discretion of the judge.

##### **App. 104.18.1**

##### **Admissibility of Scientific Evidence**

1. There must be substantially similar conditions to those existing at the time of the facts in issue. For example, if a skid test is conducted to determine stopping distance for an automobile, it must be done with the same kind of automobile on the same kind of road surface in the same kind of weather conditions as existed at the time of the fact in issue.
2. The court must determine the scientific reliability of the procedure. Ordinarily this is accomplished by using expert testimony to establish that the testing procedure was conducted by technically qualified personnel who are experts in the field. These persons must then testify in court as to how they conducted the test and as to the reliability of the testing procedures. *Judicial notice* may be used as a substitute for this expert testimony in cases where the scientific evidence is of a nature that the courts finds scientifically reliable as a matter of common and accepted practice (*e.g.*, ballistics tests for firearms, radar to measure speed, fingerprint evidence, breath testing for intoxication). Even if judicial notice is used, the proponent of the scientific evidence must still establish the foundational requirement that the test was administered by qualified personnel in the proper manner. Further, even if there is expert testimony or judicial notice concerning the scientific reliability of a given testing procedure, there is no obligation on the part of the jury to believe it is true.
3. Finally, the judge must determine that the probative value of the scientific evidence outweighs the probative dangers of confusing or misleading the jury. Scientific evidence is supposed to aid rather than confuse the jury in reaching the truth.

##### **App. 104.18.2**

##### **Kinds of Scientific Evidence**

1. Experiments with inanimate objects. For example, there may be evidence of tests of shot patterns of firearms to show distance between the gun and the object struck by the projectile; tests to show metal fatigue in collapsed structures; tests to determine stopping distances of automobiles.
2. Behavior of animals. For example, there may be evidence that a cow consistently returns to one farmer's barn every night might be evidence that another farmer who claims the cow in fact stole it; that a bloodhound given a defendant's scent at a crime scene in fact tracked down the defendant.
3. Non-volitional human behavior. For example, there may be evidence of experiments to show that the discharge of a particular firearm would cause characteristic powder burns on the hand of the person firing it. Further, scientific evidence of human characteristics may be used to identify persons (*e.g.*, by fingerprints, hair samples, handwriting samples and the like). Voiceprints have even been admitted recently to identify persons, and blood chemistry can also be used, at least to increase the probability of identifications. So-called "lie detector" tests (*i.e.*, polygraph and psychological stress evaluator) are generally inadmissible unless both prosecution and defense stipulate to admissibility

in advance of the trial and the test. Chemical tests for intoxication, however (since they depend less on examiner interpretations of results) are generally admissible to prove intoxication. Finally, tables of vital statistics (*e.g.* mortality tables) have been admitted to show human behavior in estimating probable life spans (for example, to assess damages in wrongful death cases).

##### **App. 104.18.3**

##### ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***

113 S.Ct. 2786, United States Supreme Court, June 28, 1993

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II-A, and the opinion of the Court with respect to Parts II-B, II-C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined.

Justice BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

## I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription anti-nausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.<sup>1</sup> Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects--more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (*i.e.*, a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.<sup>2</sup> These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is "sufficiently established to have general acceptance in the field to which it belongs." 727 F.Supp. 570, 572 (S.D.Cal.1989), quoting *United States v. Kilgus*, 571 F.2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence is not admissible to establish causation. 727 F.Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F.2d 1128 (1991). Citing *Frye v. United States*, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. 951 F.2d, at 1129-1130. The court declared that expert opinion based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field ... cannot be shown to be 'generally accepted as a reliable technique.'" *Id.*, at 1130, quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (CA9 1985).

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F.2d, at 1130-1131. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community." *Id.*, at 1130. Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.*, at 1131. The court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, --- U.S. ---, 113 S.Ct. 310, 121 L.Ed.2d 240 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e.g.*, *United States v. Shorter*, 257 U.S.App.D.C. 358, 363-364, 809 F.2d 54, 59-60 (applying the "general acceptance" standard), *cert. denied*, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987), with *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

## II A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, *Problems, Cases, and Materials on Evidence* 649 (1983). Although under increasing attack of late, the rule continues to be followed by a majority of courts, including

the Ninth Circuit.<sup>3</sup>

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared: "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 54 App.D.C., at 47, 293 F., at 1014 .... Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid*.

