# L. DEFENSES

## L.1. Lack of capacity

### L.1.b. Insanity

**TITLE:** Belcher v. State
**INDEX NO.:** L.1.b.
**CITE:** (12-20-19), 138 N.E.3d 318 (Ind. Ct. App.)
**SUBJECT:** Sufficient evidence D appreciated the wrongfulness of his actions
**HOLDING:** In aggravated battery prosecution, there was sufficient evidence to support trial court's finding that Defendant understood and appreciated the wrongfulness of his conduct. Evidence supporting rejection of insanity defense included Defendant's attempts to evade arrest, his act of walking away from others that confronted him following his random attacks and his statements to L.2.b. officers that the Indianapolis Metropolitan Police Department has jurisdiction of Monument Circle, not the Indiana State Police.

Court also found no abuse of discretion in trial court's implicit decision not to give too much mitigating weight to Defendant's mental illness. Finally, Defendant's 53-year-and 180-day sentence was not inappropriate given the "particularly troubling" nature of Defendant's offenses.
His random public assaults on two separate people in front of children were unprovoked, violent, and senseless. The victims sustained severe injuries, and one of victims ultimately died.

**TITLE:** Clark v. Arizona
**INDEX NO.:** L.1.b.
**CITE:** 548 U.S. 735, 126 S.Ct. 2709, 165 L. Ed2d 842 (2006)
**SUBJECT:** Insanity as relates to *mens rea*, due process
**HOLDING:** Majority found no violation of due process by Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong or by restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged or, in other words, *mens rea.* At trial, Petitioner did not contest the shooting and death of a police officer, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot the officer or knowledge that he was doing so, as required by the statute. The State presented circumstantial evidence of knowledge on Petitioner's part that he intentionally killed the officer and knew he was an officer. The Tr. Ct. denied Petitioner's motion for judgment of acquittal for failure to prove intent to kill a law enforcement officer or knowledge that he was an officer. Petitioner raised the affirmative defense of insanity, on which he carried the burden, but also challenged his *mens rea* due to his insanity. Petitioner challenged Arizona's definition of insanity as violating due process. Court analyzed the landmark English rule in M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng.Rep. 718 (1843) that analyzes insanity in terms of cognitive capacity (understanding of what one is doing) and an alternative basis for recognizing a defense of insanity understood as a lack of moral capacity (defect leaves one unable to understand his action was wrong). Although Arizona legislature initially adopted M'Naghten in full, it later dropped the cognitive incapacity prong. Petitioner argued that the two-pronged M'Naghten test represents the minimum that the government must provide, and elimination of the first part offended a long-held principle of justice so rooted that it should be considered fundamental. Patterson v. New York, 432 U.S. 197 (1977). Majority disagreed, stating history showed no deference to M'Naghten to elevate it to a fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes. Majority pointed to variances in defining insanity among states themselves as showing a diversity of American standards, making it clear that the formulation is open to state choice. Nor does the abbreviation of the M'Naghten statement raise a proper claim that some constitutional minimum has been shortchanged. Under Arizona's single-pronged definition of insanity, cognitive incapacity remains a sufficient condition for establishing the defense, albeit not a necessary one. In practical terms, if a D did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime. The Tr. Ct. recognized this in its consideration of the evidence.

Petitioner also challenged due process in relation to the rule adopted by State v. Mott, 931 P.2d 1045 (Ariz. 1997), that held that testimony of a professional psychologist about mental capacity could be considered only for its bearing on the insanity defense and not as to the element of *mens rea*. The majority opinion considers whether the Mott rule violates due process by removing the presumption of innocence, the presumption of sanity, and the principle that a criminal D is entitled to present relevant and favorable evidence on an element of the offense charged against him. Majority noted that before the last century the *mens rea* required to be proven for particular offenses was often described in general terms like Amalice,@ but in modern tendency has gravitated toward intent and/or knowledge. The presumption of sanity is equally universal in some variety, being a presumption that a D has the capacity to form the *mens rea* necessary for a verdict of guilt and the consequent criminal responsibility. Majority noted the first reason supporting the Mott rule is Arizona's authority to define its presumption

of sanity by choosing an insanity definition, and by placing the burden of persuasion on Ds who claim incapacity as an excuse from customary criminal responsibility. If the State is to have this authority in practice as well as in theory, it must be able to deny a D the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial. This would occur if expert opinion of mental disease and incapacity could be considered on the matter of *mens rea*. States are free to give such opinion such power. What due process requires, however, is simply that a State that wishes to avoid a second avenue for exploring capacity has a good reason for confining the consideration of evidence of mental disease and incapacity to the insanity defense. Mott's rule reflects such a choice. Majority noted characteristics of mental illness that should allow limitations on such evidence, including: the controversial character of some categories of mental illness; the potential of mental-disease evidence to mislead, and the danger of according greater certainty to capacity evidence than experts claim for it. Held, judgment affirmed; Breyer, J., concurring in part and dissenting in part, noted that while he agreed with the Majority's categorization of three categories of evidence related to insanity: 1) fact-related evidence; 2) expert opinion evidence affecting a D's ability to form intent; and 3) expert opinion evidence on legal sanity (knowing right from wrong) and agrees that the Constitution permits a State to confine consideration of the second and third types within the context of the insanity defense, he is concerned that in some cases the distinctions among types of evidence allowed to dismiss intent will not be clear. He would remand for the Arizona courts to determine whether the Mott rule conforms to the Majority's 3-part framework; Kennedy, with whom Stevens and Ginsburg, JJ. join, dissenting, found the Majority's three-part test of fact-related evidence and mental disease evidence unworkable in relation to the facts about mental illness where the facts cannot easily be explained without an understanding of the disease at work. “It makes little sense to divorce the observation evidence from the explanation that makes it comprehensible.” Kennedy cited to a lack of precedent and prudential reason to not allow a criminal D to present to the trier of fact evidence that he is innocent of the crime charged.

**TITLE:** Gall v. Parker
**INDEX NO.:** L.1.b.
**CITE:** 231 F.3d 265 (6 Cir. 2000)
**SUBJECT:** Prosecutorial Misconduct -- Denigrating Insanity Defense
**HOLDING:** Prosecutor committed misconduct where he presented no evidence to counter insanity defense, and instead denigrated the defense as the desperate act of a guilty D, described it as conveniently located inside the D's head and not based on facts like the state's case, mischaracterized and denigrated the testimony of the three defense experts, and made "know-nothing appeals to ignorance." Capital murder conviction set aside.

**TITLE:** Henderson v. State
**INDEX NO.:** L.1.b.
**CITE:** (3/17/23), Ind. Ct. App., 206 N.E.3d 447
**SUBJECT:** Rejection of insanity defense affirmed over one judge's strong dissent
**HOLDING:** A man and woman came home to find Defendant rummaging through their belongings in their apartment. They confronted Defendant, who responded by running out of the apartment holding several of the couple's belongings, including a vase that "didn't even have a value to it." The couple and the woman's mother, who was also with them, gave chase. In the ensuing altercation, Defendant punched the woman in the face and then punched the woman's mother in the face several times. Defendant was charged with several offenses, the most serious of which was Level 6 felony burglary. Her attorney filed notice of mental disease or defect and requested a competency evaluation, which the trial court granted. But Defendant refused to meet with the court-appointed psychologists. Based on other medical records, the trial court determined that she was not competent to stand trial. She was committed to a state hospital and restored to competency six months later. Neither party called any experts or mental health professionals at the bench trial. Defendant entered the competency report into evidence but did not indicate Defendant's mental health diagnoses or the details of her treatment. The report expressed no opinion as to whether Defendant could appreciate the wrongfulness of her criminal conduct. Defendant testified that she had never been treated for mental illness and did not believe she suffered from any. She also testified that she heard a voice in her head shortly before entering the couple's apartment. The trial court found her guilty of all charges and imposed an aggregate sentence of six years executed at the DOC. A majority of the Court of Appeals affirmed, although it was sympathetic to the reality of facts in the record showing Defendant suffering from mental illness. During her initial hearing, she made strange comments and did not appear to understand the charges against her. At a later hearing, the possibility that she might be transferred to a special problem-solving mental health court was examined, but she refused to be assessed for the program. Defendant has consistently refused to have any involvement with mental health professionals or cooperate with her attorney. But the COA ruled that its examination of the insanity defense must be limited to the evidence presented at trial. Based on that evidence, it could not conclude that Defendant met her burden. "No witnesses, expert or lay, opined as to whether [Defendant] suffered from mental illness. Likewise, whether [Defendant] was incapable of appreciating the wrongfulness of her conduct. Moreover, the testimony regarding [Defendant's] conduct is consistent with explanations other than insanity, meaning that a trier of fact could have rightfully concluded that [she] was not insane." Held: affirmed. Judge Mathias wrote a twenty-two-page dissenting opinion, which began: "I respectfully dissent. As explained in detail below, the record is without conflict, and the only reasonable conclusion from the record is that [Defendant] established by a preponderance of the evidence that she suffered from an obvious and serious mental illness at the time of the alleged offenses and also that her mental illness prohibited her from appreciating the wrongfulness of her conduct. [Defendant] needs to be committed, not incarcerated. At a bare minimum, the court's finding that [Defendant] was guilty should be modified to a finding of guilty but mentally ill."

**TITLE:** Kahler v. Kansas
**INDEX NO.:** L.1.b.
**CITE:** (3/23/20), U.S. Supreme Ct., 140 S. Ct. 1021
**SUBJECT:** States can bar insanity defense
**HOLDING:** The due process clause does not require states to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong. Here, in his death penalty trial, Defendant wanted to argue that he was not guilty of murdering his estranged wife and family because severe mental illness kept him from thinking or acting rationally at the time. But in 1995, Kansas had changed its criminal law in a way that prevented Defendant from arguing that he was insane. In most states, a defendant who suffers from a mental illness must be acquitted if, at the time she committed her crime, she either did not know what she was doing or she did not know that what she was doing was wrong. But Kansas and a few other states abolished the traditional insanity defense, replacing it with a new law that allows defendants to argue only that they could not have intended to commit the crime because of their mental illness. Thus, in these states, mentally ill people who commit crimes may be convicted even if they had no control or understanding of their actions at the time of the offense.

The U.S. Supreme Court held that a state's failure to allow a mentally ill defendant to raise a moral incapacity insanity defense does not violate the Due Process Clause of the Constitution. The Court will only deem a state's rule about when someone can be held criminally liable unconstitutional if it offends "fundamental" principles of justice, i.e., whether it is "so entrenched in the central values of our legal system" that a state could never choose a different rule. Decisions about when a mentally ill defendant cannot be held liable for his crimes are precisely the kind of question that the Supreme Court has left to the states. In fact, the court has made clear that "due process imposes no single canonical formulation of legal insanity." Clark v. Arizona, 548 U. S. 735, 753 (2006). Despite Defendant's argument, Kansas does have an insanity defense, even if it isn't the insanity defense that he wanted. Defendant could present evidence about his mental illness to try to show that he did not intend to kill. Moreover, defendants can offer mental health evidence at sentencing in the hopes of mitigation or commitment to mental health facilities instead of a prison. Breyer, J., joined by Ginsburg and Sotomayor, JJ., DISSENTING, agreed with the majority that "the Constitution gives the States broad leeway to define state crimes and criminal procedures, including leeway to provide different definitions and standards related to the defense of insanity." But Kansas went beyond simply redefining the insanity defense. Rather, it "eliminated the core of a defense that has existed for centuries: that the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy." And that principle is so fundamental that eliminating it did violate Defendant's constitutional right to due process.

**TITLE:** Marley v. State
**INDEX NO.:** L.1.b.
**CITE:** (5-30-01), Ind., 747 N.E.2d 1123
**SUBJECT:** Effects of battery statute - subject to requirements for maintaining insanity defense
**HOLDING:** Tr. Ct. did not err in requiring D to raise her defense of dissociative state resulting from battered women's syndrome (BWS) only within confines of Effects of Battery statute, Ind. Code 35-41-1-3.3 & Ind. Code 35-41-3-11, which requires filing notice of insanity defense. Effects of battery applies to D who either raises insanity defense or claims self-defense, &, in conjunction with either, raises issue that D was at time of alleged offense suffering from effects of battery as result of past course of conduct of individual who is victim of alleged crime. Ind. Code 35-41-3-11. Statute also requires victim of crime to be . . . abused individual's cohabitant or former cohabitant. Ind. Code 35-41-1-3.3(2).

Here, D lived with one of victims, her uncle who molested her years ago. When uncle told D that she wanted molesting, D killed victim & severely injured another who was present. Defense expert diagnosed D with post-traumatic stress disorder, dysthymia, polysubstance abuse, & mixed personality disorder. Where, as here, D claims that BWS has affected her ability to appreciate wrongfulness of her conduct, legislature has determined that she must proceed under & comply with requirements of insanity defense statute. Because D was not merely trying to negate intent element through evidence of BWS but claimed "dissociative state" as result of BWS, she was asserting insanity defense, & was therefore properly held subject to requirements of insanity statute. Indiana has long held that D may not submit evidence relating to mental disease or defect except through insanity defense.

Ct. also held that retroactive application of effects of battery statute to D's case did not violate State & Federal prohibitions against ex post facto laws, as it did not deprive D of defense or lesser punishment. Further, Ct. disagreed with Ct. App.' conclusion that "cohabitant" does not necessarily mean sexual partner. Term "cohabitant" requires not only living together under one roof, but also has element of ongoing relationship of at least lovers. In this case, although record did not support "cohabitation" between D & her uncle at time victim was killed, evidence was sufficient to support relationship of "former cohabitants" as provided in statute. Held, transfer granted, Ct. App.' opinion at 729 N.E.2d 1011 vacated, judgment affirmed.

**RELATED CASES:** Higginson, 183 N.E.3d 340 (Ind. Ct. App. 2022) (to entirely forbid the use of effects-of-battery evidence, or psychological trauma, in self-defense cases that fall under IC 35-41-3-11, would render the self-defense portion of the statute superfluous).

**TITLE:** Miller v. State
**INDEX NO.:** L.1.b.
**CITE:** (7/13/2018) 106 N.E.3d 1067 (Ind. Ct. App 2018)
**SUBJECT:** Need for immediate assessment of mentally ill Ds
**HOLDING:** As he has done in several other published opinions, Judge Mathias observed that severely mentally ill Ds should, once charged, be immediately assessed by mental health professionals to determine if they were able to have formed the requisite mens rea to commit the crime at issue. Here, D slashed Jeremy Kohn's throat. Both during and after the crime, D exhibited bizarre behavior and was eventually diagnosed with schizophrenia. He was initially declared incompetent to stand trial but once competency was restored, he was tried and found guilty but mentally ill of attempted murder. Addressing Indiana's deficient system for mentally ill Ds, Judge Mathias observed: "This is precisely the conundrum mentally ill criminal Ds face in Indiana. Severe mental illness at the time of the charged offense can be ignored and the D referred to mental health confinement where psychotropic medications are forcibly administered in order to restore the D's mental health for trial. The proper protocol should be to use the assessment of mental health professionals immediately after one or more crimes are charged to consider whether the D could have formed the legally required mens rea to commit the crime charged. If not, the D should more properly be committed to Indiana's mental health system for treatment, rather than charged with crime(s), where such a D might well spend the rest of her or his life." Slip op. at 6, n.2. These words echo Judge Mathias's concurrence in Habibzadah v. State, 904 N.E.2d 367, 371 (Ind. Ct. App 2009), and his dissent in Wampler v. State, 57 N.E.3d 884, 890 (Ind. Ct. App 2016), where, in both cases, he wrote:

"Our criminal justice system needs an earlier and intervening procedure to determine competency retroactively to the time of the alleged crime. Perhaps we as a society need to consider the concept of a D being unchargeable because of mental illness under Indiana Code section 35-41-3-6, and not just guilty but mentally ill under Indiana Code section 35-36-2-1, et. seq. In either case, the commitment proceedings provided for in Indiana Code section 35-36-2-4 would both protect society and best care for the D involved. "[I]t is time for the truly long-term, incompetent criminal D to have an earlier and intervening opportunity for a determination of his or her competency at the time of the crime alleged. Such a procedure convened soon after arrest, rather than years later when stale evidence and dim or non-existent memories are all that are left, or never, would best serve society and the D."

This language was the basis of the Supreme Court's decision to reduce Wampler's sentence on transfer. "Pursuant to our authority under Appellate Rule 7(B), and on the strength of Judge Mathias's dissent, we find that an aggregate sentence of thirty-three years is inappropriate." Wampler v. State, 67 N.E.3d 633, 635 (Ind. 2017). Held, judgment affirmed.

**TITLE:** Schermerhorn v. State
**INDEX NO.:** L.1.b.
**CITE:** (9/20/2016), 61 N.E.3d 375 (Ind. Ct. App 2015)
**SUBJECT:** Alleged victim's actions against third party irrelevant under effects of battery defense
**HOLDING:** In an issue of first impression regarding the effects of battery defense, Court ruled that D could not introduce evidence of her husband's alleged abuse of a third party.

After D's husband confronted D about her drinking, D punched husband and then slashed his arm with a knife. D was charged with criminal recklessness and domestic battery. She asserted a defense under the effects of battery statute, Ind. Code § 35-41-2-11, claiming that husband had abused her; she also claimed that on one occasion, while in her presence, husband physically abused his son from a prior relationship. At trial, she sought to introduce an audio recording of the incident, which the Tr. Ct. denied.

The Tr. Ct. properly denied the request to introduce the audiotape. As a general rule, evidence that a victim battered a third party may be relevant to show a D's reasonable fear of the victim for purposes of self-defense. However, the plain language of the effects of battery statute limits the defense to the alleged victim's conduct toward the D, not a third party. Thus, husband's alleged acts against his son where irrelevant to D's effects-of-battery defense. Moreover, even if Tr. Ct. should have admitted the audio recording, its exclusion was harmless. Held, judgment affirmed.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.b.1. In general (Ind. Code 35-36-2)

**TITLE:** Barany v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (11-16-95), Ind., 658 N.E.2d 60
**SUBJECT:** Insanity defense - jury instructions
**HOLDING:** Tr. Ct.'s instructions did not misinform jury regarding determination of insanity & resulting post-trial procedures. As to determination of insanity instruction, D argued that Tr. Ct. committed fundamental error in using phrase "on that date" instead of phrase "at the time of the offense." In analyzing differences between two phrases, D concluded that since there was no evidence of sanity at time of offense, jury must have been misled into believing that they need not determine his mental condition at exact time of killing. However, all three psychiatrists at trial directed their testimony to D's condition at time of killing & D's insanity defense was premised solely on his behavior at time of killing. Ct. also upheld Tr. Ct.'s instruction on consequences of "guilty but mentally ill" verdict, which stated that D would be sentenced in same manner as if he had been found guilty & would receive whatever psychiatric care as was indicated by his mental illness at DOC. D argued that instruction misled jury into believing that he would only receive required psychiatric care if found guilty but mentally ill. Ct. held that this instruction was proper to further explain subject initially raised by D in requesting instruction on consequences of "not responsible by reason of insanity" verdict. Held, no error.

**TITLE:** Barcroft v. State

**INDEX NO.:** L.1.b.1.

**CITE:** (12/3/2018), 111 N.E.3d 997 (Ind. 2018)

**SUBJECT:** Trial court may ignore unanimous conclusion of three mental health experts that D was insane at the time of the crime and find D guilty but mentally ill based on demeanor evidence.

**HOLDING:** When experts are unanimous in their opinion that a defendant was insane at the time of the crime, the factfinder may discredit their testimony -- or disregard it altogether -- and rely instead on other probative evidence from which to infer the defendant's sanity. This evidence may include demeanor evidence. Here, in murder prosecution, Tr. Ct. rejected the unanimous expert testimony that D was insane at the time of the crime and relied on evidence of D's demeanor to support its finding of guilt. Relying on Galloway v. State, 704 N.E.2d 1011 (Ind. 1998), Court of Appeals reversed, concluding that the demeanor evidence relied on by Tr. Ct. simply had no probative value. However, on transfer, the Supreme Court found that there was demeanor evidence – before, during and after the crime – to support the Tr. Ct.'s conviction.

Court also found flaws in the expert opinion testimony as well as an absence of a well-documented history of mental illness, concluding: "although some evidence could have led to a contrary finding, we cannot say that the evidence is without conflict and leads only to the conclusion that the defendant was insane when the crime was committed." Held, transfer granted, Court of Appeals opinion at 89 N.E.3d vacated, judgment affirmed.

Justice Goff, joined by Justice Slaughter, dissenting, believe the majority decision erodes Indiana's insanity defense by loosening the limitations previously placed on demeanor evidence in Galloway. In that case, the Court held that "demeanor evidence must be considered as a whole in relation to all the other evidence. To allow otherwise would give carte blanche to the trier of fact and make appellate review virtually impossible." The dissent asserted that by contrast to the unanimous expert testimony, there is very little demeanor evidence. Furthermore, that demeanor testimony was wholly consistent with the experts' unanimous conclusions.

**TITLE:** Benefiel v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (09/18/91), Ind., 578 N.E.2d 338
**SUBJECT:** Insanity defense
**HOLDING:** Tr. Ct. did not err by restricting definition of insanity to exclude "irresistible impulse." 1984 Amend. to Ind. Code 35-41-3-6 confined definition of insanity to inability to differentiate right from wrong. While this does not exclude showing of irresistible impulse to establish such inability, it excludes irresistible impulse as separate, independent excuse for commission of criminal act.

**RELATED CASES:** Williams, 393 N.E.2d 183 (D's tendered instruction, plea stating that State must prove D had sufficient willpower to control his impulse to commit act, was not correct statement of law and was properly refused).

**TITLE:** Bloomfield v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (9/30/2016), 61 N.E.3d 1234 (Ind. Ct. App 2016)
**SUBJECT:** Evidence sufficient to reject "fixed" insanity defense
**HOLDING:** There was sufficient evidence for the jury to reject D's insanity defense, as there was conflicting expert testimony about whether he understood the wrongfulness of his actions. Ind. Code § 35-41-3-6(a); Galloway v. State, 938 N.E.2d 699, 708 (Ind. 2010).

D was taking four to five Xanax pills and smoking spice on a daily basis. He was booked into the Allen County Jail on unrelated charges. Soon after, he began to exhibit signs of withdrawal. He initially suffered cold sweats, but his behavior became increasingly bizarre, as he hallucinated, stripped off his clothes, drank from a toilet, and tried to pick bugs off the wall. A few days later, he attacked two officers, leading to charges of battery of a public official. Three experts testified at trial, one stating he could not opine about D's mental state, another testifying that D was insane, and a third testifying that D was previously prescribed Geodon, an antipsychotic drug, but this did not mean D was insane at the time of the offenses. Instead, the witness testified that D's withdrawal from daily use of Xanax and Spice precipitated his conduct. The conflicting evidence about D's mental state was also sufficient for the jury to reject his claim that he suffered from "fixed" or "settled" insanity, a form of insanity where "the ingestion of intoxicants, though voluntary, has been abused to the point that it has produced a mental disease such that the accused is unable to appreciate the wrongfulness of his conduct." Berry v. State, 969 N.E.2d 35, 38 (Ind. 2012). Held, judgment affirmed.

**RELATED CASES:** Miller, 72 N.E.3d 502 (Ind. Ct. App 2017) (conflicting expert testimony about D's sanity sufficient to reject sanity defense).

**TITLE:** Buhring v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (9/19/83), Ind., 453 N.E.2d 228
**SUBJECT:** Insanity - closing argument
**HOLDING:** Tr. Ct. did not err in denying D's request to open & close final argument on insanity issue. Here, D argues that he bore burden of proving his insanity defense by a preponderance of the evidence, he should have had right to open & close on that issue. D's brief contends no statute governs order of final argument in criminal cases; therefore, party carrying burden should open & close argument. Ct. resolves issue by finding Ind. Code 35-1-35-1 [now 35-37-2-2] dictates state open & close final argument to jury in criminal cases on all issues. Held, no error.

**RELATED CASES:** Sills, 463 N.E.2d 228 (insanity & intoxication).

**TITLE:** Caldwell v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (1-27-00), Ind., 722 N.E.2d 814
**SUBJECT:** Insanity/guilty but mentally ill (GBMI); failure to instruct as to effect of finding
**HOLDING:** Tr. Ct. erred by refusing D's tendered instructions on consequences of verdicts GBMI & not responsible by reason of insanity. In State's rebuttal to D's closing argument, prosecutor stated: "Don't by your verdict tell us that he's not responsible, don't tell us that he has a license to kill. Don't let him walk out of this Ct. Room with the rest of us when this case is over with, don't let him get away with murder." Tr. Ct. overruled D's objection & again refused to give requested instructions or admonishment to eliminate any confusion that prosecutor's comments may have engendered in jury.

Generally, it is not proper to instruct jury on statutory procedures to be followed after insanity or GBMI verdict. Palmer, 486 N.E.2d 477. However, D is entitled to instruction on post-trial procedures if erroneous view of law on this subject has been planted in jurors' minds. Dipert, 259 Ind. 260, 286 N.E.2d 405 (1972). In this case, prosecutor's closing remarks were given to jury directly before deliberations began & implied that D would be able to walk out of Ct. Room with jury if he was found not responsible by reason of insanity. Because prosecutor created erroneous impression of what would happen to D if he was found not responsible by reason of insanity, Tr. Ct.'s failure to either admonish jury or give tendered instructions was reversible error. Held, conviction reversed & remanded.

**RELATED CASES:** Georgopolus, 735 N.E.2d 1138 (no error in refusing to give D's instruction because jury did not have erroneous impression of law about consequences of insanity or GBMI verdict; see full review, this section).

**TITLE:** Clay v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (5-14-76), Ind., 346 N.E.2d 574
**SUBJECT:** Lack of capacity - Insanity; Court may decide which doctors to appoint
**HOLDING:** Tr. Ct. did not err in appointing doctors to determine whether D was sane at time of alleged crime before plea of insanity had been filed. Because there was no objection by defense counsel at time of such appointment & at time when Ct. denied his petition for two different doctors. D waived issue of whether Ct. appointed doctors were "disinterested," as required by law. Mere fact that Ct. appointed doctors to examine D & they examined D prior to D's insanity plea did not give rise to any inference that doctors would, in any sense, be prejudiced in any way in D's case. Statute governing Tr. Ct.'s appointment of doctors in criminal trials in which insanity defense is pleaded is proper exercise of legislative prerogative to insure fair & just trial for those who could possibly be found insane. Held, judgment affirmed.

**RELATED CASES:** Graham, Ind., 464 N.E.2d 1 (when D presents insanity defense, it is imperative psychiatrists be appointed to examine D); Norris, 394 N.E.2d 144 (it was not prejudicial to D to refuse D's request to retain, at state expense, psychiatrist of D's choosing, although D withdrew his insanity plea after refusal).

**TITLE:** Cornelius v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (9-3-81), Ind., 425 N.E.2d 616
**SUBJECT:** Insanity - no violation of right to fair trial to deny late insanity plea
**HOLDING:** Tr. Ct. did not arbitrarily violate D's right to fair trial by denying D's motion for permission to enter insanity defense more than 30 days after entry of plea of not guilty. In interest of justice & showing of good cause, Ct. may permit filing of insanity plea to be made at any time before commencement of trial, despite requirement that notice be filed within 30 days after entry of not guilty plea. Here, between arrest & trial, D escaped from jail two times. Two psychiatrists appointed by Ct. after D's second escape between his arrest & trial examined D. Psychiatrists found D was sane & did not have mental disease or defect at time of second escape. Thus, it was within Tr. Ct.'s discretion to deny motion to file belated notice. Held, judgment affirmed.

**RELATED CASES:** Ankney, App., 825 N.E.2d 965 (Tr. Ct. did not abuse its discretion when it excluded evidence of D's mental illness at trial, after denying D's belated, oral motion to assert insanity defense).

**TITLE:** Esmond v. State

**INDEX NO.:** L.1.b.1.

**CITE:** (11/13/2014), 20 N.E.3d 213 (Ind. Ct. App 2014)

**SUBJECT:** Psychiatric examination of D by State's expert is not a critical stage requiring presence of counsel

**HOLDING:** Tr. Ct. did not err in ordering D to undergo a psychatric evaluation by the State's mental health expert without the presence of counsel. By raising an insanity defense, counsel was put on notice that State could examine D to rebut the insanity claim. D was entitled only to the opportunity to consult with counsel before submitting to a psychiatric evaluation by the State. So long as the testimony of State's expert goes to D's mental capacity at the time of the crime and as it pertains to his ability to understand the charges and assist his counsel, and not to his guilt, D has no right to presence of counsel during the examination under either the Sixth Amendment or Article 1, Section 13. See Taylor v. State, 659 N.E.2d 535 (Ind. 1995) and Williams v. State, 555 N.E.2d 133 (Ind. 1990). Held, judgment affirmed; Crone, J., "reluctantly" concurring to note that Williams and Taylor effectively compel result but that supreme court should revisit issue because even if D's mental condition improves, it is doubtful whether defense counsel will be able to effectively cross examine State's expert about the examination. At the very least, counsel should have the opportunity to record the examination conducted by agent of the State to protect D's Sixth Amendment right to confront witnesses against him.

**TITLE:** Eubank v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (12/16/83), Ind., 456 N.E.2d 1012
**SUBJECT:** Insanity - evidence of other crimes/acts
**HOLDING:** Tr. Ct. did not err in allowing state's rebuttal witness to testify re incident in which D escaped from him, which occurred a year after offenses for which D was on trial (escape, kidnapping, etc.) occurred. Here, D employed insanity defense. Ct. notes general rule is that evidence of other criminal activity is inadmissible. Beasley, 452 N.E.2d 982; Taylor, 438 N.E.2d 294. Where D employs insanity defense, exception to general rule allows great latitude in admitting evidence of other conduct by D, limited only to extent that conduct be relevant to insanity. Smith, 432 N.E.2d 1363; Lock 403 N.E.2d 1360; Holt 382 N.E.2d 1002. Challenged evidence disclosed conduct nearly identical to present charge, for which D claimed no responsibility because of his insanity. Although conduct occurred one year later, it was relevant because it evidenced conscious/intelligent choice/determination to escape. Held, no error.

**RELATED CASES:** Bond 489 N.E.2d 504 (in order to substantiate insanity claim/lack of ability to form criminal intent, D testified as to his prior drug usage & practice of mixing various types of drugs; Ct. finds D opened door to introduction of conviction for sale of dangerous drug by testifying he was unaware of effect of combining drugs; such conviction connotes knowledge of use & effect); Coble, 476 N.E.2d 102 (psychiatrist's mention of habitual offender charge did not prejudice D, who raised insanity defense; such defense distinguishes case from Lawrence, 286 N.E.2d 830, which held that bifurcation of proceedings was required in habitual offender trials); Bobbitt, 361 N.E.2d 1193 (police officer was properly permitted to testify concerning D's involvement in another robbery committed earlier on same day as crime with which D was charged).

**TITLE:** Galloway v. State
**INDEX NO.** L.1.b.1.
**CITE:** (12-22-10), Ind., 938 N.E.2d 699
**SUBJECT:** Insanity defense - insufficient evidence supporting rejection of defense
**HOLDING:** Because there was no probative evidence from which an inference of sanity could be drawn, the evidence was insufficient to support Tr. Ct.'s rejection of the insanity defense. When on appeal a D claims the insanity defense should have prevailed, the conviction will be set aside when the evidence is without conflict and leads only to the conclusion that the D was insane when the crime was committed. Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004). When there is no conflict among the expert opinions that the D was insane at the time of the offense, there must be other evidence of probative value from which a conflicting inference of sanity can be drawn. Id. at 1152. Although the standard of review is deferential, it is not impossible, nor can it be.

Here, after returning home from a brief shopping trip and lunch with his grandmother and aunt, D, without a motive, came out of his room with a knife, straddled his grandmother and stabbed her in front of multiple family members while yelling "you're going to die, I told you, you're the devil." As D's son applied pressure to Grandmother's wounds, D told Grandmother that he loved her and that he did not mean to do it. He also pled with paramedics to save her life. D had a long history of mental illness with psychotic episodes. In the year leading up to the stabbing, D had twelve contacts with the mental health system. Although two psychiatrists found D insane at the time of the stabbing, a psychologist found the D sane. However, while testifying, the psychologist withdrew his opinion of sanity in light of additional facts that he did not have when he submitted his preliminary opinion. After hearing all the facts, the psychologist testified that he could not give an opinion. In a bench trial, Tr. Ct. rejected D's insanity defense and found him GBMI, in large part, because D would continue to be a danger to society due to Indiana's inadequate mental health system.

The expert testimony of insanity was un-conflicting, despite the psychologist's uncertainty. An expert witness who has no opinion does not provide probative evidence upon which to base a verdict. Also, the lay opinion testimony did not conflict with the expert opinions of insanity. The three eyewitnesses to the stabbing testified that D was showing familiar signs of "losing it" at the time of the stabbing. The Tr. Ct. focused on D's ability to shop and eat without incident and his cooperation with police. But, when viewed against D's long history of mental illness with psychotic episodes, D's demeanor during the crime, and the absence of any suggestions of feigning or malingering, his demeanor before and after the crime is simply neutral and not probative of sanity. Further, demeanor evidence is of more limited value when the D has a long history of psychosis because insanity is not limited to the stereotypical view of a "raging lunatic" - a person experiencing a psychotic delusion may appear normal to a passerby. Finally, underlying the Tr. Ct.'s decision was a concern about the State's mental health system and D's need for structure and constant supervision. What may or may not happen to D in the future cannot be considered. Thus, Tr. Ct. erred by entering a verdict of GBMI when the evidence presented reasonably led only to the conclusion that D was legally insane at the time of the offense. Held, judgment reversed; Shepard, C.J., and Dickson, J., dissenting on basis that the psychologist's testimony and D's demeanor supported GBMI verdict and that second-guessing the Tr. Ct. places society at great risk for more violence.

**RELATED CASES:** Pierson, 73 N.E.3d 737 (Ind. Ct. App 2017) (expert testimony that insanity defense required a showing of psychosis was not fundamental error because full context of the expert's

testimony advised jury of proper standard.), Satterfield, 33 N.E.3d 344 (Ind. 2015) (jury's rejection of D's insanity or guilty but mentally ill defense was not contrary to law, where evidence conflicted as to D's mental health diagnosis and insanity, and the non-expert evidence contradicted his defense); Myers, 27 N.E.3d 1069 (Ind. 2015) (distinguishing Galloway, Court found sufficient evidence to support GBMI verdict; although experts unanimously agreed that D was insane at time of offense and he had suffered from schizophrenia since early adulthood, sanity could be inferred from facts of offense); Berry, 969 N.E.2d 35 (Ind.) (although a person who has abused intoxicants to the point where it has produced mental disease such that he is unable to appreciate the wrongfulness of his conduct may be found insane, a person who is temporarily insane due to voluntary intoxication cannot; here, evidence of insanity was conflicting because one expert testified that D's psychosis was caused by voluntary alcohol use, i.e., either intoxication or withdrawal); Lawson, 966 N.E.2d 1273 (Ind. Ct. App 2012) (an expert's opinion that D could appreciate right from wrong was sufficient to sustain D's convictions for murder, neglect and battery; although the expert's reasoning that D's delusion made her think she was helping, not hurting her son is arguably inconsistent with his opinion that she was sane, which necessarily implies that she knew that what she was doing was wrong when she killed her son, it was within the jury's province to believe him over the other expert); Carson, 963 N.E.2d 670 (Ind. Ct. App 2012) (the fact that D ran from police, dropped his knife when told to do so and claimed that he could not kill a baby like he was supposed to do constituted sufficient demeanor evidence upon which to reject D's insanity defense, although all experts agreed he was insane at the time and D's statements during and after the crime show that he was in a psychotic state believing that he was in the bible and was supposed to commit certain acts).

**TITLE:** Georgopolus v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (9-29-00), Ind., 735 N.E.2d 1138
**SUBJECT:** Insanity/guilty but mentally ill (GBMI) - required instructions
**HOLDING:** Acknowledging potential for confusion in cases where jury is faced with option of finding D not responsible by reason of insanity or GBMI, Ct. adopted following procedure for cases tried after date this opinion is certified. When verdict options before jury include not responsible by reason of insanity or GBMI, & D requests jury instruction on penal consequences of these verdicts, Tr. Ct. is required to give appropriate instruction or instructions as case may be. Although not binding, Tr. Ct. may consider following as appropriate instructions.

> Whenever a D is found GBMI at the time of the crime, the Ct. shall sentence the D in the same manner as a D found guilty of the offense. At the Department of Correction, the D found guilty but mentally ill shall be further evaluated & treated as is psychiatrically indicated for his illness.

See Ind. Code 35-36-2-5.

> Whenever a D is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney shall file a written petition for mental health commitment with the Ct. The Ct. shall hold a mental health commitment hearing at the earliest opportunity after the finding of not responsible by reason of insanity at the time of the crime, & the D shall be detained in custody until the completion of the hearing. If, upon the completion of the hearing, the Ct. finds that the D is mentally ill & either dangerous or gravely disabled, then the Ct. may order the D to be committed to an appropriate facility, or enter an outpatient treatment program of not more than ninety (90) days.

See Ind. Code 35-36-2-4; Ind. Code 12-26-6-8. Here, Tr. Ct. did not err in refusing D's tendered instruction concerning consequences of verdict of GBMI, because jury did not have erroneous impression of law about potential post-trial depositions. Held, judgment affirmed.

**RELATED CASES:** Passwater, 989 N.E.2d 766 (Ind. 2013) (Indiana Pattern Criminal Jury Instruction 11.20 (2013) represents an improvement over the instruction found appropriate in Georgopulos, thus Court endorsed and approved its use); Alexander, App., 819 N.E.2d 533 (Tr. Ct. erred in not providing an instruction on the penal consequences of a "not guilty by reason of insanity" verdict; even if a D's instruction may be an incorrect statement of the law, he is entitled to a proper instruction, thus Tr. Ct. must substitute the proper instruction on its own).

**TITLE:** Green v. State

**INDEX NO.:** L.1.b.1.

**CITE:** (6-15-81), Ind., 421 N.E.2d 635

**SUBJECT:** Insanity - procedural difference in appointing psychiatrists for insanity plea & incompetency hearing

**HOLDING:** Tr. Ct. did not abuse its discretion by determining that suggestion of incompetency was insufficient to warrant appointing two psychiatrists to examine D. Whereas insanity defense statute mandates appointment of psychiatrists upon filing of notice of insanity, incompetency statute requires appointment of two psychiatrists only if Tr. Ct. has reasonable grounds for believing that D is incompetent. Here, mandatory provision of statute requiring psychiatric exam on filing notice of insanity defense did not come into play because D was not permitted to file out-of-time notice of insanity defense. D's "suggestion of incompetency" contained only naked assertion that he was incompetent to stand trial & incapable of assisting in his defense. Thus, Tr. Ct.'s failure to appoint psychiatrists to determine either sanity at time of crime or competency to stand trial was proper. Held, judgment affirmed as to these grounds.

**TITLE:** Kelley v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (1/28/2014), 2 N.E.3d 777 (Ind. Ct. App 2014)
**SUBJECT:** Insufficient evidence to rebut D's insanity defense
**HOLDING:** In bench trial for criminal confinement and battery resulting in bodily injury, Tr. Ct. erred in finding D guilty but mentally ill when two psychiatrists' medical evaluations were unanimous that she was insane at the time of the incident and there was no contradictory lay testimony. D was arrested and charged after attacking and stabbing her boyfriend's minor child. Psychiatrists who examined D both documented her mental disease and concluded she was unable to appreciate the wrongfulness of her conduct at the time of the offense. During trial, no testimony was taken, the parties stipulated to the police reports and the two psychiatrists' reports were offered along with some of victim's medical records. On appeal, State cited Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004), as giving Tr. Ct. the freedom to reject the expert testimony.

As in Galloway v. State, 938 N.E.2d 699 (Ind. 2010), Court concluded there was not sufficient evidence of probative value from which the trier of fact could have drawn an inference of sanity to conflict with the unanimous expert testimony. "While it appears that there was limited foundation for the psychiatrists' determinations, there is even less on which the Tr. Ct. could have decided to disregard those determinations....In short, there was no lay witness testimony and little demeanor evidence from which the court could have deduced, contrary to the two psychiatrists, that [D] was sane at the time of the incident." Held, judgment reversed and remanded with instructions to enter a finding of not guilty by reason of insanity.

**TITLE:** Kocher v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (10/1/82), Ind., 439 N.E.2d 1134
**SUBJECT:** Insanity - appeal
**HOLDING:** On appeal, question on the evidence concerning insanity cannot be raised by an allegation of insufficient evidence. Question must be raised on assignment that verdict is contrary to law because D carries burden of proof in insanity defense. Thomas, 420 N.E.2d 1216; Price 412 N.E.2d 783. Here, D failed to properly frame issue, but Ct. considers issue, noting evidence at trial was conflicting (clinical psychologist said D legally insane at time of crime; 2 Ct.-appointed psychiatrists said D sane). When evidence conflicts, jury is free to believe whomever they wish. Duvall, 415 N.E.2d 718. Held, D's convictions for kidnapping & robbery while armed affirmed.

**TITLE:** Llewellyn v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (3-7-79), Ind., 386 N.E.2d 674
**SUBJECT:** Lack of capacity - Insanity; Entitlement to file insanity plea
**HOLDING:** While statute does not limit time for filing insanity plea, D was not entitled to file such plea at any time prior to trial. Right to insanity defense may not be arbitrarily cut off. Here, D was not entitled to file subsequent plea of insanity, after such initial plea & withdrawal thereof, without showing cause for such apparently incongruous action. Held, judgment affirmed.

**NOTE:** Ind. Code § 35-36-2-1 now requires D, charged with felony, to file notice of insanity plea twenty days prior to omnibus date, & D, charged with misdemeanor, to file notice ten days prior to omnibus date. However, in interest of justice & upon showing of good cause, Ct. may permit filing to be made at any time before commencement of trial.

**TITLE:** Mayes v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (10/20/82), Ind., 440 N.E.2d 678
**SUBJECT:** Insanity - evidence; sufficiency
**HOLDING:** Standard of review regarding sufficiency of evidence on question of insanity does not differ from standard employed in other sufficiency claims. Here, transfer granted & Ct. App. decision at 417 N.E.2d 1147, holding evidence insufficient to prove legal sanity vacated. Four experts testified D was psychotic & mentally ill, unable to detect right from wrong or conform her conduct to requirements of the law. Other evidence indicated D knew right from wrong & could conform her conduct to requirements of the law. Case contains discussion of presumptions & burden of proof regarding insanity. Similar insanity cases reviewed. Held, Ct. App. decision vacated; conviction affirmed.

**RELATED CASES:** Cate, 644 N.E.2d 546 (despite unanimous medical expert testimony that D was insane at time of crime, there was minimum evidence sufficient for jury to reject insanity defense & find D guilty but mentally ill); Campbell, 536 N.E.2d 285 (D was deemed sane where 4 out of 5 psychiatrists testified he was insane at time of offense, 5th testified he was sane unless he was delusional, but was sincere in belief victim threatened his life, & lay witnesses testified they thought D was just weird); Robinson, 486 N.E.2d 986 (despite fact 3 psychiatrists testified D was insane at time of crime, D was deemed sane where arresting officers testified D acted sane when interviewed several days after murder); Crane, 380 N.E.2d 89, (behavioral problems do not constitute insanity that will relieve one from criminal responsibility).

**TITLE:** Miller v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (3/17/2017), 72 N.E.3d 502 (Ind. Ct. App 2017)
**SUBJECT:** Sufficient evidence to reject insanity defense
**HOLDING:** Despite substantial evidence of Defendant's long-standing mental health problems, which include schizophrenia, there was sufficient evidence to reject his insanity defense. Defendant cut the throat of a man he thought was laughing at him. While doing so, he said nothing and had a blank look on his face. When arrested, Defendant said he was not "paranoid" or "psychotic" or on drugs, but he also said people he encountered often laughed at him or tried to frighten him. He also asked the officer why it took the police several days to contact him; he said he was aware he had broken the law. At his bench trial for attempted murder, two experts testified that he did not appreciate the wrongfulness of his conduct, but a third expert said that while Defendant acted on an "irresistible impulse," he understood the wrongfulness of his action. This conflicting expert testimony was sufficient to reject the insanity defense. Lawson v. State, 966 N.E.2d 1273, 1278 (Ind. Ct. App 2012), trans. denied. Held, judgment affirmed.