The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.<sup>4</sup> Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.<sup>5</sup> We agree.

We interpret the legislatively-enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163, 109 S.Ct. 439, 446, 102 L.Ed.2d 445 (1988). Rule 402 provides the baseline: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." "Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Rule's basic standard of relevance thus is a liberal one.

*Frye*, of course, predated the Rules by half a century. In *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.*, at 49, 105 S.Ct., at 467, but, quoting Professor Cleary, the Reporter, explained that the common law nevertheless could serve as an aid to their application: "In principle, under the Federal Rules no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided....' In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." *Id.*, at 51-52, 105 S.Ct., at 469. We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.*, at 50- 51, 105 S.Ct., at 468-469. In *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a "general acceptance" standard. The drafting history makes no mention of *Frye*, and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey*, 488 U.S., at 169, 109 S.Ct., at 450 (citing Rules 701 to 705). See also Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631, 631 (1991) ("The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts"). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.<sup>6</sup>

## B

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.<sup>7</sup> Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto." The subject of an expert's testimony must be "scientific ... knowledge."<sup>8</sup> The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Webster's Third New International Dictionary* 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, e.g., Brief for Nicolaas Bloembergen *et al.* as Amici Curiae 9 ("Indeed, scientists do not assert that they know what is immutably 'true'-- they are committed to searching for new, temporary theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science and the National Academy of Sciences as Amici Curiae 7-8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it

represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement") (emphasis in original). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.<sup>9</sup>

Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger P 702[02], p. 702-18. See also *United States v. Downing*, 753 F.2d 1224, 1242 (CA3 1985) ("An additional consideration under Rule 702--and another aspect of relevancy--is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, and 26 *Jurimetrics J.* 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on first-hand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of first-hand knowledge--a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" Advisory Committee's Notes on Fed. Rule Evid. 602 (citation omitted)--is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

### C

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),<sup>10</sup> whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.<sup>11</sup> This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green, at 645. See also C. Hempel, *Philosophy of Natural Science* 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* 61-76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 *J. Am. Med. Assn.* 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, *Reliable Knowledge: An Exploration of the Grounds for Belief in Science* 130-133 (1978); Relman and Angell, *How Good Is Peer Review?*, 321 *New Eng. J. Med.* 827 (1989). The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation. See *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), *cert. denied*, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F.2d, at 1238. See also 3 Weinstein & Berger P 702[03], pp. 702-41 to 702-42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique that has been able to attract only minimal support within the community," *Downing, supra*, at 1238, may properly be viewed with skepticism.

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.<sup>12</sup> Its overarching subject is the scientific validity--and thus the evidentiary relevance and reliability--of the principles that underlie a proposed submission. The focus, of course, must be

solely on principles and methodology, not on the conclusions that they generate.

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F.R.D., at 632.

### III

We conclude by briefly addressing what appear to be two underlying concerns of the parties and amici in this case. Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. Cf., e.g., *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), *cert. denied*, 506 U.S. ----, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992); *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F.2d 166 (CA5 1989), *cert. denied*, 494 U.S. 1046, 110 S.Ct. 1511, 108 L.Ed.2d 646 (1990); Green 680-681. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Petitioners and, to a greater extent, their amici exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, e.g., Brief for Ronald Bayer *et al.* as Amici Curiae. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment--often of great consequence--about a particular set of events in the past. We recognize that in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.<sup>13</sup>

### IV

To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence--especially Rule 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice STEVENS joins, concurring in part and dissenting in part.

The petition for certiorari in this case presents two questions: first, whether the rule of *Frye v. United States*, 54 App.D.C. 46, 293 F. 1013 (1923), remains good law after the enactment of the Federal Rules of Evidence; and second, if *Frye* remains valid, whether it requires expert scientific testimony to have been subjected to a peer-review process in order to be admissible. The Court concludes, correctly in my view, that the *Frye* rule did not survive the enactment of the Federal Rules of Evidence, and I therefore join Parts I and II-A of my opinion. The second question presented in the petition for certiorari necessarily is mooted by this holding, but the Court nonetheless proceeds to construe Rules 702 and 703 very much in the abstract, and then offers some "general observations." *Ante*, at 2796.

"General observations" by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations--they are not applied to deciding whether or not particular testimony was

or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their amici. Twenty-two amicus briefs have been filed in the case, and indeed the Court's opinion contains no less than 37 citations to amicus briefs and other secondary sources.