**TITLE:** Miller v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (7/13/2018) 106 N.E.3d 1067 (Ind. Ct. App 2018)
**SUBJECT:** Need for immediate assessment of mentally ill Ds
**HOLDING:** As he has done in several other published opinions, Judge Mathias observed that severely mentally ill Ds should, once charged, be immediately assessed by mental health professionals to determine if they were able to have formed the requisite mens rea to commit the crime at issue. Here, D slashed Jeremy Kohn's throat. Both during and after the crime, D exhibited bizarre behavior and was eventually diagnosed with schizophrenia. He was initially declared incompetent to stand trial but once competency was restored, he was tried and found guilty but mentally ill of attempted murder. Addressing Indiana's deficient system for mentally ill Ds, Judge Mathias observed: "This is precisely the conundrum mentally ill criminal Ds face in Indiana. Severe mental illness at the time of the charged offense can be ignored and the D referred to mental health confinement where psychotropic medications are forcibly administered in order to restore the D's mental health for trial. The proper protocol should be to use the assessment of mental health professionals immediately after one or more crimes are charged to consider whether the D could have formed the legally required mens rea to commit the crime charged. If not, the D should more properly be committed to Indiana's mental health system for treatment, rather than charged with crime(s), where such a D might well spend the rest of her or his life." Slip op. at 6, n.2. These words echo Judge Mathias's concurrence in Habibzadah v. State, 904 N.E.2d 367, 371 (Ind. Ct. App 2009), and his dissent in Wampler v. State, 57 N.E.3d 884, 890 (Ind. Ct. App 2016), where, in both cases, he wrote:

"Our criminal justice system needs an earlier and intervening procedure to determine competency retroactively to the time of the alleged crime. Perhaps we as a society need to consider the concept of a D being unchargeable because of mental illness under Indiana Code section 35-41-3-6, and not just guilty but mentally ill under Indiana Code section 35-36-2-1, et. seq. In either case, the commitment proceedings provided for in Indiana Code section 35-36-2-4 would both protect society and best care for the D involved. "[I]t is time for the truly long-term, incompetent criminal D to have an earlier and intervening opportunity for a determination of his or her competency at the time of the crime alleged. Such a procedure convened soon after arrest, rather than years later when stale evidence and dim or non-existent memories are all that are left, or never, would best serve society and the D."

This language was the basis of the Supreme Court's decision to reduce Wampler's sentence on transfer. "Pursuant to our authority under Appellate Rule 7(B), and on the strength of Judge Mathias's dissent, we find that an aggregate sentence of thirty-three years is inappropriate." Wampler v. State, 67 N.E.3d 633, 635 (Ind. 2017). Held, judgment affirmed.

**TITLE:** Moler v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (1-30-03), Ind. App., 782 N.E.2d 454
**SUBJECT:** Insanity defense - proper for jury to believe lay witness testimony over psychiatrists
**HOLDING:** Evidence was sufficient to support D's guilty but mentally ill conviction for murder, despite fact that no witnesses testified that D was sane during commission of his crime. D, who had long documented history of schizophrenia, killed elderly woman because he thought she had turned into a witch. Both Ct.-appointed experts testified that D was unable to appreciate wrongfulness of his conduct at time crime was committed due to mental illness. However, there were lay witnesses who testified that D seemed fine, that there was nothing unusual about his behavior on day of killing, & that D had received injection that day to control his illness. Because lay witnesses testified to normal demeanor before & after crime, jury could have decided that lay testimony about D's behavior was more indicative of his actual mental health at time of killing than unanimous expert opinion that D was insane. Barany v. State, 658 N.E.2d 60 (Ind. 1995). Notwithstanding holding, Ct. noted that Barany has made it very difficult even for Ds with well-documented mental illnesses (especially illnesses which are known to cause delusional or hallucinogenic episodes, like schizophrenia) to successfully raise insanity defense & in interests of justice urged S.Ct. to revisit issue. Held, judgment affirmed.

**RELATED CASES:** Jones, App., 825 N.E.2d 926 (Ct. found this case strikingly similar to Barany & affirmed GBMI finding); Thompson, 804 N.E.2d 1146 (Ct. unambiguously reaffirmed rule in Barany).

**TITLE:** Moore v. Duckworth
**INDEX NO.:** L.1.b.1.
**CITE:** (7-2-79), 443 U.S. 713, 99 S.Ct. 3088, 61 L.Ed.2d 865
**SUBJECT:** Insanity - Sufficiency; lay testimony
**HOLDING:** Under Indiana law whereby sanity may be established by either expert of lay testimony, evidence as to sanity of D at time victim was killed was constitutionally adequate. This was even though prosecution relied on lay witnesses to prove sanity without providing any expert testimony to rebut D's expert testimony. Held, judgment affirmed.

**RELATED CASES:** McCall, 408 N.E.2d 1218 (expert witnesses who did not complete full psychiatric exam of D were competent to testify as lay witnesses on issue of insanity); Atkinson, App., 391 N.E.2d 1170 (weight to be accorded to expert testimony, as well as to lay testimony, is exclusive province of trier of fact which is at liberty to discount or reject expert testimony in face of lay testimony which it finds more persuasive); Cobb, 412 N.E.2d 728 (in prosecution wherein D claimed insanity, jury was properly allowed to consider opinions of lay persons); Blake, 390 N.E.2d 158 (fact that officer assertedly had only five to seven minutes in which to formulate opinion as to D's sanity only went to weight of testimony on issue of sanity & not to its admissibility).

**TITLE:** Murphy v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (8-10-76), Ind., 352 N.E.2d 479
**SUBJECT:** Insanity - Withdrawal from drug addiction
**HOLDING:** Tr. Ct.'s instruction relating to drug influence as not being defense incorrectly stated law. Tr. Ct. instructed jury that it is not defense that accused was under influence of drugs & analogized drug intoxication to voluntary alcohol intoxication. Correct statement of law is in order for intoxication to relieved accused from responsibility, accused must have been so intoxicated as to be incapable of entertaining required intent. In addition, analogizing influence of drugs to intoxication was inapplicable to facts of D's case. D did not argue that addiction to drugs incapacitated him to such extent that he could not from specific intent to commit crime. Instead, D argued his drug withdrawal reaction affected him in such way he could not curb intent or impulse to commit robbery in order to obtain funds to support his addiction. Held, judgment reversed & remanded for new trial.

**TITLE:** Palmer v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (12/12/85), Ind., 486 N.E.2d 477
**SUBJECT:** Insanity - constitutionality
**HOLDING:** IN's insanity statute does not violate equal protection or due process of law. Green 469 N.E.2d 1169; Taylor 440 N.E.2d 1109. Statutory definitions of mentally ill & insanity are not vague. Taylor. Here, Ct. rejects D's contention that distinction between insanity & GBMI verdicts (Ind. Code 35-36-2-3) are insufficiently drawn/not based on scientific psychological definitions. Held, conviction affirmed.

**TITLE:** Patterson v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (9/14/2018), 110 N.E.3d 429 (Ind. Ct. App 2018)
**SUBJECT:** Insanity - burden of proof and use of "not responsible" language in jury instructions
**HOLDING:** In attempted murder prosecution, use of phrase "not responsible by reason of insanity" in jury instructions did not constitute fundamental error. D argued that the language "not responsible" poses a substantial risk that the jury would believe he would suffer no consequences if found "not responsible." But the trial court expressly instructed the jury on the consequences of finding D not responsible by reason of insanity. Thus, Court was not persuaded that D was deprived of due process because of the challenged instruction. *Citing* Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004), Court also rejected D's claim that the State has the burden of proving he was sane beyond a reasonable doubt. The State must prove the offense, including mens rea, beyond a reasonable doubt, but need not disprove insanity. Id. The burden of proof is on the D to establish insanity defense by a preponderance of the evidence. Ind. Code § 35-41-4-1(b). Held, judgment affirmed.

**TITLE:** Pierson v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (4/4/2017), 73 N.E.3d 737 (Ind. Ct. App 2017)
**SUBJECT:** Incorrect testimony about insanity standared cured by other testimony
**HOLDING:** Expert testimony that the insanity defense required a showing of psychosis, such as hallucinations or delusions, was not fundamental error because the full context of the expert's testimony advised the jury of the correct standard for insanity. Defendant's four-month-old child died of severe malnutrition, so the State charged him with Class A felony Neglect of a Dependent Resulting in Death. Defendant raised an insanity defense, partly based on his intellectual disabilities. Dr. George Parker, one of the State's witnesses, testified that mental disease or defect referred to the "presence of significantly impaired perception . . . which I interpret to mean symptoms of psychosis, like hallucinations or delusions." (Emphasis added). Parker later admitted that the statute said nothing about psychosis, hallucinations, or delusions and acknowledged that the correct standard is whether a person is "unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6(a). He reiterated the proper standard several times during his testimony as did the other expert who testified. Therefore, there was no error, fundamental or otherwise. Held, judgment affirmed.

**TITLE:** Robinson v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (5/4/2016), 53 N.E.3d 1236 (Ind. Ct. App 2016)
**SUBJECT:** Evidence sufficient to support rejection of insanity plea
**HOLDING:** In attempted murder prosecution, evidence was sufficient to support the jury's rejection of D's insanity defense. Jury found D guilty but mentally ill on two counts of attempted murder after he stabbed a woman and her great-granddaughter with a sharpened screwdriver after they left a library. The experts' opinions conflicted as to whether D could understand the wrongfulness of his conduct at the time of the offense, and there was "significant" lay testimony indicating D understood the wrongfulness of his conduct. Held, judgment affirmed; Mathias, J., concurring to express his concerns with "the inadequacy of our criminal justice system when confronted with Ds who are mentally ill." To assist the trier of fact, psychiatric examinations of Ds should occur shortly after arrest and before the administration of psychotropic medication.

**TITLE:** Schweitzer v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (4/6/90), Ind., 552 N.E.2d 454
**SUBJECT:** Insanity/guilty but mentally ill (GBMI); instructions as to effect of finding
**HOLDING:** Tr. Ct. did not err in refusing D's tendered instructions on effect of verdicts of not guilty by reason of insanity & GBMI. D was charged with attempted murder & 4 counts of criminal recklessness. D, who had history of mental problems, interposed insanity defense, & tendered instruction informing jury of penal ramifications of GBMI verdict & not guilty by reason of insanity verdict. It is generally inappropriate to instruct jury on specific penal ramifications of verdicts. Wilson, 533 N.E.2d 114; Smith 502 N.E.2d 485. Where, as here, jury plays no part in fixing penalty, jury should not be confused by reference to sentencing consequences following finding of guilty. Id. Thus, Tr. Ct. did not err in refusing to give tendered instructions was not error. Held, conviction affirmed.

**RELATED CASES:** Caldwell, 722 N.E.2d 814 (because prosecutor created erroneous impression of what would happen to D if he was found not responsible by reason of insanity, Tr. Ct.'s failure to either admonish jury or give tendered instructions was reversible error; see full review, this section).

**TITLE:** Shannon v. U.S.
**INDEX NO.:** L.1.b.1.
**CITE:** 52 U.S. 573, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994)
**SUBJECT:** Insanity - instruction on consequences
**HOLDING:** Federal jury need not be instructed on consequences of acquittal by reason of insanity, except in limited circumstances such as where misleading information has been presented to them. D requested instruction regarding commitment proceedings that would take place if he was found not guilty by reason of insanity (NGRI). Tr. Ct. refused, & instead instructed jurors to apply law regardless of consequences & to ignore punishment in its deliberations. D argued that instruction was necessary to counter mistaken impression jurors might have thought insanity aquittee would be immediately released into society. Majority disagrees, writing that potential for releasing dangerous person is no more difficult to ignore when it results from insanity acquittal than when it results from failure of state's proof. Further, D's reasoning would justify many kinds of inappropriate instructions. **NOTE:** See Williams v. State, 555 N.E.2d 133, (card at this index no.) for similar Indiana case.

**TITLE:** State v. Berryman
**INDEX NO.:** L.1.b.1.
**CITE:** (1st Dist., 9-24-03), Ind. App., 796 N.E.2d 741, trans. granted 801 N.E.2d 170
**SUBJECT:** Insanity defense - Ct.-appointed experts
**HOLDING:** After jury's finding that D was not responsible by reason of insanity on charge of murder, State appealed upon two questions of law. First, Ct. affirmed Tr. Ct.'s denial of State's motion to exclude testimony of D's expert witnesses after D refused to speak to Ct.-appointed expert witnesses. Indiana S.Ct. has held that testimony of D's expert witness should not be excluded because of D's refusal to cooperate with Ct.-appointed expert witnesses. McCall v. State, 408 N.E.2d 1218 (Ind. 1980). While Ind. Code 35-36-2-2 requires Tr. Ct. to appoint experts & experts to testify, statute places no obligation on D to cooperate. Ct. noted that decision might be different if State moved Tr. Ct. for order to compel cooperation or face sanctions.

Second, Ct. held that Tr. Ct. erred in allowing defense counsel to attend Ct.-appointed psychiatric evaluations where his sole purpose was to advise D not to cooperate. D has no right to counsel at examination conducted by Ct.-appointed expert because such an examination is not a critical stage of proceeding. Williams v. State, 555 N.E.2d 133 (Ind. 1990). Advising a client not to cooperate with Ct.-appointed expert is an obstructive tactic which should be prohibited in violation of Indiana Professional Conduct Rule 3.4. Held, judgment affirmed in part & reversed in part. Friedlander, J., dissenting, distinguished this case from McCall because in that case, D was not cooperating due to irrational behavior, whereas here D was not cooperating solely for tactical reason. Dissent notes that this decision will encourage defense advisements to clients not to cooperate.

**NOTE:** On transfer at 801 N.E.2d 170, Indiana S.Ct. held that, had there been an order compelling D's cooperation, & a hearing advising him that testimony of his experts could be excluded if he failed to cooperate with Ct.-appointed experts, the State would have prevailed on this issue.

**RELATED CASES:** Esmond, 20 N.E.3d 213 (Ind. Ct. App 2014) (Berryman does not hold that a court order compelling D to submit to psychiatric examination transforms the examination into a "critical stage" of prosecution with right to presence of counsel).

**TITLE:** Stolarz v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (4th Dist. 2/16/83), Ind. App., 445 N.E.2d 114
**SUBJECT:** Insanity - examination of D by state's psychiatrists
**HOLDING:** Tr. Ct.'s order requiring D, who filed insanity defense, to submit to examination by psychiatrists employed by prosecution did not violate D's 5th Amend right against self-incrimination. Ct. finds when D filed insanity defense, Ind. Code 35-5-2-2 (repealed) became effective, requiring psychiatric examination of D by Ct.-appointed psychiatrists as well as by psychiatrists employed by prosecution. Such psychiatric examinations do not violate 5th Amend right against self-incrimination. Weaver, 215 N.E.2d 533; Noelke, 15 N.E.2d 950; Berwanger, App., 307 N.E.2d 891. 5th Amend prohibits only compelled self-incrimination. Right attaches to person, not to incriminating information. D was not compelled to file insanity defense. Psychiatric exams were to determine sanity, not to extract incriminating statements. Ct. compares exam to compelled speaking or physical display at trial. Ct. finds Tr. Ct. admonished prosecution not to ask testifying psychiatrist questions concerning crime itself. Held, no error.

**RELATED CASES:** Coble, 476 N.E.2d 102 (admissibility of incriminating remarks made to physician during compulsory psychiatric examination hinges upon purpose for which evidence is offered: to demonstrate mental condition - admissible; to demonstrate guilt - not admissible over proper objection, *citing* Phelan, 406 N.E.2d 237).

**TITLE:** Stratton v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (11/20/86), Ind., 499 N.E.2d 1123
**SUBJECT:** Insanity - appointment of "disinterested" experts
**HOLDING:** Tr. Ct. did not err in appointing 2 psychiatrists who were brothers & shared office space to determine whether D was insane. Here, psychiatrists examined D separately & did not confer with each other before reaching their conclusions (that D was sane). Defense hired a clinical psychologist who testified that D was insane at time of murder. D contends psychiatrists were not disinterested as required by Ind. Code 35-36-2-2. D concedes doctors were not biased toward state or against her. D contends Code of Professional Responsibility governing attorneys should also apply to doctors appointed to conduct sanity evaluations. Ct. finds psychiatrists were not inherently biased simply because they shared professional & familial relationships & finds attorney Code of Professional Responsibility inapplicable to physicians. Held, no error.

**TITLE:** Taylor v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (12-28-95), Ind., 659 N.E.2d 535
**SUBJECT:** Insanity defense - self-incrimination & psychiatric examination
**HOLDING:** Where D interposed defense of insanity, he was not entitled to Miranda warnings prior to his interview with State's psychiatrist. Psychiatrist testified at trial that D's descriptions of night to offense revealed that he knew right from wrong. Following Mahaffey v. State (1984), Ind., 459 N.E.2d 380, Ct. held that D initiated psychiatric examination when he filed his insanity plea, & accepted fact that he would then be subject to evaluation for purpose of gathering evidence admissible in oncoming trial & useful to prosecution in defeating his position. D also argued that his Sixth Amendment right to assistance of counsel was violated, because defense was not notified that psychiatrist's examination would touch on events surrounding crime itself & that doctor would testify concerning D's statements about crime. Ct. noted, however, that D had ample opportunity to consult with counsel before raising insanity defense, & counsel should have anticipated that State would use examination to rebut his defense. Held, convictions affirmed; DeBruler, J., dissenting.

**TITLE:** Townsend v. State

**INDEX NO.:** L.1.b.1.

**CITE:** (11/5/2015), 45 N.E.3d 821 (Ind. Ct. App 2015)

**SUBJECT:** Insanity - voluntary consumption of medications; no error in not finding temporary insanity as mitigator

**HOLDING:** In burglary and criminal confinement prosecution, jury properly rejected D's insanity defense because any mental defect was caused by D's voluntary intoxication. "Mental disease or defect," for purposes of the insanity statute, does not include temporary mental incapacity that results from voluntary intoxication. Berry v. State, 969 N.E.2d 35 (Ind. 2012). Although both experts agreed that D was suffering from psychosis at the time he committed the offenses, they also both agreed that his psychosis was caused by his knowing and voluntary consumption of medications for which he did not have a prescription. Thus, there was sufficient evidence upon which the jury could reasonably find that, as a result of D's voluntary intoxication, he was not suffering from a mental disease or defect under Ind. Code § 35-41-3-6(a). Court also found no abuse of discretion in declining to find that temporary insanity was a mitigating factor. The jury rejected D's insanity defense and did not find him guilty but mentally ill. Further, there is no evidence that D's psychosis was a symptom of a longstanding mental illness. D failed to carry his burden to show that his 55-year sentence is inappropriate based on the nature of the offenses and his character. Held, judgment affirmed.

**TITLE:** Watson v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (12-5-95), Ind., 658 N.E.2d 579
**SUBJECT:** Insanity - denial of further psychological testing
**HOLDING:** Tr. Ct. did not deny D fair trial & equal protection when it denied his pre-trial motion for further psychological testing. Pursuant to Ind. Code 35-36-2-2, Tr. Ct. appointed two psychiatrists to examine D. First psychiatrist reported that D may have been sane at time of offense, but recommended review of D's earlier evaluation for further assessment of his organic functioning. Second psychiatrist advised that it was not clear whether D met criteria for insanity defense & stated that additional testing may "help further clarify" issue. At trial, first psychiatrist testified that D might have been sane at time of offense & second psychiatrist concluded that D was sane. Neither psychiatrist testified concerning whether additional testing would affect their opinions regarding D's eligibility for insanity defense. Considering substance of psychiatrists' reports & testimony, & absence of demonstrated medical necessity for further testing, Ct. held that Tr. Ct.'s denial of requested additional assistance did not constitute abuse of discretion. Psychiatrist assistance requirement of Ake v. Oklahoma (1985), 105 S.Ct. 1087, even if applicable to non-capital cases, was satisfied in this case. Both Ct.-appointed psychiatrists were available to assist defense on issue of insanity, & Ct. would not extend Ake to require supplemental testing in this case. Held, judgment affirmed.

**TITLE:** Williams v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (6/6/90), Ind., 555 N.E.2d 133
**SUBJECT:** Insanity defense - instructions & argument re post-verdict proceedings
**HOLDING:** Tr. Ct. did not err in refusing D's tendered instructions on commitment proceedings following verdict of not responsible by reason of insanity & prohibiting discussion of topic in final argument. D was charged with murder & interposed insanity defense. D is not entitled to have jury instructed on statutory procedure to be followed upon verdict of not responsible by reason of insanity unless erroneous view of law has been presented to jury. [Citations omitted.] D contends that jury was given erroneous view during voir dire by Tr. Ct.'s statement that if insanity verdict were returned "[t]here is a very real possibility" that commitment proceedings would occur. Tr. Ct. made statement at defense counsel's request after prospective juror said, "I'm not sure I believe that he should be let off totally if found insane or found guilty & then found insane." While Tr. Ct.'s statement may be viewed as potentially misleading, it was not of magnitude of statement by prosecutor in Dipert, 286 N.E.2d 405 that D would go "scot free" if jury found him not guilty by reason of insanity. Here, defense counsel chose not to ask for clarification at time, although he did inform jury with his next voir dire question that there would be commitment hearing. Further, tendered instruction, which was text of Ind. Code 35-36-2-4 pertaining to commitment proceedings, did not paint clear picture for jury, nor remind them that they are not to consider post-trial proceedings in reaching verdict. Held, Tr. Ct. did not err in refusing tendered instruction or in prohibiting argument on post-trial proceedings.

**RELATED CASES:** Caldwell, 722 N.E.2d 814 (because prosecutor created erroneous impression of what would happen to D if he was found not responsible by reason of insanity, Tr. Ct.'s failure to either admonish jury or give tendered instructions was reversible error; see full review, this section); Washington, 390 N.E.2d 983 (Tr. Ct.'s remark, which advised jury if D was found incompetent he would be referred for commitment proceedings and which was followed by correct instructions on insanity issue, was not abuse of discretion); Blake, 390 N.E.2d 158 (no curative instruction required where D's psychologist testified that D would be in same kind of difficulty within short period if released and likelihood of successful treatment of D was essentially zero).

**TITLE:** Zamani v. State
**INDEX NO.:** L.1.b.1.
**CITE:** (5/29/2015), 33 N.E.3d 1130 (Ind. Ct. App 2015)
**SUBJECT:** No error in denial of belated request to assert insanity defense
**HOLDING:** In attempted murder prosecution, where D did not give notice of insanity defense until well after the time limit prescribed in Ind. Code §35-36-2-1, Tr. Ct. did not abuse its discretion in denying the request to assert it. Despite D being examined and found incompetent to stand trial for some period and then being re-examined after he was returned to competency, the defense did not demonstrate good cause as to why his late notice should be accepted. Ankey v. State, 825 N.E.2d 965 (Ind. Ct. App 2005). Medical reports and other evidence related to D's history of mental illness gave him and his defense counsel adequate time to prepare and file a notice of intent to assert an insanity defense if it were desired and merited. Held, judgment affirmed; Robb, J., dissenting, believes D showed good cause for allowing late notice, noting that "[D's] mental health was clearly an issue from the outset of this prosecution and the trial had not yet started when he made his request." Allowing a late insanity plea would not prejudice the State and would be in the interest of justice.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.b.2. Definition (Ind. Code 35-41-3-6)

**TITLE:** Hill v. State
**INDEX NO.:** L.1.b.2.
**CITE:** (10/16/85), Ind., 483 N.E.2d 746
**SUBJECT:** Insanity - definition; low mentality
**HOLDING:** Ct. rejects D's request that Wilson 333 N.E.2d 755 be overruled & low mentality be deemed insanity. Here, D, aged 42, had mentality of 9-12-year old third grade education, IQ in upper sixties, & history of mental problems, including 10-year stay in state hospital. D shot & killed his girlfriend. Three psychiatrists examined D. One found D capable of knowing right from wrong/appreciating wrongfulness of his conduct. Another found D capable of standing trial & no evidence of disturbance. Third recommended further examination. Ct. notes Ind. Code 35-41-3-6 protects those mentally retarded people in need of protection. Held, murder conviction affirmed.

**TITLE:** Pierson v. State
**INDEX NO.:** L.1.b.2.
**CITE:** (4/4/2017), 73 N.E.3d 737 (Ind. Ct. App 2017)
**SUBJECT:** Incorrect testimony about insanity standared cured by other testimony
**HOLDING:** Expert testimony that the insanity defense required a showing of psychosis, such as hallucinations or delusions, was not fundamental error because the full context of the expert's testimony advised the jury of the correct standard for insanity. Defendant's four-month-old child died of severe malnutrition, so the State charged him with Class A felony Neglect of a Dependent Resulting in Death. Defendant raised an insanity defense, partly based on his intellectual disabilities. Dr. George Parker, one of the State's witnesses, testified that mental disease or defect referred to the "presence of significantly impaired perception . . . which I interpret to mean symptoms of psychosis, like hallucinations or delusions." (Emphasis added). Parker later admitted that the statute said nothing about psychosis, hallucinations, or delusions and acknowledged that the correct standard is whether a person is "unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6(a). He reiterated the proper standard several times during his testimony as did the other expert who testified. Therefore, there was no error, fundamental or otherwise. Held, judgment affirmed.

**TITLE:** State v. Wilson
**INDEX NO.:** L.1.b.2.
**CITE:** 242 Conn. 605, 700 A.2d 633 (Conn. 1997)
**SUBJECT:** Insanity; Wrongfulness of Conduct
**HOLDING:** Connecticut Supreme Court holds that D may prevail on insanity defense even if he knows his conduct is contrary to law, if he establishes that, as result of mental disease, he believed that society would condone his actions if it shared his understanding of circumstances. Model Penal Code, which was source of Connecticut insanity statute, provided two alternatives in cognitive prong -- that D was able to appreciate "wrongfulness" of conduct or "criminality" of conduct. Connecticut, like Indiana, selected "wrongfulness," injecting moral issue into insanity definition. Connecticut Court holds that D does not truly appreciate "wrongfulness" of his conduct if mental disease or defect causes him to harbor distorted perception of reality and to believe that, under circumstances as he honestly perceives them to be, his actions do not offend societal notions of morality even though he may be aware that they violate criminal law. This formulation appropriately balances concepts of societal morality that underlie criminal law with concepts of moral justification motivating legislature's adoption of term "wrongfulness" in its insanity statute.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.b.3. Burden of proof/ presumptions (Ind. Code 35-41-4-1(b))

**TITLE:** Mayes v. State
**INDEX NO.:** L.1.b.3.
**CITE:** (10/20/82), Ind., 440 N.E.2d 678
**SUBJECT:** Insanity - burden of proof/presumptions
**HOLDING:** Standard of review regarding sufficiency of evidence on question of insanity does not differ from standard employed in other sufficiency claims. Here, transfer granted & fourth district decision (Mayes, App., 417 N.E.2d 1147, holding evidence insufficient to prove legal sanity) vacated. D charged with neglect, criminal recklessness & involuntary manslaughter stemming from her alleged attempt to "cleanse" the filthy bodies & spirits of her 3 grandchildren by forcing them to drink large amounts of salt water. Testimony at trial indicated D believed she had Jesus in her body. Four experts testified D was psychotic & mentally ill, unable to detect right from wrong or conform her conduct to requirements of the law. Other evidence indicated D knew right from wrong & could conform her conduct to requirements of the law. Case contains discussion of presumptions & burden of proof regarding insanity. Similar insanity cases reviewed. Held, Ct. App. decision vacated; conviction affirmed.

**TITLE:** Van Orden v. State
**INDEX NO.:** L.1.b.3.
**CITE:** (10/26/84), Ind., 469 N.E.2d 1153
**SUBJECT:** Insanity - instructions
**HOLDING:** Instructions given by Tr. Ct. defining insanity & preponderance of evidence were not erroneous. Here, Ct. rejects D's contention that Tr. Ct. erred in giving its own instruction on insanity instead of hers (both set forth in opinion). Ct. finds state's instruction on preponderance of evidence (set forth in opinion) was proper statement of law. See Ind. Code 35-41-4-1(b); Emory 420 N.E.2d 883; Great Atlantic & Pacific Tea Co. v. Custin 14 N.E.2d 538. Held, no error.

**RELATED CASES:** Crose, App., 650 N.E.2d 1187 (insanity instruction was relevant & appropriate because both parties presented substantial evidence that placed D's mental instability at issue; see card at D.9.g.2.g); Ashby 486 N.E.2d 469 (Crim L 782(14); instruction correctly defined preponderance of evidence); Palmer 486 N.E.2d 477 (Crim L 790; D was not entitled to have jury instructed on statutory procedure to be followed upon verdict of NRBRI, *citing* Tyson 386 N.E.2d 1185 & Johnson 359 N.E.2d 525, unless erroneous view of law has been presented to jury, *citing* Dailey 406 N.E.2d 1172 & Dipert 286 N.E.2d 405; here, verdict forms recited statute exactly; Ct. rejects D's contention that verdict form incorrectly suggested to jury that D would be set free if found NRBRI; held, no error).

**TITLE:** Young v. State
**INDEX NO.:** L.1.b.3.
**CITE:** (3-30-72), Ind., 280 N.E.2d 595
**SUBJECT:** Insanity - erroneous instruction on presumption of sanity
**HOLDING:** Because D met burden of producing evidence of insanity, legal presumption of sanity had no further evidentiary value, & jury should not have been instructed as to its existence. D, in criminal prosecution, is presumed to be sane. Presumption of sanity is sufficient to establish prima facie case in favor of State & to eliminate necessity of State proving sanity in each & every criminal prosecution. Presumption of law is not evidence, but merely serves as challenge for proof. When opponent of presumption has met burden of production thus imposed, presumption has no further effect & drops from case. Burden of producing evidence imposed by presumption of sanity is met when competent or admissible evidence, direct or circumstantial, has been introduced on issue of sanity. Test is not whether evidence is credible. Here, because there was competent evidence introduced on insanity issue, it was error to instruct jury as to existence of legal presumption of sanity. It also was error to instruct "if jury finds credible evidence [of insanity], then State has burden to prove beyond reasonable doubt D was sane." Once issue of D's insanity has become question of fact for jury, jury has right to consider all evidence relating to issue, whether introduced by State or D. Held, judgment reversed & remanded; Arterburn, C.J., concurring in part & dissenting in part.

**RELATED CASES:** Fitch, App., 313 N.E.2d 548 (once criminal D raises issue of insanity, burden of proving sanity rests upon State).

# L. DEFENSES

## L.1. Lack of capacity

### L.1.b.4. Trial/bifurcation

**TITLE:** Crawford v. State
**INDEX NO.:** L.1.b.4.
**CITE:** (6-26-02), Ind., 770 N.E.2d 775
**SUBJECT:** Insanity - order of witnesses
**HOLDING:** In murder prosecution, Tr. Ct. erred by allowing expert witnesses it appointed to examine D to be called out of order at trial. Ind. Code 35-36-2-2 clearly requires that Ct.-appointed mental health professionals be called following all evidence presented by State & by D. Here, in attempt to accommodate witnesses' schedules, Tr. Ct. called Ct.-appointed experts before close of D's case. In so doing, Tr. Ct. openly acknowledged that it was ignoring statute & controlling precedent. Despite Tr. Ct.'s blatant & intentional error, Ct. could not say it affected D's substantial rights or had effect on jurors. Held, conviction affirmed, remanded with instructions to reduce D's sentence to fifty-five years.

**Note:** Although Ct. found harmless error in this case, it indicated that Tr. Ct. that chooses to disregard law as in this case leaves itself open to disciplinary action. It noted: "A Ct.'s indifference to clearly stated rules breeds disrespect for & discontent with our justice system. Government cannot demand respect of the laws by its citizens when its tribunals ignore those very same laws. This is one of the fundamentals of our Code of Judicial Conduct. Ind. Code of Judicial Conduct Canon 2A ("A judge shall respect & comply with the law & shall act at all times in a manner that promotes public confidence in the integrity & impartiality of the judiciary.")."

**RELATED CASES:** Alexander, App., 819 N.E.2d 533.

**TITLE:** Stevens v. State
**INDEX NO.:** L.1.b.4.
**CITE:** (9-24-76), Ind., 354 N.E.2d 727
**SUBJECT:** Insanity - prior bad conduct is inadmissible if privileged
**HOLDING:** Plea of not guilty by reason of insanity in criminal case does not open door to privileged matters, although D may waive privilege by himself by introducing evidence falling within privilege. Under plea of not guilty by reason of insanity, general rule is there is great latitude in admitting evidence of other conduct of D. However, it is limited to extent such conduct must be relevant to insanity issue, which is D's state of mind at time of offense. "Opening the door" rule means insanity defense makes legally relevant & admissible all evidence which throws some light on insanity question. Here, Tr. Ct. admitted testimony of D's wife concerning conversations between D & wife in which D threatened to shoot wife & victim. Because such testimony is protected under marital privilege statute, Ind. Code § 31-1-14-5, & D did not introduce any evidence of confidential marital communications, Tr. Ct. erroneously admitted D's wife's testimony on subject. Held, judgment affirmed.

**TITLE:** Thomas v. State
**INDEX NO.:** L.1.b.4.
**CITE:** (12/26/85), Ind., 486 N.E.2d 531
**SUBJECT:** Insanity - bifurcation
**HOLDING:** Tr. Ct. did not err by permitting introduction of videotape of examination of Dr. Klassen (who had examined D pursuant to his insanity defense). Here, Dr. Klassen was unavailable for trial, so his testimony was videotaped & introduced following testimony of the other examining psychiatrist, after prosecution & D had rested. D contends Klassen's testimony was in contravention of statutory requirement that testimony of psychiatrist follow prosecution & defense evidence. D acknowledges tape was played at appropriate time, but argues (1) he was denied opportunity to question Klassen re actual evidence adduced & issues raised at trial & (2) legislature intentionally placed testimony at conclusion of cases-in-chief to permit evidence to be tried together & placed within psychiatric framework. D *cites* Phelan 406 N.E.2d 237 (error to allow psychiatrist to testify in case-in-chief; held, error harmless). Ct. finds purpose of statute is to separate evidence re substantive crime from evidence related to issue of sanity. Held, no error.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.b.5. GBMI (Guilty but mentally ill) (Ind. Code 35-36-2-3(4)) (see, also E.7.b)

**TITLE:** Cate v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (12-14-94), Ind., 644 N.E.2d 546
**SUBJECT:** Sufficiency of evidence - guilty but mentally ill
**HOLDING:** There was minimum evidence sufficient for jury to reject insanity defense & find D guilty but mentally ill. Although unanimous medical expert testimony was presented that D was insane at the time he committed murder, this evidence was not conclusive. Record contained evidence of D's lucidity after arrest, demonstrating awareness of actions & deliberation in accomplishing killing. Evidence of intent when D fired ten bullets into daughter was sufficient to support conviction. Held, conviction affirmed.

**TITLE:** Gore v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (4/29/2014), 7 N.E.3d 387 (Ind. Ct. App 2014)
**SUBJECT:** Guilty but mentally ill finding affirmed - conflicting expert opinions
**HOLDING:** In murder and battery prosecution, jury did not clearly err in finding D guilty but mentally ill instead of not guilty by reason of insanity. D is schizophrenic and has a history of mental health issues, having been hospitalized at least five times by his family due to mental health reasons. D called a friend to pick him up, and they drove around to look for marijuana. The victim and victim's girlfriend noticed that D was dressed all in black and warmly for the weather, but did not seem agitated. As victim's girfriend drove, D shot his friend multiple times and shot girlfriend in the leg. D jumped out of the car and police caught him a few blocks away. D was initially found incompetent to stand trial, but was restored to competency.

Trial testimony of four experts did not, as D claimed, reflect that three experts found him insane and one expert provided no opinion. On the contrary, it showed D's expert applied an incorrect standard, one State expert testified D's ability to appreciate wrongfulness “might” have been affected by his mental illness, another testified D was not insane, and the third State expert testified D was insane based on his interviews with his mother and cousin. The disagreement among the experts as to whether D was insane at the time of his offense amounts to an evidentiary conflict, which cannot be reweighed on appeal. Held, judgment affirmed.

**TITLE:** Hurst v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (8-26-98), Ind., 699 N.E.2d 651
**SUBJECT:** Failure to return guilty but mentally ill verdict - standard of review
**HOLDING:** When D challenges jury's rejection of guilty but mentally ill verdict, Ct. will review jury's guilty verdict in light of whether there was sufficient evidence to sustain conviction. Here, court-appointed psychiatrist found that D suffered from LSD psychosis which substantially disturbed his thinking, feeling & behavior, & impaired his ability to function. Psychiatrist testified that LSD psychosis was mental illness. Court-appointed clinical psychologist, however, testified that D was not mentally ill. This was sufficient evidence for jury to return verdict of guilty rather than guilty but mentally ill.

Ct. noted that independent of Ind. Code § 35-36-2-5, which provides for evaluation & treatment procedures upon finding of guilty but mentally ill, Department of Correction is required to conduct psychiatric evaluation & order psychiatric services for all committed offenders. Ind. Code §§ 11-10-1-2 & 3(b). D failed to demonstrate that he would have received some advantage had he been found guilty but mentally ill that he will not otherwise receive. Held, judgment affirmed.

**TITLE:** Miller v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (7/13/2018) 106 N.E.3d 1067 (Ind. Ct. App 2018)
**SUBJECT:** Need for immediate assessment of mentally ill Ds
**HOLDING:** As he has done in several other published opinions, Judge Mathias observed that severely mentally ill Ds should, once charged, be immediately assessed by mental health professionals to determine if they were able to have formed the requisite mens rea to commit the crime at issue. Here, D slashed Jeremy Kohn's throat. Both during and after the crime, D exhibited bizarre behavior and was eventually diagnosed with schizophrenia. He was initially declared incompetent to stand trial but once competency was restored, he was tried and found guilty but mentally ill of attempted murder. Addressing Indiana's deficient system for mentally ill Ds, Judge Mathias observed: "This is precisely the conundrum mentally ill criminal Ds face in Indiana. Severe mental illness at the time of the charged offense can be ignored and the D referred to mental health confinement where psychotropic medications are forcibly administered in order to restore the D's mental health for trial. The proper protocol should be to use the assessment of mental health professionals immediately after one or more crimes are charged to consider whether the D could have formed the legally required mens rea to commit the crime charged. If not, the D should more properly be committed to Indiana's mental health system for treatment, rather than charged with crime(s), where such a D might well spend the rest of her or his life." Slip op. at 6, n.2. These words echo Judge Mathias's concurrence in Habibzadah v. State, 904 N.E.2d 367, 371 (Ind. Ct. App 2009), and his dissent in Wampler v. State, 57 N.E.3d 884, 890 (Ind. Ct. App 2016), where, in both cases, he wrote:

"Our criminal justice system needs an earlier and intervening procedure to determine competency retroactively to the time of the alleged crime. Perhaps we as a society need to consider the concept of a D being unchargeable because of mental illness under Indiana Code section 35-41-3-6, and not just guilty but mentally ill under Indiana Code section 35-36-2-1, et. seq. In either case, the commitment proceedings provided for in Indiana Code section 35-36-2-4 would both protect society and best care for the D involved. "[I]t is time for the truly long-term, incompetent criminal D to have an earlier and intervening opportunity for a determination of his or her competency at the time of the crime alleged. Such a procedure convened soon after arrest, rather than years later when stale evidence and dim or non-existent memories are all that are left, or never, would best serve society and the D."

This language was the basis of the Supreme Court's decision to reduce Wampler's sentence on transfer. "Pursuant to our authority under Appellate Rule 7(B), and on the strength of Judge Mathias's dissent, we find that an aggregate sentence of thirty-three years is inappropriate." Wampler v. State, 67 N.E.3d 633, 635 (Ind. 2017). Held, judgment affirmed.

**TITLE:** Reighard v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (1/5/84), Ind., 457 N.E.2d 557
**SUBJECT:** GBMI - sufficiency
**HOLDING:** Jury heard sufficient testimony to support GBMI verdict & was fully instructed on elements of offense charged & legal definitions of "insanity" & "mentally ill." Here, psychiatrists testified D was suffering from mental illness, but none found him insane. Lay witnesses testified re observations & opinions re D's mental condition at time of shooting (severe mental & emotional problems). D had been treated for nervous condition since he was a teenager; his mental condition had started to deteriorate in 1979 when his infant son died (for which D blamed himself). Some family members said they felt he should have been in hospital for treatment prior to shooting. Jury was entitled to consider both lay & expert testimony, as well as D's actions, in assessing his mental capacity at time of shooting. Held, judgment affirmed.

**RELATED CASES:** Green 469 N.E.2d 1169 (GBMI instructions, set forth in opinion, were proper).

**TITLE:** Taylor v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (10/25/82), Ind., 440 N.E.2d 1109
**SUBJECT:** GBMI - constitutionality
**HOLDING:** Guilty but mentally ill statute is not unconstitutional, either as applied or on its face, because of (1) vagueness, (2) lack of specificity of the charge, or (3) equal protection. Ct. recognizes insanity & mental illness as defined by legislature involve similar behavioral characteristics. Existence of a mental disease does not, ipso factor, render D legally insane. Hill 251 N.E.2d 429. Ct. relies in part on Michigan cases to reach holding. Held, Ind. Code 35-5-2-3 (verdict choices), now Ind. Code 35-36-2-3, is constitutional.

**RELATED CASES:** Gambill, 675 N.E.2d 668 (verdict option of Guilty but Mentally Ill does not deny equal protection under Art. I, Sec. 23 of Ind. Const.); Palmer 486 N.E.2d 477 (D lacked standing to challenge GBMI statute, see card at G.6.b).

**TITLE:** Thompson v. State
**INDEX NO.:** L.1.b.5.
**CITE:** (3-23-04), Ind., 804 N.E.2d 1146
**SUBJECT:** Guilty but mentally ill finding affirmed - unanimous expert testimony of D's insanity
**HOLDING:** Despite unanimous expert testimony that D was insane at time of crime, there was other evidence of probative value from which a conflicting inference could be drawn, & Tr. Ct. was entitled to find that D was mentally ill but able to distinguish right from wrong. Trier of fact is entitled to decide whether to accept or reject opinions of experts on insanity, & conflicting lay testimony is not required for trier of fact to reject expert testimony.

To avoid responsibility for crime proven by State, D must establish insanity defense by a preponderance of evidence. Ind. Code 35-41-4-1(b). Here, D waived jury trial on residential entry charge & parties stipulated to psychiatric evaluations made in connection with unrelated charges. Two Ct.-appointed psychiatrists concluded that D was not able to understand wrongfulness of actions for charges that took place two days after crime alleged here. Although State did not present expert or lay witness testimony as to D's sanity, non-medical evidence of D's sanity could be gleaned from affidavit, e.g., that D took her belongings with her as she left victim's home, had no psychotic symptoms when released from hospital a few days before incident, & had history of avoiding criminal responsibility through her illness. Trier of fact was entitled to prefer this evidence to psychiatric examinations conducted weeks or months later. Held, transfer granted, Ct. App.' opinion at 782 N.E.2d 451 vacated, judgment affirmed. Sullivan, J., concurring, noted that there will be insufficient evidence to convict where: 1) there is unanimous, credible expert testimony that a D is insane at time of crime at issue & 2) there is no other evidence of probative value from which a conflicting inference can be drawn.