The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language--the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review--in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 703 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

But even if it were desirable to make "general observations" not necessary to decide the questions presented, I cannot subscribe to some of the observations made by the Court. In Part II-B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante*, at 2794-95. Federal Rule of Evidence 402 provides, as the Court points out, that "[e]vidence which is not relevant is not admissible." But there is no similar reference in the Rule to "reliability." The Court constructs its argument by parsing the language "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ... an expert ... may testify thereto...." Fed. Rule Evid. 702. It stresses that the subject of the expert's testimony must be "scientific ... knowledge," and points out that "scientific" "implies a grounding in the methods and procedures of science," and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." *Ante*, at 2794-95. From this it concludes that "scientific knowledge" must be "derived by the scientific method." *Ante*, at 2795. Proposed testimony, we are told, must be supported by "appropriate validation." *Ante*, at 2795. Indeed, in footnote 9, the Court decides that "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity." *Ante*, at 2795, n. 9 ....

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this dicta apply to an expert seeking to testify on the basis of "technical or other specialized knowledge"--the other types of expert knowledge to which Rule 702 applies--or are the "general observations" limited only to "scientific knowledge"? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge" be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante*, at 2796. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante*, at 2796. Following this sentence are three quotations from treatises, which speak not only of empirical testing, but one of which states that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability," *ante*, pp. 2796-97.

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

#### Footnotes

1. Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34-44.

2. For example, Shanna Helen Swan, who received a master's degree in biostatistics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the Appendix of the California Department of Health and Services that determines causes of birth defects, and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. App. 113-114, 131-132. Stewart A. Newman, who received his master's and a doctorate in chemistry from Columbia University and the University of Chicago, respectively, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. App. 54-56. The credentials of the others are similarly impressive. See App. 61-66, 73-80, 148-153, 187-192, and Attachment to Petitioners' Opposition to Summary Judgment, Tabs 12, 10, 21, 26, 31, 32.

3. For a catalogue of the many cases on either side of this controversy, see P. Gianelli & E. Imwinkelried, *Scientific Evidence* § 1-5, pp. 10-14 (1986 & Supp.1991).

4. See, e.g., Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation, 86 *Nw.U.L.Rev.* 643 (1992) (hereinafter Green); Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years--the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 *Geo.Wash.L.Rev.* 857, 876-885 (1992); Hanson, "James Alphonso Frye is Sixty-Five Years Old; Should He Retire?," 16 *W.St.U.L.Rev.* 357 (1989); Black, A Unified Theory of Scientific Evidence, 56 *Ford.L.Rev.* 595 (1988); Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 *N.C.L.Rev.* 1 (1988); Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 *Jurimetrics J.* 235 (1986); Gianelli, The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half-Century Later, 80 *Colum.L.Rev.* 1197 (1980); The Supreme

Court, 1986 Term, 101 *Harv.L.Rev.* 7, 119, 125-127 (1987). Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term--"Frye-ologist"--has been advanced to describe those who take part. See Behringer, Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 *Jurimetrics J.*, at 239, quoting Lacey, Scientific Evidence, 24 *Jurimetrics J.* 254, 264 (1984).

5. Like the question of *Frye*'s merit, the dispute over its survival has divided courts and commentators. Compare, e.g., *United States v. Williams*, 583 F.2d 1194 (CA2 1978), *cert. denied*, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979) (*Frye* is superseded by the Rules of Evidence), with *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1111, 1115-1116 (CA5 1991) (en banc) (*Frye* and the Rules coexist), *cert. denied*, --- U.S. ---, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence P 702[03], pp. 702-36 to 702-37 (1988) (hereinafter Weinstein & Berger) (*Frye* is dead), and M. Graham, *Handbook of Federal Evidence* § 703.2 (2d ed. 1991) (*Frye* lives). See generally P. Gianelli & E. Imwinkelried, *Scientific Evidence* § 1-5, pp. 28-29 (1986 & Supp.1991) (citing authorities).

6. Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally-enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

7. THE CHIEF JUSTICE "do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility," *post*, at 2800, but would neither say how it does so, nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

8. Rule 702 also applies to "technical, or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

9. We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). See Black, A Unified Theory of Scientific Evidence, 56 *Ford.L.Rev.* 595, 599 (1988). Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 *Jurimetrics J.* 249, 256 (1986), our reference here is to evidentiary reliability--that is, trustworthiness. Cf., e.g., Advisory Committee's Notes on Fed.Rule Evid. 602 ("[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'" (citation omitted)); Advisory Committee's Notes on Art. VIII of the Rules of Evidence (hearsay exceptions will be recognized only "under circumstances supposed to furnish guarantees of trustworthiness"). In a case involving scientific evidence, evidentiary reliability will be based upon scientific validity.

10. Rule 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges." These matters should be established by a preponderance of proof. See *Bourjaily v. United States*, 483 U.S. 171, 175-176, 107 S.Ct. 2775, 2778-2779, 97 L.Ed.2d 144 (1987).

11. Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed.Rule Evid. App. 101.

12. A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, e.g., *Downing*, 753 F.2d at 1238-1239 (on which our discussion draws in part); 3 Weinstein & Berger P 702[03], pp. 702-41 to 702-42 (on which the *Downing* court in turn partially relied); McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 *Iowa L.Rev.* 879, 911-912 (1982); and Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.

13. This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral.... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, *The Nature of the Judicial Process* 178, 179 (1921).

#### App. 104.18.4

#### *Smith v. State*

N.E.2d

[No. 49A02-0005-CR-300]

Court of Appeals of Indiana

September 12, 2000

#### *The Facts*

In September 1997 Smith was arrested and charged with rape in an unrelated case. The trial court in the 1997 case ordered that Smith provide blood, hair, and saliva samples which were then forwarded to the Indianapolis-Marion County Forensic Services Agency (Crime Lab) for analysis. The record indicates that Smith's DNA profile was used in the 1997 case and that Smith's defense was consent of the alleged victim. Record at 103. The jury in the 1997 case acquitted Smith.

The events giving rise to the instant case also occurred in 1997. During the early morning hours on March 26, 1997, V.O. was asleep in her home when the attack began. The attacker covered her head with clothing, thus preventing V.O. from seeing his

face, and raped her. Police investigated the case but were unable to identify a suspect. Then in July 1998, the Crime Lab advised a detective investigating V.O.'s rape that a computer check had shown a tentative match between the DNA recovered following V.O.'s attack and Smith's DNA obtained in the 1997 case. Further DNA testing confirmed that Smith was the source of the DNA recovered from V.O.

Based on the DNA evidence, on March 2, 1999, Smith was charged with Rape, Robbery, and Burglary. Thereafter, Smith moved to suppress the DNA evidence. The trial court denied Smith's motion, and now he appeals pursuant to Ind. Appellate Rule 4(B)(6). We accepted jurisdiction over this interlocutory appeal on March 20, 2000.

#### *The Legal Rules Involved*

The case before us today presents an issue of first impression in this state. Appellant-defendant Damon Smith appeals the trial court's denial of his motion to suppress evidence. Specifically, Smith contends that the use of his DNA profile in the instant case—a profile originally created for use in a prior unrelated case—constitutes an unreasonable warrantless seizure violative of his U.S. and Indiana constitutional rights as well as IND. CODE § 10-1-9-8.

#### *The Ruling of the Court*

*[The Indiana Court of Appeals affirmed the trial court, ruling the evidence is admissible.]*

Smith first argues that the State's use of his DNA sample violates the Fourth and Fourteenth Amendments to the U.S Constitution and Article I, Section 11 of the Indiana Constitution. The Fourth Amendment to the United States Constitution prohibits police from conducting warrantless searches and seizures except under limited circumstances. *[citation omitted]* The language of the Indiana Constitution, Article I, § 11, mirrors the federal protection. *[citation omitted]* However, the tests for determining a rights violation differ for the state and federal provisions. *[citation omitted]*

The Fourth Amendment protects citizens from warrantless searches of places and items where the individual has an actual expectation of privacy so long as society recognizes that expectation as reasonable. *[citation omitted]* However, before deciding whether a search or seizure violates the federal constitutional provision, we must first decide whether a constitutionally relevant search or seizure has taken place. A "seizure" implicates the Fourth Amendment "when an officer, 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *[citation omitted]* In addition, our supreme court has described a "search" as the "'prying into hidden places for that which is concealed.'" *[citation omitted]* More specifically, except when authorized by search warrant or court order, the Fourth Amendment protects Smith's privacy interest not to have the police invade his body and take a blood sample. *[citation omitted]*

In the instant case, Smith has failed to specify how the State's conduct rises to the level of a Fourth Amendment search or seizure. Smith does not complain of the 1997 court order to draw blood, hair, and saliva for a DNA profile. Rather, Smith challenges the use of the DNA obtained in the 1997 case to inculcate him here. However, police conduct in *comparing* Smith's court-ordered DNA sample with the DNA obtained from the V.O. rape is not a Fourth Amendment search or seizure.