**RELATED CASES:** Fernbach, 954 N.E.2d 1080 (Ind. Ct. App 2011) (although experts who testified unanimously opined that D was insane at the time of the shootings, there was probative evidence upon which to reject their opinions; an officer who dealt with D after shootings felt D understood the difference between right and wrong, and a jail nurse thought D was faking the extent of his mental illness); Galloway, 938 N.E.2d 699 (Ind. 2010) (insufficient evidence to support the GBMI verdict where the totality of the circumstances, i.e., lay testimony, demeanor and expert testimony, was unconflicting that D was insane); Jones, App., 825 N.E.2d 926 (given several lay witnesses' testimony from which one could infer D was sane, jury's determination that D was guilty but mentally ill was not contrary to law; three doctors testified that D suffered from schizophrenia & was insane at the time he killed his child & attempted to kill his mother); Carson, App., 807 N.E.2d 115 (Tr. Ct.'s determination that D was guilty but mentally ill of attempted murder was not contrary to law, despite D's argument that evidence supported finding that he was insane at time of offense).

# L. DEFENSES

## L.1. Lack of capacity

### L.1.c. Diminished capacity

**TITLE:** Neaveill v. State
**INDEX NO.:** L.1.c.
**CITE:** (1st Dist. 2/27/85), Ind. App., 474 N.E.2d 1045
**SUBJECT:** Diminished capacity - low IQ
**HOLDING:** Tr. Ct. did not err in refusing D's tendered instruction. Here, D, with IQ of 72 (borderline mentally retarded), was charged with child molesting/conspiracy/incest in connection with her husband's sexual relations with their daughter. Psychiatrist testified re IQ, passivity & that D was easily influenced by persons of superior intelligence/stronger will such as her husband. Parties stipulated D was not under duress/threat/intimidation at time of acts charged. D tendered instruction that if she lacked mental capacity to oppose crimes being committed by her husband, she was not guilty of aiding/abetting such offenses. Low mental capacity is no defense to criminal charge. Brown 448 N.E.2d 10. Mental condition may be offered to negate capacity to form criminal intent. Terry 465 N.E.2d 1085 (card at L.1.e). Tr. Ct. gave instruction (set forth in opinion) adequately covering capacity to form criminal intent. Held, no error.

**RELATED CASES:** Pierson, 73 N.E.3d 737 (Ind. Ct. App 2017) (D's intellectual disability did not prevent him from forming requisite intent to knowingly and voluntarily commit Neglect of a Dependent Resulting in Death.), Reed, App., 693 N.E.2d 988 (evidence that transient ischemic attacks placed D in state of confusion & disorientation was not evidence of diminished capacity but rather evidence of negating intent); Cardine 475 N.E.2d 696 (no error in refusing to admit evidence that D had been treated for alcoholism after his arrest; Ind. does not recognize separate legal defense of diminished capacity, citing Cowell 331 N.E.2d 21); Brown 448 N.E.2d 10 (held, Tr. Ct. did not err in granting state's motion in limine to bar testimony of defense witness re D's low IQ; D made offer to prove testimony was relevant on culpability element but Ct. finds that low mental capacity is not proper subject of expert testimony where insanity defense is not raised); Fuller, 304 N.E.2d 305 (Tr. Ct. did not err in refusing D's instruction that intelligence is factor to be considered in determining if D had requisite capacity to conform his actions to requirements of law; only testimony on matter of intelligence indicated that D's IQ was around 90).

**TITLE:** Pierson v. State
**INDEX NO.:** L.1.c.
**CITE:** (4/4/2017), 73 N.E.3d 737 (Ind. Ct. App 2017)
**SUBJECT:** Sufficient evidence for Neglect of Dependent despite intellectual disabilities
**HOLDING:** The State presented sufficient evidence that Defendant's intellectual disability did not prevent him from forming the requisite intent to knowingly and voluntarily commit Neglect of a Dependent Resulting in Death, a Class A felony. See Ind. Code § 35-46-1-4(a)(1).

Defendant and Amy Hockett had their fourth child, K.H., in October of 2011. When discharged from the hospital, K.H. weighed just under eight pounds. On February 5, 2012, Defendant and Hockett called the police because K.H. was not breathing. Emergency responders found Defendant holding the dead K.H. There were urine-soaked diapers around the home, which were also covered in feces. At death, K.H. weighed only six pounds, two ounces, his body having wasted "away to practically nothing" from malnourishment.

At trial, experts testified Defendant was intellectually disabled based on his IQ score of 67 and his inability to respond to basic abstract questioning. Defendant's disability imposed moderate limits on his capacity to maintain concentration, keep a routine, or carry out basic life activities. One expert testified that someone like Defendant might not notice his own medical needs, let alone the medical needs of someone else. However, experts testified Defendant would be capable of performing some basic life tasks, like feeding a child. For instance, even though Defendant had difficulty with even the most basic arithmetic, he understood the proper ratio of dried formula to water: one scoop of formula for every two ounces of water, two scoops for four ounces, and three scoops for six ounces. Several witnesses also testified that Defendant was able to provide basic care for the children, including changing them, playing with them, and feeding them. Defendant was convicted and was sentenced to 37 years.

"This case is a tragedy. . . . When a parent is intellectually disabled and struggles with the basics of taking care of himself, let alone his children, it feels less than perfectly just to send him away to prison for failing to do what he may be barely capable of doing. Of course, it would also be unjust to the child-victims of those who neglect their dependents if our justice system made an exception for parents in difficult circumstances, as those children likely require the most protection." (Emphasis added).

While some evidence suggested Defendant was incapable of understanding the harm that failure to feed K.H. was inflicting, other evidence suggested the contrary. Because of the conflicting evidence, the standard of review required the Court to affirm the jury's verdict. Held, judgment affirmed.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.d. Post-traumatic stress disorder

**TITLE:** Lyon v. State
**INDEX NO.:** L.1.d.
**CITE:** (02-12-93), Ind., 608 N.E.2d 1368
**SUBJECT:** Post-Traumatic Stress Disorder (PTSD) evidence insufficient to support insanity defense
**HOLDING:** Although D suffered from PTSD, evidence was insufficient to show that mental illness precluded him from knowing right from wrong. D, Korean War veteran who suffered from PTSD & raised insanity defense, was convicted of murder after killing his supervisor. After working as janitor for 4 or 5 years, he was put on long-term disability & sent to Employee Assistance Program. He made threats to kill both himself & his supervisor. He was eventually terminated from work, & after becoming very frustrated concerning his disability benefits, loaded pistol, walked into victim's office, & fired three shots at victim, killing her. He then walked into adjacent office, laid gun on desk, & waited for police. Ct.-appointed psychiatrist testified that D had delusion disorder, but was able to differentiate right from wrong, & psychologist testified that he was not suffering from any mental disease that made him unable to control behavior. Psychologist called by D testified that D's war experience had profound effect on him, & that he was possibly suffering from organic brain dysfunction & had dementia, presenile onset. Ct. found preponderance of evidence did not support insanity defense, & any mental illness he had did not render him "unable to appreciate the wrongfulness of the conduct at the time of the offense," as required by Ind. Code 35-41-3-6. Ct. seemed to find that by going into office, laying down gun, & waiting for police, D demonstrated his realization of wrongfulness of his conduct. Held, conviction affirmed.

**TITLE:** Porter v. McCollum
**INDEX NO.:** L.1.d.
**CITE:** (U.S.), (11-30-09), 130 S.Ct. 447
**SUBJECT:** Post-combat stress disorder as a defense in capital cases
**HOLDING:** Per Curiam. Eleventh Circuit erred in rejecting district court's conclusion that D's counsel failed completely to adduce mitigation evidence relating to his lack of education, his mental health, his family background, and his battlefield service in Korean War and trauma arising from that experience. D was sentenced to death for murdering his former girlfriend and her boyfriend. He represented himself at trial, pleaded guilty and was appointed standby counsel for penalty phase. Counsel put on D's ex-wife as a witness and read an excerpt from a deposition but failed to put on any evidence related to D's mental health, family background, or his military service. The relevance of D's extensive combat experience "is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [him]." Post-traumatic stress disorder is not uncommon among veterans returning from combat, and in D's case, a medical expert testified that his symptoms "would 'easily' warrant a diagnosis" of PTSD. Had jury heard about D's wartime experiences and other evidence about mental problems, it might well have refused to recommend a death sentence. Held, reversed and remanded for further proceedings.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.e. Intoxication (Ind. Code 35-41-3-5)

**TITLE:** Alfrey v. State
**INDEX NO.:** L.1.e.
**CITE:** (01-19-12), 960 N.E.2d 229 (Ind. Ct. App 2012)
**SUBJECT:** Intoxication - taking medicine as prescribed is not a defense
**HOLDING:** Tr. Ct. did not abuse its discretion by giving its instruction on intoxication. Intoxication is not a defense in a prosecution for an offense unless the D meets the requirements of Ind. Code 35-41-3-5: 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. Ind. Code 35-41-2-5.

Here, D was charged with crimes resulting from his intoxication from prescribed drugs, such as OxyContin, for his pain from cancer and other medical issues. The jury was instructed that:

Voluntary intoxication is not a defense to a charge of burglary, theft, trespass, residential entry, or escape. You may not take voluntary intoxication into consideration in determining whether the D acted intentionally or knowingly as alleged in the informations.

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.

Involuntary intoxication is a defense to the crime charged if the intoxication rises to the level that D was unable to appreciate the wrongfulness of the conduct at the time of the offense.

Even if D's use of the drugs at issue was entirely as prescribed, the legislature did not list it as a circumstance in which intoxication is a defense. There are only the two narrow exceptions outlined in the statute, and D's conduct did not fall within them. Thus, Tr. Ct.'s instruction was a complete and accurate statement of the law. Held, judgment affirmed.

**TITLE:** Babbs v. State
**INDEX NO.:** L.1.e.
**CITE:** (3rd Dist., 09-07-93), Ind. App., 621 N.E.2d 326
**SUBJECT:** Voluntary intoxication instruction not fundamental error
**HOLDING:** Use of instruction stating voluntary intoxication was not defense to robbery, attempted murder, battery or criminal recklessness because it is defense only to extent it negates element of offense referred to by "with intent to" or "with intention to" was not fundamental error. D did not object to instruction nor tender one of his own & did not raise issue on direct appeal. Furthermore, instruction was correct statement of law at time of D's trial. While Terry, 465 N.E.2d 1085, held defense was available to person charged with any crime, & holding is applicable retroactively, Pavey, 498 N.E.2d 1195, instruction as given does not necessarily constitute fundamental error. Ct. found PCR Ct. was correct in determining D was not entitled to intoxication instruction, & therefore giving of instruction restricting availability of defense did not require reversal. Although D was drinking whiskey & was "tipsy," there was also evidence that he had enough foresight, dexterity & coordination to obtain rope, tie up victim, commit robbery in secluded part of store, search for money, warn accomplice, & effectuate escape when police came. He also gave clear account of incident in statement to police & trial testimony. Because he was not entitled to instruction, error was harmless, & other instructions given properly informed jury of elements of intent State was required to prove.

**TITLE:** Barnes v. State
**INDEX NO.:** L.1.e.
**CITE:** (3-11-98), Ind., 693 N.E.2d 520
**SUBJECT:** Voluntary intoxication - memory loss
**HOLDING:** State did not fail to prove beyond reasonable doubt that D possessed required mens rea to commit murder. Evidence of capacity to form criminal mens reas includes ability to devise plan, operate equipment, instruct behavior of others, carry out acts requiring physical skill attempt to hide wrongdoing or take oneself from place to place after crime. Memory loss alone, however, is not inconsistent with ability to form criminal mens rea. McClain, 678 N.E.2d 104. Although D contended that he had no memory of killing victim, D was able to formulate plan after killing by moving body & getting his brother for help. Further, D attempted to hide his wrongdoing by wrapping body in sheet, fleeing scene, climbing through window of house & walking back to house when car overheated. Thus, State presented sufficient evidence proving that D was aware of his actions. Held, conviction affirmed.

**TITLE:** Brancaccio v. State
**INDEX NO.:** L.1.e.
**CITE:** 698 So.2d 597 (Fla. Ct. App. 1997)
**SUBJECT:** Involuntary Intoxication -- Prescription Use of Anti-depressant Zoloft
**HOLDING:** D who presented expert testimony that side effects of prescription anti- depressant, Zoloft, caused him to beat stranger to death was entitled to jury instruction on involuntary intoxication.

**TITLE:** Brown v. State
**INDEX NO.:** L.1.e.
**CITE:** (3rd Dist., 08-12-93), Ind. App., 618 N.E.2d 1348
**SUBJECT:** Voluntary intoxication did not negate intent
**HOLDING:** Although D was extremely intoxicated, there was sufficient evidence to show he intended to cause injury to victim when he beat him, & therefore voluntary intoxication was not defense to battery. D was discovered by police so intoxicated that he was unconscious. He was arrested & placed in jail cell with victim. Later D asked other inmates for cigarette & one inmate said if D would silence snoring victim & show inmate some blood, he would give D cigarette. D then beat & kicked victim while other inmates cheered him on. He threw victim's bloody shirt out of cell, showed his bloody hands, & said, "Give me the cigarette. Look. I got him bloody, good & bloody." Later D told police he got very mad when victim mumbled something, D asked him to be quiet, & hit him number of times.

Although agreeing D was extremely intoxicated, Ct. noted that voluntary intoxication is defense only when it negates element of offense referred to as "with intent to" or "with an intention to." Ct. found underlying principle was necessity of negating mens rea. Because there was sufficient evidence to show D intended to inflict injury on victim, Ct. determined that intoxication was no defense.

**Note:** Effective July 1, 1997, according to Ind. Code § 35-41-2-5, voluntary intoxication is no longer defense to crime; however, it may be argued that intoxication evidence is still admissible because it is always relevant to D's intent/state of mind.

**RELATED CASES:** Vickers, App., 653 N.E.2d 110 (intoxication was not so severe as to prevent D from knowingly or intentionally fleeing from police officer; evidence sufficient to sustain conviction for resisting law enforcement); Hubbard, 469 N.E.2d 740 (D can offer defense of voluntary intoxication to any crime. However, potential of this defense should not be confused with reality of situation).

**TITLE:** Burns v. State
**INDEX NO.:** L.1.e.
**CITE:** (1st Dist. 7/17/90), Ind. App., 556 N.E.2d 955
**SUBJECT:** Voluntary intoxication instruction - leaving scene of property damage accident
**HOLDING:** Tr. Ct. erred in refusing D's tendered instruction on defense of voluntary intoxication, as to offense of leaving scene of property damage accident. D was charged with leaving scene of property damage accident, driving while suspended, & driving while intoxicated. Tr. Ct. refused D's tendered instruction on voluntary intoxication as defense, & D challenges this on appeal. Factors Ct. considers on appeal include (1) whether tendered instruction correctly states law; (2) whether evidence supports giving instruction; & (3) whether substance of tendered instruction was covered by other instructions given. Hughes 546 N.E.2d 1203. Where D is charged with leaving scene of personal injury accident, under Ind. Code 9-4-1-40, knowledge that such accident has occurred is element of offense. Micinski 487 N.E.2d 150. Prosecution for leaving scene of property damage accident, under same statute, also requires proof of knowledge. Any factor which serves to negate existence of mens rea must be considered by trier of fact, & voluntary intoxication may be such factor. Terry 465 N.E.2d 1085. To negate mens rea, intoxication must be of such degree as to deprive D of power to deliberate or to form necessary state of mind, & this is question of fact for trier of fact. Melendez 511 N.E.2d 454. Because D's knowledge that property damage had occurred was element of offense, instruction on effect of voluntary intoxication as to that element was correct statement of law. Further, evidence supported giving of instruction, & substance of instruction was not otherwise covered. Held, reversed & remanded for new trial on this charge.

**TITLE:** Butrum v. State
**INDEX NO.:** L.1.e.
**CITE:** (10-31-84), Ind., 469 N.E.2d 1174
**SUBJECT:** Intoxication - evidence relevant to determination of D's mental condition
**HOLDING:** In homicide prosecution, fact of intoxication, although not itself defense, was relevant to issue of D's mental condition at time of offense. Intoxication is not defense but may be considered as would be any other mental incapacity of such severe degree that it would preclude ability to form intent. See Terry, 465 N.E.2d 1085. Tr. Ct. correctly permitted expert witnesses to testify concerning intoxication & effect that might have on ability to form intent. Tr. Ct. properly instructed jury with respect to consideration of expert testimony, including instruction that jury was able to decide extent of D's mental disability from consideration of all evidence relating thereto. Held, judgment affirmed; DeBruler, J., concurring in result.

**NOTE:** This case could be used as argument to admit evidence of voluntary intoxication, otherwise inadmissible under Ind. Code 35-41-2-5.

**RELATED CASES:** Lynn, 392 N.E.2d 449 (all evidence which has logical reference to D's sanity, including D's sobriety & behavior on date of offense, is competent on issue of insanity).

**TITLE:** Davidson v. State

**INDEX NO.:** L.1.e.

**CITE:** (06-28-06), Ind., 849 N.E.2d 591

**SUBJECT:** Evidence of involuntary intoxication does not require instruction including voluntariness as element of crime

**HOLDING:** Tr. Ct. did not err by refusing to read D's tendered instruction adding "& voluntarily" as an additional element of murder. If evidence raised voluntariness as an issue, State must prove the D acted voluntarily beyond a reasonable doubt. Baird v. State, 604 N.E.2d 1170 (Ind. 1992). In fact, Indiana Pattern Jury Instructions insert the phrase "& voluntarily" into elements of crime when evidence raises voluntariness issue. Ind. Pattern Jury Inst. 9.01 (3rd. ed. 2005). Here, D presented expert testimony that combination of Ambien & Zoloft, which D took night of murder, could adversely affect person's control over impulsive behavior, causing one to become uninhibited. Experts also testified that D was unaware of these potential adverse effects, & D was in a disassociative state rendering his conduct involuntary. This testimony supports an involuntary intoxication defense. If the Ct. were to hold that evidence of intoxication raised question of voluntary conduct, result would be that all intoxication, & not just involuntary intoxication, would be a defense. Further, because D has burden to prove defense of involuntary intoxication, D could switch burden back to State by framing intoxication as evidence of voluntariness. Thus, evidence of intoxication does not raise issue of voluntariness, & does not require Ct. to add the phrase "& voluntarily" into the element instruction of the charged crime. Held, judgment affirmed.

**TITLE:** Fowler v. State
**INDEX NO.:** L.1.e.
**CITE:** (8/24/88), Ind., 526 N.E.2d 1181
**SUBJECT:** Instruction - burden of proof; voluntary intoxication defense
**HOLDING:** Tr. Ct. erred in instructing jury D had burden of proving voluntary intoxication defense beyond reasonable doubt. Evidence of voluntary intoxication is admissible on issue of mens rea. Whenever state is required to prove particular state of mind, evidence of intoxication is permitted to negate existence of that element. State must prove existence of each element, & burden cannot be shifted to D. However, D may have burden of raising affirmative defense. To get intoxication defense before jury, D must present such evidence of intoxication that, if believed, could create reasonable doubt that D entertained requisite specific intent. Williams 402 N.E.2d 954. D presented such evidence here. However, instruction shifted to D burden of proving beyond reasonable doubt that he did not have specific intent to kill. Held, reversed & remanded for new trial.

**TITLE:** Hall v. State
**INDEX NO.:** L.1.e.
**CITE:** (07/03/91), Ind., 574 N.E.2d 287
**SUBJECT:** Voluntary Intoxication - Burden of Proof error harmless
**HOLDING:** Instruction that required D to carry burden of proving voluntary intoxication is impermissible shifting of burden of proof on an element of the offense, namely intent. Ind. S.Ct. granted transfer of decision in Hall, App., 566 N.E.2d 1072, to resolve the question of the burden of proof of voluntary intoxication. Although making it clear that instruction placing burden of proof on D was erroneous, Ct. also held that giving of such erroneous instruction would be subject to harmless error analysis. If instruction given did not call for proof by D beyond reasonable doubt or for proof of specific facts, but only called for proving the defense generally, it would not be considered as fundamental error. At trial there had been several modifications of instructions tendered by both state & D but final version with burden on D had not been objected to. For this reason, & fact that there were other basic instructions given on burden of State to prove all elements of offense, Ct. found instruction error to be harmless, & did not disturb convictions upheld by the Ct. App. Held, convictions af firmed.

**TITLE:** Heyward v. State
**INDEX NO.:** L.1.e.
**CITE:** (11/2/84), Ind., 470 N.E.2d 63
**SUBJECT:** Involuntary intoxication - instruction; sufficiency
**HOLDING:** Tr. Ct. did not err in combining D's involuntary-intoxication-is-complete-defense instruction with state's tendered instruction that "Involuntary intoxication is a defense to crime if intoxication rises to level that D lacked substantial capacity either to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law." To operate as complete defense, intoxication must have deprived accused of power to deliberate/form necessary design or guilty intent. Jackson 426 N.E.2d 685. Intoxication must have put D, at least temporarily, into state of mind resembling insanity. Thus, Tr. Ct. correctly modified D's proposed instruction by adding language taken verbatim from IN's insanity defense statute, Ind. Code 35-41-3-6(a). Held, no error.

**RELATED CASES:** Neal, App., 506 N.E.2d 1116 (Crim L 53, 332, 570(1); evidence was sufficient to find D formed requisite intent to commit burglary despite D's contention he unwittingly mixed prescription drugs & alcohol); Carter, App., 408 N.E.2d 790 (involuntary intoxication defense is applicable to only two types of offense, offenses wherein crime depends upon intent and purpose, rather than motive, aim, or goal with which act was done and offenses wherein knowledge of attendant circumstance is material element of crime).

**TITLE:** Moore v. State
**INDEX NO.:** L.1.e.
**CITE:** (3rd Dist., 11-26-96), Ind. App., 673 N.E.2d 776
**SUBJECT:** Voluntary intoxication (VI) instruction - fundamental error
**HOLDING:** Following instruction concerning affirmative defense of VI impermissibly placed burden of persuasion on D to prove that he was so intoxicated that he could not form requisite intent to kill: Voluntary intoxication requires a showing by the D that he was so intoxicated as to be incapable of formulating the requisite intent. Stated differently, the D must show that he was intoxicated to such a degree as to deprive him of the power to deliberate or to form the necessary design or guilty intent....The D must show that he was incapable of performing acts which require a significant degree of physical or intellectual skills.