The closest analogue to retention of DNA samples is the fingerprint databank. Our supreme court has held that police are not required to destroy an individual's fingerprint records after acquittal. *[citation omitted]* Balancing the public interest against the individual's right to privacy, the court observed that fingerprint records were "available and valuable only to the expert searching for criminals." *[citation omitted]* Our supreme court has also found that the State's interest in making records of arrested parties outweighed the right to privacy a defendant may have in his arrest records. *[citation omitted]* In *Kleiman v. State*, this court upheld the constitutionality of the statute limiting expungement of arrest records despite a defendant's acquittal. *[citation omitted]*

Likewise, Smith points to nothing that might suggest that the Crime Lab was legally required to destroy Smith's DNA sample after his acquittal in the 1997 case. Furthermore, Smith cites no relevant authority requiring the Crime Lab or other law enforcement agencies to obtain a court order or search warrant before reusing Smith's DNA profile. In short, law enforcement agencies may retain validly obtained DNA samples for use in subsequent unrelated criminal investigations in circumstances such as these presented here.

In addition, we note that the Georgia Court of Appeals decided a case involving similar factual circumstances. In *Bickley v. State*, the defendant's DNA sample, drawn pursuant to a search warrant in a prior unrelated case, was used by different law enforcement personnel to convict him of rape in a subsequent case. In *Bickley*, the court observed:

In this case defendant's blood was obtained pursuant to a warrant for the purpose of DNA testing, and that is the only test ever performed on defendant's blood. . . . What defendant is really objecting to is the *comparison* of his DNA derived from samples taken from victims of crimes other than the one specified in the warrant. We agree with the trial court that "[i]n this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations." *[citation omitted]*

We agree with the decisions of our sister states in so far as they hold that reuse of a criminal suspect's validly obtained DNA sample in a subsequent unrelated criminal investigation does not trigger Fourth Amendment protections.

We now address Smith's standing to challenge the DNA profile's reuse. To argue that a search or seizure is unreasonable, Smith "must establish ownership, control, possession, or interest in either the premises searched or the property seized." *[citation omitted]* The property at issue in the instant case is a DNA profile record compiled by the Crime Lab. Smith has failed to show that he has any possessory interest or any other interest in the records kept by the Crime Lab. Inasmuch as Smith has no possessory interest in the profile record, Smith lacks standing to challenge the Crime Lab's use of its own record.

Moreover, our supreme court has recognized that law enforcement agencies are permitted to retain and reuse fingerprint records as well as other records of arrested parties. *[citation omitted]* Thus, we find nothing unreasonable with the Crime Lab's retention and reuse of its profile of Smith's DNA. Therefore, Smith's Indiana constitutional claim must fail.

Finally, Smith challenges the denial of his motion to suppress under I.C. § 10-1-9-8. The statute provides in relevant part

that “[t]he superintendent is authorized to establish a data base of DNA identification records for convicted criminals, crime scene specimens, unidentified missing persons, and close biological relatives of missing persons.” *[citation omitted]*

We begin our analysis by noting that this statute does not expressly exclude records obtained from other sources, that is, DNA profile records obtained—by valid search warrants or court orders—pursuant to criminal investigations not resulting in conviction. It is well settled that law enforcement agencies are permitted to retain arrest records of acquitted individuals for possible use in subsequent investigations. *[citation omitted]* Interpreting such non-exclusive language of this statute in conjunction with our supreme court’s decisions regarding arrest and fingerprint records, leads us to conclude that the DNA database is not prohibited from storing DNA profile records of an arrestee whose DNA was collected pursuant to a valid search warrant or court order. **Thus,** we conclude that the denial of Smith’s motion to suppress evidence did not violate the Fourth Amendment to the U.S. Constitution, Article I, Section 11 of the Indiana Constitution, or I.C. § 10-1-9-8. As a result, there was no error.