Instruction clearly placed burden of proof upon D to negate mens rea element of attempted murder, thereby constituting fundamental error. Street, 567 N.E.2d 102. Accordingly, harmless error analysis did not apply in this case. Held, reversed & remanded; Hoffman, J., dissenting.

**RELATED CASES:** Cheshier, App., 690 N.E.2d 1226 (instruction stating D should not be relieved of responsibility if he could devise plan, operate equipment, instruct behavior of others to carry out acts requiring physical skill,was not fundamental error).

**TITLE:** Russelburg v. State
**INDEX NO.:** L.1.e.
**CITE:** (10/24/88), Ind., 529 N.E.2d 1193
**SUBJECT:** Voluntary intoxication - failure to give instruction
**HOLDING:** Tr. Ct. did not err in failing to give D's tendered instruction on voluntary intoxication defense. D was charged with criminal recklessness, attempted murder, & robbery. Tr. Ct. admitted testimony from D's psychiatric expert that D was at least intoxicated & may have been undergoing stress-induced "psychogenic fugue." According to expert, this alcoholic disorder involves splitting of personality, so that individual is able to perform complicated intellectual & physical functions while lacking ability to form intent. D tendered instruction on defense of voluntary intoxication, which was refused. On appeal, D acknowledges rule that voluntary intoxication will not excuse D who is capable of devising plan, operate equipment, instruct others or perform acts requiring physical skill, all of which D did in course of alleged offenses. Terry, 465 N.E.2d 1085. However, he argues that testimony of expert supported giving instruction in his case. Ind. S. Ct. reasons that expert's testimony supported instruction on insanity defense, which was given here. However, Tr. Ct. instructed jury that it must find D acted "knowingly," & other instructions defined that term. Held, no error in refusing instruction on voluntary intoxication defense. DeBruler, J., DISSENTS, arguing that insanity & voluntary intoxication defenses are not mutually exclusive.

**RELATED CASES:** Dalton, App., 418 N.E.2d 544 (refusal to give instruction on intoxication was proper, although testimony disclosed D had been drinking and consumed slight quantity of marijuana).

**TITLE:** Sanchez v. State
**INDEX NO.:** L.1.e.
**CITE:** (6-26-01), Ind., 749 N.E.2d 509
**SUBJECT:** No voluntary intoxication defense under Indiana Constitution
**HOLDING:** Ind. Code 35-41-2-5, prohibiting use of evidence of voluntary intoxication to negate mens rea requirement in criminal cases, does not violate Indiana Constitution. Thus, in rape & criminal confinement prosecution, Tr. Ct. did not err in instructing jury, pursuant to statute, that it could not consider evidence of D's intoxication in determining whether he acted knowingly or intentionally as alleged in charging information. Ct. disagreed with Terry, 465 N.E.2d 1085, to extent it held that intent is constitutionally required element of every crime. Ind. intoxication statute, which eliminates requirement that voluntarily intoxicated D acted "knowingly" or "intentionally" as to those crimes that include those elements, acts qualitatively the same as felony murder, & both are constitutional forms of strict liability.

In concluding that statute does not violate federal due process clause or any notion of fundamental fairness embedded in Ind. Const., Ct. read statute as redefining elements of crimes, not as excluding relevant evidence. Statute redefines requirement of mens rea to include voluntary intoxication, in addition to traditional mental states. Thus, evidence of voluntary intoxication does not negate mens rea requirement; rather, it satisfies this element of crime. D's use of alcohol or drugs may be admissible as general background, or as relevant to something other than lack of mens rea, e.g., identity. Perhaps it may also be relevant to claim of accident under other circumstances. However, other rules of evidence, e.g., Ind.Evid. Rule 404 (b), may preclude use of this evidence if defense objects. Here, evidence of D's intoxication was admitted & embraced by D. If such evidence is admitted, instruction given by Tr. Ct. is proper. Tr. Ct. may properly exclude evidence of blood alcohol content, as was done in this case, if it finds that it bears solely on degree of intoxication. Held, transfer granted, judgment of Tr. Ct. affirmed. Sullivan & Rucker, JJ., concurring in result, argued that voluntary intoxication statute denies D's right to present relevant evidence to negate element of any charged offense.

**RELATED CASES:** Bennett, 175 N.E.3d 331 (Ind. Ct. App. 2021) (permitting voluntary intoxication even to support the subjective belief that force was necessary when arguing self-defense would impermissibly resurrect the voluntary intoxication defense, which is not permitted by Sanchez or I.C. 35-41-2-5); Walls, 993 N.E.2d 262 (Ind. Ct. App 2013) (voluntary intoxication statute does not impose a substantial obstacle to drinking intoxicating beverages; D had a right to drink them, but police got involved only after his state of intoxication and his conduct produced more harm than would be usual to apartment tenants); Orta, 940 N.E. 2d 370 (Ind. Ct. App 2011) (Tr. Ct. properly limited scope of D's cross examination to prevent questioning doctor about effect of voluntary intoxication on D's ability to form requisite mental state for murder); Hornbostel, App., 757 N.E.2d 170 (no error in instructing jury with verbatim recitation of Ind. Code 35-41-3-5, which limits intoxication defense to instances where intoxication resulted from introduction of substance into D's body without his consent or when he did not know that substance might cause intoxication).

**TITLE:** Street v. State
**INDEX NO.:** L.1.e.
**CITE:** (03/07/91), Ind., 567 N.E.2d 102
**SUBJECT:** Voluntary Intoxication (VI), burden of proof
**HOLDING:** Instruction on VI that included language that VI was defense if it rose to level that capacity to form intent was negated, & then stated: "[t]he D has the burden of proving that the D reached this degree of intoxication," was erroneous, because juror could reasonably understand it as requiring D to convince jury that he lacked capacity to form intent, an element of offense. Decision on transfer reverses Street, Ind. App., 559 N.E.2d 375, wherein Ct. App. found instruction not erroneous. Despite expression of limited applicability of defense in Ind. Code 35-41-3-5, it may be offered as defense to any crime, Terry 465 N.E.2d 1085. Presupposition upon which defense of VI rests is that "intoxication can be so severe as to render a person incapable of forming or entertaining the criminal intent required to commit a crime, yet not so severe as to render such person incapable of the conduct required to commit the crime." Therefore, if intoxication is sufficient, it can negate essential element of crime. Burden of raising, asserting & pointing out factual basis for defense is on D, & question of whether evidence of intoxication is sufficient to require an instruction on it is question for trial judge; but placing burden on D to prove defense beyond reasonable doubt is erroneous in that it shifts burden of proof on element of the crime. To extent that instruction in Huffman 543 N.E.2d 360, 378 may be in conflict with this decision, it is overruled. Held, conviction reversed & new trial ordered.

**RELATED CASES:** Seeley, App., 678 N.E.2d 1137 (erroneous VI instruction constituted fundamental error); But see Hall 574 N.E.2d 287 at L.1.e, finding such error harmless.

**TITLE:** Terry v. State
**INDEX NO.:** L.1.e.
**CITE:** (7/9/84), Ind., 465 N.E.2d 1085
**SUBJECT:** Voluntary intoxication - defense to any crime
**HOLDING:** Tr. Ct. did not err in refusing D's voluntary intoxication instruction (attempted murder) where evidence showed D drove car/gave directions to others/made decision re own course of conduct. Here, Ct. holds voluntary intoxication statute (Ind. Code 35-41-3-5(b)) unconstitutional. D may offer voluntary intoxication defense to any crime. However, Ct. provides guidance re "reality" of presenting such a defense: D will not be relieved of responsibility if able to devise plan, operate equipment, instruct others, or carry out acts requiring physical skill. Ct. relies on reasoning of Givins' opinion concurring in result in Sills 463 N.E.2d 228 (intoxication is defense to all crimes - because all crimes require mens rea). Held, no error. DeBruler CONCURRING IN RESULT would uphold statute.

**NOTE:** Effective July 1, 1997, according to Ind. Code 35-41-2-5, voluntary intoxication is no longer defense to crime; however, it may be argued that intoxication evidence is still admissible because it is always relevant to D's intent/state of mind.

**RELATED CASES:** Sanchez, 749 N.E.2d 509 (Ind. Code 35-41-2-5, prohibiting use of evidence of voluntary intoxication to negate mens rea requirement in criminal cases, does not violate Indiana Constitution); Pavey 498 N.E.2d 1195 (Ct. applies Terry retroactively, finds D's voluntary intoxication instruction was correct statement of law, & determines that refusal of instruction constitutes reversible error because evidence supports giving it; Shepard DISSENTS finding D was not impaired by alcohol at time he killed his wife); Hubbard 469 N.E.2d 740 (held, improper instruction on intoxication defense harmless error because evidence did not support giving of instruction).

**TITLE:** Thomas v. State
**INDEX NO.:** L.1.e.
**CITE:** (9/28/2016), 61 N.E.3d 1198 (Ind. Ct. App 2016)
**SUBJECT:** Voluntary intoxication not a defense to attempted murder
**HOLDING:** The Tr. Ct. did not err, let alone commit fundamental error, by instructing the jury that voluntary intoxication is not a defense to attempted murder. See Ind. Code § 35-41-2-5; Sanchez v. State, 749 N.E.2d 509 (Ind. 2001).

D fired his shotgun multiple times toward four individuals, grazing one person while striking another in the face. He was charged with, inter alia, four counts of attempted murder. The Tr. Ct. instructed the jury that voluntary intoxication is not a defense.

It is true that Indiana law treats attempted murder differently from other intent crimes, in that it requires proof of specific intent to kill. This, however, does not affect the constitutionality of the voluntary intoxication statute as to attempted murder. "Given that the Indiana legislature has not expressly identified attempted murder as an exception to the law negating voluntary intoxication as a defense, and our Supreme Court has not . . . indicate[ed] that any such exception exists, we decline [D's] invitation to create one." Held, judgment affirmed.

**TITLE:** White v. State

**INDEX NO.:** L.1.e.

**CITE:** (5th Dist., 12-17-96), Ind. App., 675 N.E.2d 345

**SUBJECT:** Erroneous voluntary intoxication (VI) instruction- requiring mandatory minimum level of intoxication

**HOLDING:** In instructing jury on VI defense, Tr. Ct. committed fundamental error in stating that "evidence must show that D was incapable of performing acts which require significant degree of physical or intellectual skills before trier of fact is justified in finding that he was not responsible for his actions because if his intoxication." D argued that statement was erroneous because reasonable jury could interpret language of instruction as direction by Ct. to find intent if it found existence of certain facts. Instruction that compels jury to find D guilty if it finds certain facts are true is forbidden by Indiana Constitution, Article I, Section 19. Pritchard, 230 N.E.2d 416. Instruction here required jury to convict if it did not find that D was incapable of performing acts which require significant degree of physical or intellectual skill. Because instruction was mandatory & bound jury to return guilty verdict upon finding certain facts, instruction impermissibly invaded province of jury. Further, language required finding of mandatory, minimum level of intoxication before jury was permitted to accept defense of voluntary intoxication. Degree of intoxication is question of fact for jury in determining whether D was incapable of formulating requisite intent. Mattingly, 142 N.E.2d 607; Anderson, 380 N.E.2d 606. Because jury could have acquitted D based upon intoxication defense, giving this improper instruction was not harmless error. Held, judgment reversed, case remanded with instructions to grant D's petition for post-conviction relief.

**RELATED CASES:** Curran, App., 675 N.E.2d 341 (error in giving similar instruction was harmless because jury could not have properly found that D was sufficiently intoxicated to prevent formation of criminal intent); Hooker, App., 387 N.E.2d 1354 (any intoxication may be considered in question of specific intent).

**TITLE:** Weaver v. State
**INDEX NO.:** L.1.e.
**CITE:** (12-5-94), Ind., 643 N.E.2d 342
**SUBJECT:** Voluntary intoxication - attempted murder
**HOLDING:** In attempted murder prosecution, reasonable jury could have found that D was not so intoxicated that he was unable to form specific intent to kill victim, granting transfer & vacating Ct. App. decision on this issue at 627 N.E.2d 1311. Affected by his consumption of LSD, D became violent, attacked acquaintances, & severely injured his girlfriend. Evidence & inferences supported jury's conclusion that D had capacity to form intent to kill & acted with that intent. D's recollection of events was more complete at hospital than when he testified at trial, & after witnessing D's inability to respond to questions after having testified at length & responsively, jury was free to conclude that D's apparent disorientation on stand was not genuine. Held, jury verdict affirmed.

# L. DEFENSES

## L.1. Lack of capacity

### L.1.f. Other

**TITLE:** Jones v. State
**INDEX NO.:** L.1.f.
**CITE:** (8-19-82), Ind., 438 N.E.2d 972
**SUBJECT:** Lack of capacity - defense theory
**HOLDING:** D foreclosed entitlement to instruction on lesser included offense. D's proffered lack of capacity was incompatible with theory that D committed lesser included offense of criminal trespass rather than charged burglary offense. Held, judgment affirmed; DeBruler & Hunter, JJ., concurring.

**RELATED CASES:** Mingle, App., 396 N.E.2d 399 (it is impossible to both confess guilt & assert insanity defense, although it is not error to admit evidence relevant to issue other than D's sanity).

**TITLE:** McClain v. State
**INDEX NO.:** L.1.f.
**CITE:** (3-24-97), Ind., 678 N.E.2d 104
**SUBJECT:** Evidence of automatism relevant to issue of voluntariness
**HOLDING:** Where D claimed he was unable to form criminal intent on night of offense due to automatistic state of mind that precluded voluntary behavior, he was entitled to present evidence of automatism to show whether he acted voluntarily. Dissociative state resulting from sleep deprivation, referred to as "automatism," involves sleepwalking, hypnotic states, metabolic disorders, & involuntary convulsions or reflexes. Evidence D sought to present on automatism in this case properly related to voluntariness of his actions within meaning of Ind. Code 35-41-2-1(a). Statute's general purpose is that criminal conduct be "act of choice" by person in "conscious state of mind." In footnote, Ct. rejected State's argument to limit availability of involuntary act statute to convulsions & reflexes. Accordingly, at trial D can call expert witnesses & otherwise present evidence of sleep deprivation & automatism within confines of Indiana Rules of Evidence, subject to State's rebuttal evidence as adversary process allows.

Ct. also held that D's evidence of automatism as pleaded should not be classified as mental disease or defect within meaning of Ind. Code 35-41-3-5 & need not be presented under insanity defense. Merging automatism & insanity defenses in this case would be contrary to legislative intent of Indiana's insanity statute. Accordingly, D was not required to give notice to Tr. Ct. of his intent to impose insanity defense, thus Tr. Ct. erred in granting State's motion in limine to exclude expert testimony after D withdrew his insanity defense. Held, transfer granted, Ct. App.'s opinion at 670 N.E.2d 911 vacated, cause remanded for further proceedings.

**RELATED CASES:** Schlatter, App., 891 N.E.2d 1139 (automatism defense is not available for the voluntarily intoxicated); Reed, App., 693 N.E.2d 988 (evidence of transient ischemic attacks is not mental disease or defect, thus, raising confusion associated with TIA is not required to plead under insanity statute; evidence of TIA is relevant to issue of voluntariness).

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.a. Abandonment (Ind. Code 35-41-3-10)

**TITLE:** Babin v. State
**INDEX NO.:** L.2.a.
**CITE:** (3rd Dist., 02-22-93), Ind. App., 609 N.E.2d 3
**SUBJECT:** Inadequate abandonment defense
**HOLDING:** Evidence was sufficient to overcome defense of abandonment to charge of conspiracy to commit murder. Evidence indicated that D, former police officer, started photographing his adopted daughter in various states of undress in 1987-88, & he admitted to same in 1990. In Feb. 1991, accused child molester told police that D had paid him to give child fatal overdose of drugs, & working with police, informant arranged meeting with D & undercover officer posing as contract killer. D agreed to pay officer to kill child & gave him down payment. Five days later, D canceled contract, apparently saying he could beat child in Ct.

Ind. Code 35-41-3-10 provides defense to various offenses if person "voluntarily abandoned his effort to commit the underlying crime & voluntarily prevented its commission." Defense is only available to those who physically & mentally abandon enterprise where decision to abandon comes from within & is not due to extraneous factors. Peak App., 520 N.E.2d 465. Additionally, D must have abandoned criminal plan before completion of underlying crime, or before it becomes inevitable, Sheckles, 501 N.E.2d 1053.

Officer testified that when D called to cancel plan, he sounded rehearsed or "scripted." All of D's conversations with informant & officer were taped & played to jury, which was able to make own decision as to whether D had experienced true change of heart. D was experienced police officer, & Ct. appeared to conclude abandonment was therefore more likely product of fear of discovery than change of heart. Evidence was sufficient to show D's abandonment was not "voluntary" as required by statute.

**RELATED CASES:** Patterson, App., 729 N.E.2d 1035 (because D's abandonment was made in response to extrinsic factor, i.e., probability of detection, it did not constitute legal defense & D was not entitled to instruction on this theory); Barnes, 378 N.E.2d 839 (when D abandoned robbery plan when his accomplice was unable to open cash register, alleged abandonment was clearly motivated by unanticipated difficulty rather than free and voluntary decision to withdraw).

**TITLE:** Bigger v. State

**INDEX NO.:** L.2.a.

**CITE:** (3/26/2014), 5 N.E.3d 516 (Ind. Ct. App 2014)

**SUBJECT:** D waived issue of whether State presented sufficient evidence to disprove D's abandonment defense

**HOLDING:** D waived claim that the State failed to present sufficient evidence to disprove his claim of abandonment. In December of 2012, D tried to rob a Fort Wayne bank. After the State charged D, at no time did he assert the defense of abandonment. He did not, before trial, file some sort of pleading or notice to advise Tr. Ct. about his intentions. Once the trial was underway, D did not, in any way, inform the court that he intended to pursue this defense. Thus, the jury could not have known to consider the defense in its deliberations of a D's guilt. See Norton v. State, 273 Ind. 635, 408 N.E.2d 514 (1980). Thus, the issue is waived. Held, judgment affirmed.

**TITLE:** Gravens v. State
**INDEX NO.:** L.2.a.
**CITE:** (2nd Dist., 11-3-05), Ind. App., 836 N.E.2d 490
**SUBJECT:** Abandonment instruction properly given
**HOLDING:** In attempted robbery prosecution, Tr. Ct. did not abuse its discretion in instructing jury on defense of abandonment. D sought to have pattern jury instruction on abandonment given, while State sought same instruction but with an additional paragraph taken primarily from appellate cases that explained that voluntary abandonment cannot be influenced by extrinsic circumstances that increase the probability of detection or make the criminal act more difficult. Ct. acknowledged that preferred practice is to use the pattern jury instructions & that mere fact that language is used in appellate Ct. opinions does not make it proper language for instructions to a jury. Ludy v. State, 784 N.E.2d 459 (Ind.2003). However, there is no blanket prohibition against the use of appellate language. Hurt v. State, 553 N.E.2d 1243 (Ind. Ct. App1990) *overruled on other grounds by* Ham v. State, 826 N.E.2d 640 (Ind. 2005). D argued that the additional paragraph was an "impermissible judicial comment" on particular evidence & it expressed an appellate standard of review that was irrelevant to the jury's role as finder of fact under Art. I, ' 19 of Indiana Constitution. Ct. found instruction allowable as "whether abandonment caused by extrinsic factors is voluntary for purposes of abandonment statute" emphasizes the applicable law & not a specific fact as in Ham or Ludy. Instruction in Ludy related to the sufficiency of evidence presented at trial whereas the instruction here aided the jury in "determining in the first instance whether the State proved beyond a reasonable doubt that a D committed a charged crime." *Quoting* Ludy. Ct. also found sufficient evidence existed that D only abandoned his attempted bank robbery because of extrinsic circumstances where evidence showed D placed a note before a teller telling her to give him the money from two tellers & only left after teller asked him in louder than usual voice (to bring attention to D) what he wanted & D became flustered & left the bank. Held, judgment affirmed.

**TITLE:** Jones v. State
**INDEX NO.:** L.2.a.
**CITE:** (12/19/2017), 87 N.E.3d 450 (Ind. 2017)
**SUBJECT:** State disproved abandonment defense
**HOLDING:** Where D was convicted of conspiracy to rob a gas station and attempted robbery of the same gas station, the State disproved D's abandonment defense because it showed his abandonment of the crimes was not voluntary. After entering six homes in the middle of the night to steal various items, D and Stoney Johnson decided to rob a Speedway gas station. They disguised themselves with masks and hooded sweatshirts. When they arrived at the Speedway, they discovered it would be more difficult to commit their crimes than expected because of the steady stream of customers at the Speedway. They then took off their disguises and entered the Speedway. While Johnson distracted the cashier, D burglarized the back office.

For abandonment to be voluntary, the evidence must show that a D abandoned his crime because of a change of heart, because of a "rising revulsion" about the harm his crime would cause. Smith v. State, 636 N.E.2d 124, 127 (Ind. 1994). Thus, the decision to withdraw must not be attributable to "extrinsic factors" that increase the probability of detection or that make it more difficult to complete the crime. Id.; Barnes v. State, 269 Ind. 76, 82-83, 378 N.E.2d 839, 843 (1978). Here, the jury could have inferred D's abandonment was not voluntary because it was at least partially attributable to extrinsic factors. D preferred to commit crimes with minimal likelihood of detection; all six overnight thefts occurred while the victims were sleeping. Unlike those homes, the Speedway gas station presented an obvious danger of detection. Because the jury could have concluded D abandoned his crime because of fear of detection, not because of change of heart, the State disproved the abandonment defense beyond a reasonable doubt. Held, transfer granted, Court of Appeals opinion at 75 N.E.3d 195 vacated, judgment affirmed.

**TITLE:** Munford v. State
**INDEX NO.:** L.2.a.
**CITE:** (03-10-10), 923 N.E.2d 11, (Ind. Ct. App 2010)
**SUBJECT:** Abandonment - proper instruction
**HOLDING:** Tr. Ct.'s defense-of-abandonment instruction did not constitute fundamental error, and State presented sufficient evidence to disprove Munford's defense beyond reasonable doubt.
Instruction provided:

> **Abandonment that may relieve one of criminal responsibility exists where a criminal enterprise is cut short by a change of heart, desertion of criminal purpose, change of behavior, and rising revulsion for the harm intended. Abandonment must occur before the criminal act charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.**

Here, D took three liquor bottles from grocery store shelf and put them in his coat. Store employee followed D into restroom, where he removed bottles from coat, put them on floor, and said to others in restroom, "They're on to us; we need to get out of here." D was charged with attempted theft. Portion of instruction stating abandonment must be product of "rising revulsion" for intended crime was not erroneous. "Rising revulsion" is not in abandonment statute, but Indiana Supreme Court has often used phrase in describing abandonment defense. Instruction's failure to tell jury that State had to disprove defense beyond reasonable doubt did not make instruction fundamentally erroneous because Tr. Ct. instructed jury that: 1) State must prove each element of attempted theft beyond reasonable doubt; 2) State carried burden to prove guilt beyond reasonable doubt; 3) D was presumed innocent and was not required to present evidence of innocence; and 4) jury was to consider all instructions together. Where D is charged with attempted crime, phrase stating "abandonment must occur *before* the criminal act charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed" is, at worst, an incomplete statement of law. In attempted crimes, abandonment must occur after inchoate crime of attempt has been committed but before underlying crime is completed. Instruction correctly told jury that abandonment must occur before completion of the crime.

State presented sufficient evidence to disprove D's abandonment defense, which required D to *voluntarily* abandon his efforts. Only evidence regarding abandonment was testimony that D removed bottles from his coat, placed them on restroom floor, and said, "They're on to us; we need to get out of here." Jury could readily conclude D=s abandonment was not voluntary but product of extrinsic factors that increased probability of detection or made it more difficult to accomplish the attempted theft. Held, judgment affirmed.

**TITLE:** Pyle v. State
**INDEX NO.:** L.2.a.
**CITE:** (4/12/85), Ind., 476 N.E.2d 124
**SUBJECT:** Abandonment
**HOLDING:** D failed to establish defense of abandonment to attempted murder charge as matter of law. Here, D contends he abandoned plan to kill victim after shooting her only once (he had threatened to shoot her 6 times). Tr. Ct. instructed jury that prosecution had burden of proving no abandonment. Abandonment is legal defense to charge of aiding/inducing, attempt or conspiracy. Ind. Code 35-41-3-10. Abandonment requires change of heart/behavior, desertion of criminal purpose & rising revulsion for intended harm. Land 470 N.E.2d 697 (Crim L 772(6); evidence did not support giving of D's tendered abandonment instruction). Abandonment must occur before criminal act becomes inevitable. Norton 408 N.E.2d 514; Hedrick 98 N.E.2d 906. Ct. finds sufficient evidence to support finding D did not withdraw from plan to shoot & kill victim. Held, conviction affirmed.

**RELATED CASES:** Sheckles, 501 N.E.2d 1053 (abandonment of attempted robbery is not a defense to felony murder; opinion sets forth policy argument behind defense of abandonment); Woodford 488 N.E.2d 1121 (prosecutor erroneously argued that abandonment is no defense to attempted rape, but because Tr. Ct. properly instructed jury, D was not placed in grave peril; held no reversible error); Haskett, App., 467 N.E.2d 32 (abandonment of scheme by co-D does not indicate D's abandonment, citing Norton); Smith, App., 409 N.E.2d 1199 (abandonment must occur before crime is completed or harm is done; D who stabbed uncle and further pursued him with knife did not abandon crime of attempted murder when, after stabbing, D transported uncle to hospital); Brownlow, 400 N.E.2d 1364 (abandonment defense was not available to D in prosecution for being accessory to felony- murder because there was no evidence that D prevented commission of crime).

**TITLE:** Weida v. State

**INDEX NO.:** L.2.a.

**CITE:** (11-21-02), Ind. App., 778 N.E.2d 843

**SUBJECT:** Withdrawal of conspiracy - improper not to give jury instruction; same as abandonment defense

**HOLDING:** Tr. Ct. abused its discretion when it refused to give D's tendered instruction regarding defense of withdrawal of conspiracy. D's instruction stated, to withdraw from conspiracy, D must cease his activity in the conspiracy & take affirmative act to defeat or disavow conspiracy's purposes either by making full confession to authorities or by communicating his withdrawal in a manner reasonably calculated to inform co- conspirators, & his withdrawal must be both complete & in good faith.

Withdrawal from conspiracy is affirmative defense under federal law, of which D's instruction adequately set forth elements of defense but is not recognized under Indiana law. However, D argued that instruction is correct statement of abandonment defense, which was not covered by any other instructions. State argued that pursuant to Ind. Code 35-41-3-10, abandonment is defense, that person who engaged in prohibited conduct voluntarily abandoned effort to commit underlying crime & voluntarily prevented its commission. Comparing defenses of withdrawal & abandonment, it is clear that both consist of same concepts because they require D to forsake the conspiracy. State further argued that tendered instruction would have reduced D's burden in establishing affirmative defense. Ct. disagreed, noting that defense of withdrawal requires D to affirmatively act to defeat conspiracy, whereas abandonment requires only that D voluntarily abandon effort to commit crime. Good analogy is that abandonment is lesser-included defense of withdrawal. While withdrawal has never been recognized as defense in Indiana & D bears additional burden of demonstrating that he took affirmative act to defeat goals of conspiracy to establish withdrawal defense, withdrawal & abandonment are essentially same defense. Further, instruction was not covered by other instructions & there was evidence in record that would support giving it, therefore Tr. Ct. abused its discretion by refusing instruction. Held, conspiracy to commit murder conviction reversed & remanded.

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.b. Mistake of fact (Ind. Code 35-41-3-7)

**TITLE:** Chavers v. State
**INDEX NO.:** L.2.b.
**CITE:** (7/16/2013), 991 N.E.2d 148 (Ind. Ct. App 2013)
**SUBJECT:** Invasion of privacy - mistake of fact defense rejected
**HOLDING:** State presented sufficient evidence to support D's conviction for Class A misdemeanor invasion of privacy for knowingly violating a no-contact order. D argued there was no knowing violation, but rather a mistake of fact negating his culpability in that he relied on the complaining witness's (C.W.'s) statement that she had the protective order vacated. Police officer testified she believed that both C.W. and D thought there was no protection order in effect. Mistake of fact defense has three parts: 1) mistake must be honest and reasonable, 2) be about matter of fact, and 3) negate culpability required for offense. Potter v. State, 684 N.E.2d 1127 (Ind. 1997). State must disprove defense beyond reasonable doubt.

Court concluded that even if D's mistake was honest, it is not clear that his mistake was reasonable. D did not ask to see C.W.'s documentation and instead relied on her assertion even though he had been informed by his probation officer that day that the no-contact order was still in effect. In the face of such conflicting information, a reasonable person would attempt to verify the validity of the order by looking at the dismissal papers personally or contacting the clerk of the issuing court. Held, conviction affirmed; Baker, J., dissenting, believes that D did not knowingly violate the order of protection, noting the confusion police officer and C.W. had between the orders from two different courts. "[A]n average person could be easily mistaken regarding the exact superior court number where he or she needed to go to get a no contact vacated, especially in a county as large as Marion."

**RELATED CASES:** Johnson, 38 N.E.3d 686 (Ind. Ct. App 2015) (no error in rejecting D's mistake-of-fact defense to criminal trespass charge and C.W.'s authority to order D from common areas of apartment complex because Tr. Ct. believed C.W.'s testimony that D stood in the doorway of apartment so that she could not close the door).

**TITLE:** Cowans v. State
**INDEX NO.:** L.2.b.
**CITE:** (4/27/2016), 53 N.E.3d 540 (Ind. Ct. App 2016)
**SUBJECT:** Instruction properly rejected as mistake of law; guidance on "fleeing" element
**HOLDING:** In D's trial for Level 6 felony resisting law enforcement (Ind. Code. § 35-44.1-3-1), Tr. Ct. did not abuse its discretion in refusing D's tendered instruction on mistake of fact because D's mistaken belief that he could continue driving to find a safe place to pull over was a mistake of law, not a mistake of fact. Even so, while Indiana has not adopted D's view, it is not surprising that he and many others justifiably understand that the law allows this. Multiple news stories quote local sheriffs or prosecutors who recommend drivers find a safe place to pull over. "Internet commentary is almost unanimous in expressing a belief that citizens have this right." Also, under some circumstances common sense dictates that motorists should be allowed this latitude. For instance, a motorist on a ten-lane highway would not be required to "stop in her tracks" to avoid committing a felony by continuing to drive to a safe place. "It would be an intolerable state of affairs if basic common sense, not to mention the explicit advice of many police departments, turned ordinary citizens into felons." Finally, focusing on the "knowing" element of the crime of resisting does not allay these concerns. The better approach is to focus on the definition of "flee." Ind. Code § 35-44.1-3-1(a)(3). A person who continues to drive only briefly to find a safer location is not fleeing. Thus, while "we reiterate that a driver does not have full discretion to choose to stop anywhere, [we observe that] it would be equally absurd to hold that drivers have zero discretion to choose the location of a stop." Here, D bypassed serveral opportunities to pull over into a safe area. Held, judgment affirmed.

**TITLE:** Giles v. State
**INDEX NO.:** L.2.b.
**CITE:** (5th Dist., 8-5-98), Ind. App., 699 N.E.2d 294
**SUBJECT:** Mistake of fact - no error to refuse instruction
**HOLDING:** In order for mistake of fact to be valid defense, three elements must be satisfied: 1) mistake must be honest & reasonable; 2) mistake must be about matter of fact; & 3) mistake must negate culpability required to commit crime. Potter, 684 N.E.2d 1127. Here, in theft prosecution, D testified that he never intended to deprive grocery store of use & value of its money. Rather, D stated that, although he knew there were insufficient funds in his checking account when he cashed checks at store, he intended to deposit money in account before checks were presented to his bank. D contended that he was thus mistaken about his ability to obtain & deposit money in account before store presented checks. Ct. held that D's speculation about his future ability to obtain money in short period of time & deposit it in account before store presented cashed checks is not "matter of fact." Thus, Tr. Ct. did not err by refusing D's instruction on mistake of fact. Held, reversed & remanded on other grounds.

**TITLE:** Lechner v. State
**INDEX NO.:** L.2.b.
**CITE:** (2nd Dist., 9-20-99), Ind. App., 715 N.E.2d 1285
**SUBJECT:** Refusal of mistake of fact instruction - reversible error
**HOLDING:** In child molesting prosecution, Tr. Ct. improperly declined to give instruction D tendered concerning defense of mistake of fact. Jury had before it evidence that victim told 17- year-old D she was at least 14 years old; that D's sister represented to D that victim was at least 14 years old; & that D was aware that victim's friends were 13 & 14 years old. In 1994, legislature amended Ind. Code 35-42-4-3 by criminalizing sexual activity by persons of any age involving persons under 14 years of age. In amending statute, legislature failed to amend subsection establishing as defense the actor's reasonable belief that victim was 16 years of age or older.

Ct. concluded that legislature's failure to modify age at which "reasonable belief" defense becomes available to a D was oversight or scrivener's error & could not be reflective of legislative intent to permit defense only when actor believes victim is 16 years or older, when statute itself does not prohibit activity with a child aged 14 to 16. Thus, availability of statutory mistake of fact defense is not limited to those Ds whose reasonable belief was that victim was at least 16 years old. Defense is available to any D who reasonably believes victim to be of such age that activity engaged in was not criminally proscribed. Held, conviction reversed.

**RELATED CASES:** T.M., App., 804 N.E.2d 773 (in child molesting prosecution, Tr. Ct. abused its discretion by denying D's mistake of fact defense).

**TITLE:** Rose v. State
**INDEX NO.:** L.2.b.
**CITE:** (2nd Dist., 2-22-82), Ind. App., 431 N.E.2d 521
**SUBJECT:** Mistake of fact - negates culpability
**HOLDING:** In battery prosecution, Tr. Ct. did not err in refusing to give D's instruction on mistake of fact. It was undisputed that D's conduct in using gun against felon was intentional or knowing, & only mistake alleged involved question of whether victim committing forcible felony would have justified D's use of deadly force. This did not concern mistake of fact because it did not negate D's culpability. Held, judgment remanded for further proceedings involving sentencing & affirmed in all other aspects.

**RELATED CASES:** Curry, 453 N.E.2d 1006 (where defense of mistake of fact was not pleaded & D introduced no evidence upon it, Tr. Ct. did not err in refusing such instruction on such defense).

**TITLE:** Stoner v. State
**INDEX NO.:** L.2.b.
**CITE:** (12/10/82), Ind., 442 N.E.2d 983
**SUBJECT:** Mistake of fact
**HOLDING:** Ind. Code 35-41-3-7 requires: (1) mistake must be honest & reasonable; (2) mistake must be about a matter of fact; (3) mistake must serve to negate culpability. Jury instruction on mistake of fact required only where evidence relevant to defense could create reasonable doubt in jury's mind that accused acted with requisite mental intent to commit crime charged. Here, D, (free without bail upon another charge under terms of agreement he act as informant for police in drug cases) served as lookout for Johnson (who D said knew a lot of drug dealers) during a home burglary. When owner returned, D signaled Johnson who struck owner on head with hammer & tied him up. Owner bled to death. D was charged with knowingly killing owner. D argued mistake of fact (police authorization) & tendered instruction which was rejected. Evidence indicated even if D believed police authorization permitted him to go to residence where burglary/murder occurred, such authority did not prevent D from being aware of high probability that his conduct could result in harmful consequences. Held, no error in refusal of tendered instruction.

**RELATED CASES:** Barton, 936 N.E. 2d 842 (Ind. Ct. App. 2010) (the instructions that the State must proved D knew or should have known he was involved in an accident which resulted in injury to a person and that a person engages in conduct knowingly when aware of the high probability that he is doing so covered the D's proposed mistake of fact instruction; thus, the Tr. Ct. did not err by refusing the mistake of fact instruction); Saunders, App., 848 N.E.2d 1117 (State proved beyond reasonable doubt that D did not act under a mistaken fact); Smith 477 N.E.2d 857 (Burgl 41(1); Crim L 33; Tr. Ct. properly rejected D's tendered instruction re mistake of fact; in burglary case, son of victim, who did not live with victim & whose relationship with victim was strained, could not give consent to D to steal guns from victim's home); Sureporn Roll, App., 473 N.E.2d 161 (evidence does not support giving of mistake of fact instruction; held, no error in refusing to give it).

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.c. Mistake of law

**TITLE:** Hood v. State
**INDEX NO.:** L.2.c.
**CITE:** (2d Dist. 11/27/89), Ind. App., 546 N.E.2d 847
**SUBJECT:** Plea agreement - waiver of counsel improper condition
**HOLDING:** Where waiver of counsel was made condition to plea agreement, guilty plea was involuntary per se. While D was in jail awaiting initial hearing, prosecutor offered to forego filing habitual count if D would plead guilty without counsel. D did so, but later requested & received counsel for purpose of attempting to withdraw plea. D's motion to withdraw was denied & sentence was imposed. On PCR, D sought to vacate guilty plea on grounds that because he was forced to waive right to counsel, plea was not made knowingly, intelligently, & voluntarily. D appeals denial of PCR. An accused has right to counsel during plea bargaining, because it is critical stage of proceedings. Gallarelli v. US (3d Cir. 1971), 441 F.2d 1402. Counsel or effective waiver of counsel is sine qua non of permissible plea bargaining. Grades v. Boles (4rh Cir. 1968), 398 F.2d 409. Counseled Ds are considered capable of intelligent choices when confronted with prosecutorial persuasion, while uncounseled Ds are not. Bordenkircher v. Hayes (1978), 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604. In Gallarelli, supra, plea resulting from negotiations with uncounseled D was held to be involuntary per se. However, Ct. App. does not reach that issue since prosecutor additionally made waiver of counsel condition of plea bargain. This additional factor renders guilty plea involuntary per se. Held, denial of PCR reversed, remanded for vacation of guilty pleas & further proceedings as necessary.

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.d. Duress (Ind. Code 35-41-3-8)

**TITLE:** Dixon v. United States
**INDEX NO.:** L.2.d.
**CITE:** 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)
**SUBJECT:** Duress defense, burden of proof instructions
**HOLDING:** Petitioner was charged with receiving a firearm while under indictment, in violation of 18 U.S.C. '922(n), and with making false statements in connection with acquisition of the firearm. She admitted knowledge of her indictment when she purchased the firearm and that it was a crime, but claimed she was acting under duress through threats by her boyfriend toward herself and her children if she did not buy the firearms for her boyfriend. The Tr. Ct. declined her request for a jury instruction placing the burden on the government to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that Petitioner had the burden to establish her defense by a preponderance of the evidence. The jury instruction did not run afoul of the Due Process Clause. The crime required that Petitioner acted "knowingly" which "merely requires proof of knowledge of the facts that constitute the offense" or "willfully" which requires acting "with knowledge that the conduct was unlawful." Bryan v. U.S., 524 U.S. 184 (1998). The government bore the burden of proving beyond a reasonable doubt that Petitioner knew that she was violating the law which was met through Petitioner's own testimony. Court rejected Petitioner's claim that she could not have formed the necessary *mens rea* because she did not freely choose to commit the crimes. While the duress defense may excuse conduct that would otherwise be punishable, the existence of duress normally does not controvert any of the elements of the offense itself. The jury instructions were consistent with the requirement that the government prove the mental states specified and did not run afoul of due process by placing the burden on Petitioner to establish duress by a preponderance of the evidence. Further, modern common law does not require the government to bear the burden of disproving Petitioner's duress defense beyond a reasonable doubt. This burden on the defense was not upset by Davis v. U.S., 160 U.S. 469 (1895), where the Court interpreted a D's insanity to controvert the necessary *mens rea* for a murder committed "feloniously, wilfully, and of his malice aforethought," and required the government to prove the D's sanity beyond a reasonable doubt because tending to prove insanity also tended to disprove an essential element of the offense. Petitioner's duress evidence does not contradict or tend to disprove any element of her statutory offenses. She is also not helped by the resulting "Davis rule," which was not constitutionally mandated, and which Congress overruled by statute, requiring a D to prove insanity by clear and convincing evidence. Petitioner's reliance on Davis also ignores that federal crimes are solely creatures of statute, and thus the Court must effectuate the duress defense as Congress may have contemplated it in the context of the specific offenses. The Court can assume that, when passing the relevant 1968 Act, Congress was familiar with long established common-law rule and the rule of McKelvey v. U.S., 260 U.S. 353 (1922) that the one relying on an affirmative defense must set it up and establish it, and would have expected federal courts to apply a similar approach to any affirmative defense. To accept Petitioner's contrary hypothesis that Davis dramatically upset well-settled law would require a consensus among federal courts that does not exist. Held, judgment affirmed; Kennedy, J. filed a concurring opinion to note the question how to proceed

when Congress has enacted a criminal statute, the Omnibus Crime Control and Safe Streets Act of 1968, without explicit instructions regarding the duress defense. He would not stringently follow the law of the time as it seems unlikely Congress would want the burden of proof to vary from different statutes depending on when they were enacted. Good reason exists here to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue; Alito, J. filed a concurring opinion in which Scalia, J. joined noting that he joined the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another, basing his concurrence on a common law approach; Breyer, J. filed a dissent, in which Souter J. joined, agreeing that the burden of production lies on the D in relation to a duress defense, that here the burden of persuasion issue is not constitutional, and that Congress may allocate that burden as it sees fit. But, in the absence of any different congressional intent, the burden of persuading the jury beyond a reasonable doubt for federal crimes should lie where such burdens normally lie in criminal cases, upon the prosecution.

**TITLE:** Early v. State
**INDEX NO.:** L.2.d.
**CITE:** (9-5-85), Ind., 482 N.E.2d 256
**SUBJECT:** Duress - Limitations on defense
**HOLDING:** Defense of duress is not intended to be given broad reading. It is only allowed when prohibited conduct is compelled by threat of imminent serious bodily injury, & crime which D commits is crime against person. When D is under duress, but his actions show he has ability to form requisite mens rea, D may not claim defense of duress. Here, D was not compelled to commit crime by threat of imminent injury, although he testified his accomplices badgered him, called him names, & told him he had "no guts." D had ability to form requisite mens rea because D took part in planning robbery, called out before shooting victim, proceeded to seriously injure victim, & took victim's watch. Thus, D was not entitled to defense of duress to robbery charge. Held, judgment affirmed.

**RELATED CASES:** Kee, 438 N.E.2d 993 (attempted murder is "offense against person" within meaning of statute excluding defense of duress).

**TITLE:** Fry v. State
**INDEX NO.:** L.2.d.
**CITE:** (4th Dist. 10/13/82), Ind. App., 440 N.E.2d 1133
**SUBJECT:** Duress - sufficiency
**HOLDING:** Under Ind. Code 35-41-3-8, it is a defense to certain crimes that D acted under duress. Defense is not available when D recklessly, knowingly, or intentionally places self in situation in which duress is foreseeable. Here, D, charged with burglary, maintained he committed crime under duress from South Bend street gang. Alleged threats of physical harm, made 2 hours before burglary, were not imminent. D stated he was not afraid of club member who broke into home with him. D had told police he took part in burglary merely to be in good standing with his group. Held, evidence sufficient to sustain conviction.

**RELATED CASES:** Murrell, 960 N.E.2d 854 (Ind. Ct. App 2012) (evidence was sufficient to sustain conviction despite duress defense; although D was threatened if she did not traffic contraband into prison, D was also offered reward for trafficking and the threatened harm to D was no longer imminent by the time she arrived at prison); Armand, 474 N.E.2d 1002 (defense of duress is not applicable to attempted robbery, *citing* Kee 438 N.E.2d 993, which held duress inapplicable to attempted murder); Sanders, 466 N.E.2d 424 (duress not defense to crime against person); Neaveill, App., 474 N.E.2d 1045 (common law presumption of coercion by husband of wife is outmoded rule, easily rebutted; stipulation of D (low I.Q.) that she was under no duress, threat, intimidation effectively rebutted presumption; held, child molesting conviction affirmed); Love, 393 N.E.2d 178 (fact that D needed money to buy heroin in order to prevent withdrawal does not constitute legal defense to commission of crime on theory that D in such situation was acting under duress).

**TITLE:** Hensley v. State
**INDEX NO.:** L.2.d.
**CITE:** (12/30/91), Ind. App., 583 N.E.2d 758
**SUBJECT:** Duress defense- available in probation revocation proceedings
**HOLDING:** Duress defense may be asserted by D, who violated probation conditions that he contact probation department, obtain permission to leave state & notify department of any address change. Duress is defense when person who engaged in prohibited conduct was compelled to do so by threat of imminent serious bodily injury to himself or another. Ind. Code § 35- 41-3-8. Compulsion must be such that alternative with which D is faced be instant & imminent. Love, 393 N.E.2d 178. Here, D contended that threats from victim of earlier conviction caused him to be in fear & move to Florida. However, D did not show that compulsion he felt from victim's alleged harassment rose to degree necessary to constitute duress. Even if D's assertion did qualify as duress, D could have reported victim's threats to probation department. Because fleeing state was not D's only alternative, D violated probationary terms by fleeing state. Held, judgment affirmed.

**TITLE:** Randall v. State
**INDEX NO.:** L.2.d.
**CITE:** (12/11/2018), 115 N.E.3d 526 (Ind. Ct. App 2018)
**SUBJECT:** Defense of duress instruction properly rejected in accomplice liability case
**HOLDING:** In Level 3 robbery prosecution, Tr. Ct. did not abuse its discretion in rejecting D's tendered duress instruction. D claimed that he had been kidnapped and forced to participate in the alleged armed robbery. But Ind. Code § 35-41-3-8(b)(2) explicitly provides that the duress defense is unavailable to a persons alleged to have "committed an offense against the person." This rule applies regardless of whether D is the principal or an accomplice, or whether another inchoate basis of liability is alleged. Held, judgment affirmed.

**TITLE:** U.S. v. Haney
**INDEX NO.:** L.2.d.
**CITE:** 87 Fed.Appx. 151 (10th Cir. 2002)
**SUBJECT:** Duress - Averting Harm to Third Party
**HOLDING:** Tenth Circuit holds that defense of duress can apply to situations in which D asserts he acted to prevent greater harm to third party. D and co-D were friends and fellow prison inmates. Television program erroneously identified co-D as a leader of Aryan Brotherhood, and he began receiving death threats from both minority inmates and actual members of Aryan Brotherhood. D and Co-D believed threats to be serious, but determined that revealing them to guards, and thus being labeled as snitch, would be equally dangerous. D agreed to help co-D escape and helped acquire tools to assist break-out. During course of escape, D convinced co-D that better plan would be to get caught trying to escape and be put in disciplinary segregation without snitching. The two were caught after strewing escape materials around prison yard. At trial, D sought jury instruction on duress, and Tr. Ct. refused it because D himself was not subject of threat. Tenth Circuit holds that duress defense can apply to situations where third party faces threat of harm. Government argues that extension of duress defense to third-parties should be limited to family members, but 10th Cir. rejects this restriction as arbitrary and unjust.

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.e. Unaware of possession (Ind. Code 35-41-2-1(b))

**TITLE:** Duff v. State
**INDEX NO.:** L.2.e.
**CITE:** (5/28/87), Ind., 508 N.E.2d 17
**SUBJECT:** Theft - present possession
**HOLDING:** 2-2 opinion. Tr. Ct. did not err in failing to give D's tendered instruction stating that it is a defense to show D was unaware of his possession of property for time sufficient to terminate his possession. Present possession is not a necessary element of theft, though it can be factor in chain of proof of theft. Once property is stolen, crime is completed; it is no defense to return it belatedly. Jones, App., 457 N.E.2d 231. Statute used as basis for D's tendered instruction (Ind. Code 35-41-2-1 (b)), is generally meant to apply to crimes such as certain controlled substances offenses, where knowing possession of contraband is gravamen of offense. Jones. Held, no error.

**TITLE:** McClendon v. State
**INDEX NO.:** L.2.e.
**CITE:** (3rd Dist., 10-15-96), Ind. App., 671 N.E.2d 486
**SUBJECT:** Possession of cocaine - claim of unawareness of possession
**HOLDING:** Evidence supported jury's conclusion that D had possession of cocaine. Driver of car testified that cocaine D dropped in street belonged to driver. Driver also testified that when he saw police, he handed cocaine to D & told D to get rid of it. On appeal, D argued that driver's testimony should have been interpreted by jury to establish defense that D did not have time to terminate his possession, pursuant to Ind. Code 35-41-2-1. Ct. held that it is no defense for D to assert that he possessed cocaine only to hide it from police & it was not "really" his cocaine. Ind. Code 35-41- 2-1 does not provide defense for those who knowingly possess illicit drugs in order to aid someone else's illegal drug sales or use. Rather, Ind. Code 35-41-2-1 provides defense for those unwittingly duped into possession of illegal drugs because such drugs have been planted on their person or hidden on their property without their knowledge. Held, conviction affirmed.

**RELATED CASES:** Hanson, App., 704 N.E.2d 152 (no error to refuse D's instruction paralleling involuntary possession statute).

# L. DEFENSES

## L.2. Other conditions affecting intent

### L.2.h. Other

**TITLE:** Battles v. State
**INDEX NO.:** L.2.h.
**CITE:** (11-24-97), Ind., 688 N.E.2d 1230
**SUBJECT:** Refusal to instruct on defense of accident - no error
**HOLDING:** In murder prosecution, Tr. Ct. did not err in finding no evidentiary basis for D's tendered instruction on defense of accident. Evidence on which D relied to support instruction was his out-of-Ct. statement to police that he intended to place "sleeping hold" on victim, & physician's testimony that victim's death from manual strangulation could have resulted from misapplication of martial arts technique known as "shime waza." Neither D's statement nor physician's testimony constituted substantive evidence tending to prove elements of defense of accident set forth in instruction. D is not entitled to instruction on defense of accident when only support for instruction was D's own out of Ct. self-serving statement & medical evidence introduced at trial showed that victim's death was not accidental. Clemens, 610 N.E.2d 236. Extreme force exerted upon victim's neck & described by physician tends to negate any inference that D's conduct was unintentional, or that "sleeper hold" was not applied recklessly, carelessly, or in wanton disregard of consequences. Ct. also found that Tr. Ct. did not err in refusing D's tendered instruction regarding voluntariness of his statement to police. Held, no error.

**TITLE:** Boulware v. United States
**INDEX NO.:** L.2.h.
**CITE:** 128 S.Ct. 1168, 170 L.Ed.2d 34 (2008)
**SUBJECT:** Federal criminal tax evasion: return-of-capital defense
**HOLDING:** Unanimous Court held a distributee accused of criminal tax evasion may claim return-of-capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital. Tax classifications like "dividend" and "return of capital" turn on a transaction's "objective economic realities," not "the particular form the parties employed." In economic reality, a shareholder's informal receipt of corporate property "may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend," or as effective a means of returning a shareholder's capital. Economic substance remains the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books. The view of Ninth Circuit precedent that a return-of-capital defense requires evidence of a corresponding contemporaneous intent sits uncomfortably not only with the tax law's economic realism, but also with the particular wording of 26 U.S.C. '' 301 and 316(a) in criminal cases unnecessarily emphasizes the deficiency's amount while ignoring the willfulness of the intent to evade taxes. Willfulness is an element of the crimes because the substantive provisions defining tax evasion and filing a false return expressly require it, e.g., 26 U.S.C. '7201. Nothing in the statutes relieves the Government of the burden of proving willfulness or impedes it from doing so if there is evidence of willfulness.

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.a. Self-defense (Ind. Code 35-41-3-2)

**TITLE:** Ault v. State
**INDEX NO.:** L.3.a.
**CITE:** (06-02-11), 950 N.E.2d 326 (Ind. Ct. App 2011)
**SUBJECT:** Self-defense instruction - D does not have to testify
**HOLDING:** Tr. Ct. abused its discretion by requiring D to testify in order to obtain an instruction on self-defense. The Indiana self-defense statute requires both subjective belief force was necessary to prevent serious bodily injury, and that such actual belief was one that a reasonable person would have under the circumstances. Inferences about an individual's subjective state of mind are routinely drawn from the circumstances, regardless of whether that individual provides personal insight into his actual state of mind.

Here, the State's case-in-chief established that the victim drove to D's house where he was on D's property, shouting and threatening D with bodily force, removing his coat and claiming that his attack on D would be "now." D then shot victim in the head. These facts were adequate to support a reasonable inference regarding the subjective component of self-defense, namely that D believed deadly force was necessary to protect himself. Thus, Tr. Ct.'s ruling that D had to testify in order for the jury to be instructed on self-defense was erroneous. When D did testify, the State crossed him on his previous convictions for burglary, theft, auto theft and forgery. Tr. Ct.'s erroneous ruling harmed D. Held, judgement reversed.

**TITLE:** Bixler v. State
**INDEX NO.:** L.3.a.
**CITE:** (12/17/84), Ind., 471 N.E.2d 1093
**SUBJECT:** Self-defense - instructions
**HOLDING:** Final instructions re self-defense were not error. Here, D contends various instructions constituted error, but Ct. finds instructions (partially set forth in opinion) were correct statements of law. Here, D shot & killed man who attempted to remove his unoccupied pickup truck from disputed access lane with bulldozer. Victim was armed. Jury was instructed on aggressor (Harris 382 N.E.2d 913), mutual combat (Montague 360 N.E.2d 181) & dwelling/premises (Smith, App., 403 N.E.2d 869) issues. State's case attempted to show unreasonableness of D's actions. Jury was instructed to view situation from D's standpoint in determining existence of danger/extent of force to be used. Held, no error.

**RELATED CASES:** Miller, 720 N.E.2d 696; Misztal, App., 598 N.E.2d 1119 (no error in self-defense instruction requiring determination of D's fear of death or serious bodily injury be made objectively under circumstances); Smith, 506 N.E.2d 31 (instructions re use of force & deadly force, set forth in opinion, were correct statement of law; therefore, instructions were properly given); Harlan, 479 N.E.2d 569 (Tr. Ct. need not separately instruct jury re burden of proof on issue of self-defense); Blair, App., 364 N.E.2d 793 (instruction on self-defense was not erroneous in implying that one exercising right of self-defense must retreat at some point, or if he stands his ground, must not himself attack).

**TITLE:** Birdsong v. State
**INDEX NO.:** L.3.a.
**CITE:** (9-4-97), Ind., 685 N.E.2d 42
**SUBJECT:** Self-defense claim - sufficiency
**HOLDING:** Evidence was sufficient to convict D of murder & attempted murder. To support self-defense claim, D presented evidence that victims were intoxicated & that, while armed with gun & can of wasp spray, they forced their way into D's apartment. However, fact that victims were initial aggressors is not dispositive as to whether deadly force was reasonable response. Tunstill, 568 N.E.2d 539. Here, Tr. Ct. was also presented with evidence that supported State's argument that D used unreasonable force. Victim was carrying gun by its barrel & it came out of his hand as soon as he entered D's apartment. Even after victim lost gun, D continued to chop him with axe. Both victims were chopped & shot several times, even after they were incapacitated. Attempted murder victim was unarmed & standing across hallway in his own doorway when D shot at him. Sufficient evidence existed from which Tr. Ct. could find that D did not validly act in self-defense & that he was guilty as charged. Held, convictions affirmed.

**RELATED CASES:** Stewart, 167 N.E.3d 367 (Ind. Ct. App. 2021) (despite victim's "reprehensible" behavior, D was no longer under physical threat or reasonable fear of danger when she left porch, retrieved her gun from her car and then approached the victim; D did not act without fault and was not justified in her use of deadly force); Simpson, App., 915 N.E.2d 511 (evidence most favorable to verdict showed that D shot victim in retaliation for beating another person, rather than to defend that person from victim's blows; victim had stopped the beating before D shot him); Hobson, App., 795 N.E.2d 1118 (Although victim was initial aggressor & there was evidence of previous harassment, D chose to fight back in fight & escalated fight by getting gun & shooting victim several times); Wooley, 716 N.E.2d 919 (a mutual combatant, whether or not initial aggressor, must declare an armistice before he or she may claim self-defense); Wilson, 770 N.E.2d 799 (where D was willing participant in shooting & continued shooting after victim had ceased firing & was attempting to leave area, evidence was sufficient to rebut D's self-defense claim); Miller, 720 N.E.2d 696 (considering D's aggressive behavior & that he fired multiple shots at victim, there was sufficient evidence to disprove self-defense claim).

**TITLE:** Black v. State
**INDEX NO.:** L.3.a.
**CITE:** (3rd Dist., 06-21-05), Ind. App., 829 N.E.2d 607
**SUBJECT:** Prohibiting reference to self-defense during voir dire - fundamental error
**HOLDING:** In murder prosecution, Tr. Ct. committed fundamental error in prohibiting D from questioning prospective jurors during voir dire regarding law of self-defense. D failed to request relief from State's motion in limine during voir dire, & therefore failed to properly preserve issue for appeal. Nevertheless, fundamental error occurred because D was denied the right to a fair & impartial jury provided by Article 1, Section 13 of Indiana Constitution. The ability to question prospective jurors regarding their beliefs & feelings concerning doctrine of self-defense, so as to determine whether they have firmly-held beliefs which would prevent them from applying law of self-defense to facts of case, is essential to a fair & impartial jury. See Everly v. State, 395 N.E.2d 254 (Ind. 1979). State has a valid right to exclude persons who cannot be fair to its position when seeking death penalty. Burris v. State, 465 N.E.2d 171 (Ind. 1984). Likewise, basic fairness dictates that a D has a valid right to exclude persons who cannot be fair to his position when making a claim of self-defense. Prohibiting D from questioning prospective jurors regarding self-defense during voir dire so prejudiced his rights as to make a fair trial impossible. Fact that D was able to establish self-defense claim & advance the theory during closing arguments & that Tr. Ct. gave jury self-defense instruction failed to ensure that jury was fair & impartial &, therefore, could not remedy error that occurred during voir dire. Held, conviction reversed & remanded for a new trial.

**TITLE:** Brand v. State
**INDEX NO.:** L.3.a.
**CITE:** (4-29-02), Ind. App., 766 N.E.2d 772
**SUBJECT:** Self-defense - evidence of victim's violent character admissible
**HOLDING:** In murder prosecution, Tr. Ct. committed reversible error in not allowing D to present evidence that victim had dealt drugs, been gang member, & had offered to sell D firearm. When D claims he acted in self-defense, evidence of victim's character may be admitted, to show that victim had violent character giving D reason to fear him. Holder v. State, 571 N.E.2d 1250 (Ind. 1991). Here, evidence was relevant to show reasonableness of fear or apprehension of victim, was proper character evidence, & did not constitute hearsay as it was not offered for truth of matter asserted. Jury should have been afforded opportunity to consider circumstances surrounding fatal shooting as they appeared to D. Any bad light this would have placed victim in was substantially outweighed by probative value of evidence. Held, conviction reversed & remanded for new trial.

**RELATED CASES:** Zachary, App., 888 N.E.2d 343 (trial counsel was not ineffective for failing to object to instruction and admonishment that restricted evidence of victim's character to be considered solely on issue of who was the initial aggressor and not for any other purpose); Welch, App., 828 N.E.2d 433 (events which occurred after stabbing could not be relevant to D's state of mind or reasonable fear at time of stabbing).

**TITLE:** Bryan v. State
**INDEX NO.:** L.3.a.
**CITE:** (6/28/83), Ind., 450 N.E.2d 53
**SUBJECT:** Self-defense - killing; sufficiency re aggressor
**HOLDING:** Evidence was sufficient to prove D knowingly killed victim where D strangled her with wire after allegedly wrestling baseball bat from her. Here, D contends ex-wife's statement that she planned to remove children from state so he would never see them again caused him to kill her in sudden heat. Ct. holds such a statement is not sufficient provocation to reduce homicide to manslaughter. Provocation must be adequate to arouse emotions of an ordinary person so as to obscure reasoning powers. See Hooks, 409 N.E.2d 618; Dickens, 295 N.E.2d 613; 15 I.L.E. Homicide Section 32; 40 Am. Jur.2d Homicide Section 61; 40 C.J.S. Homicide Section 46. Evidence also shows D attacked victim with deadly force after any danger to him had passed. Right of self-defense passes when danger passes. Schlegel, 150 N.E.2d 563. Held, conviction affirmed.

**RELATED CASES:** Mendez, 491 N.E.2d 532 (Homic 239; evidence was sufficient to negate self-defense where D gave 2 different statements re details of homosexual attack by victim); Bell, 486 N.E.2d 1001 (evidence warranted finding that D provoked victim's unlawful action & was aggressor; here, D threatened supervisor of bootleg casino & bar & took $5 from him; owner/victim got hatchet & questioned people about missing money & looked at D in accusatory manner; D told victim not to draw hatchet on him; D then hit 2 men on head with gun, threatened to kill victim & hit him with gun; victim followed D with ax raised & D shot him).

**TITLE:** Carson v. State
**INDEX NO.:** L.3.a.
**CITE:** (2nd Dist., 10-14-97), Ind. App. 686 N.E.2d 864
**SUBJECT:** Erroneous jury instruction on self-defense
**HOLDING:** Tr. Ct. erroneously instructed jury on use of deadly force in self-defense because instruction omitted prevention of forcible felony as justification for use of such force. If instruction given by Tr. Ct. to jury is erroneous such that it could mislead reasonable juror as to applicable law, reversal is warranted. Determinative question is whether error by itself infected entire trial such that resulting conviction violates due process. Willford, App., 571 N.E.2d 310. A person is justified in using deadly force only if he reasonably believes that force is necessary to prevent serious bodily injury to himself or to third person or commission of forcible felony. Ind. Code § 35-41-3-2(a). Here, Tr. Ct. instructed jury that "[a] person may use deadly force only if he reasonably believes force is necessary to prevent serious bodily injury or harm to himself or another." Because Tr. Ct.'s instruction omitted prevention of forcible felony as justification for deadly force, instruction was incorrect statement of law on essential aspect of D's defense. Held, conviction reversed; Friedlander, J., dissenting on grounds that Tr. Ct. gave other instructions adequately stated law of self-defense.

**TITLE:** Chapman v. State
**INDEX NO.:** L.3.a.
**CITE:** (4th Dist. 10/11/84), Ind. App., 469 N.E.2d 50
**SUBJECT:** Self-defense - character evidence
**HOLDING:** Tr. Ct. did not err in excluding D's evidence of prior specific acts of violenceof battery victim. Here, D presented evidence of self-defense, refuted by state's witnesses, that victim pulled a knife on D during first encounter & lunged toward D with knife during second encounter, forcing D to protect himself by knifing victim. D then called 3 witnesses, including victim, who testified re specific prior violent acts of victim, including 5 prior battery convictions. Tr. Ct. excluded additional proffered evidence of victim's violent acts. Character evidence admissible in homicide (Teague, 379 N.E.2d 418) & battery (Bates, 269 N.E.2d 749) cases where D claims self-defense. Evidence of victim's violent character is admissible to show: (1) D acted in reasonable fear; or (2) victim was initial aggressor. Types of proof are testimony re: (a) conduct reflecting on character; (b) witness' opinion re character based on observation; or (c) reputation. Purpose of D's offer of proof was to show victim was more-probably-than-not the aggressor. Ct. rejects state's argument that D had to show knowledge of victim's character. Annot., 1 ALR3d 571 (1965). Type of proof offered to show victim was aggressor is limited to reputation evidence. [Citations omitted.] Limitation reduces prejudice/collateral issues/unfair surprise. Tr. Ct. allowed D to present some evidence of specific acts of violence (which appellate Ct. would disallow). Excluded evidence was cumulative. Held, no error.

**TITLE:** Cobbs v. State
**INDEX NO.:** L.3.a.
**CITE:** (9/14/88), Ind., 528 N.E.2d 62
**SUBJECT:** Self-defense - insufficient rebuttal evidence
**HOLDING:** Evidence was insufficient to support D's conviction of 2 counts of murder. D admitted shooting 2 victims but alleged that he acted in self-defense in course of robbery. D had been drinking with victims, who later insisted he accept ride home with them. D got in back seat of 2-door car. According to D, victims stopped car, turned around, & demanded D's wallet. D responded by shooting both victims in head with .357 Magnum. D then staggered away and, when stopped by police, told them what he had done & explained he was looking for telephone to report it. D raised self-defense at trial but was convicted on both counts. On appeal, D argues state did not disprove self-defense beyond reasonable doubt. When self-defense is raised casting some reasonable doubt as to guilt, state must prove that D did not meet at least one element of self-defense. Spinks, 437 N.E.2d 963. Elements are: (1) D acted without fault, (2) was in place he/she had legal right to be, & (3) was in real danger of death or great bodily harm or such apparent danger as to cause good faith fear of death or bodily harm. Id. Here, D had right to be in car & could not retreat from back seat. Because he & victims knew each other, he had reason to fear they would kill him to prevent identification. State's only rebuttal evidence is that D walked in opposite direction of nearby bus station, which had telephones. This evidence in no way negates D's claim of self-defense. Held, conviction reversed & D discharged. **Note:** 2006 amendment to IC 35-41-3-2 added “there is no duty to retreat” language to subsection (a), (b), and (c).

**TITLE:** Dixson v. State
**INDEX NO.:** L.3.a.
**CITE:** (12/17/2014), 22 N.E.3d 836 (Ind. Ct. App 2014)
**SUBJECT:** Self -defense jury instruction - harmless error
**HOLDING:** In battery prosecution which did not involve deadly force, Tr. Ct. erred in instructing jury that D had to have a reasonable fear of death or serious bodily harm. This contradicted the correctly-given instruction which stated the D could use reasonable force to protect himself from what he reasonably believed to be the imminent use of unlawful force. When taken as a whole, the instructions misled the jury with respect to D's self-defense claim. However, the error was harmless because uncontradicted evidence negated the self-defense claim. D was not in a place he had the right to be when he disregarded the work release facility's protocols by entering undesignated door of cafeteria and when he disregarded security guard's commands to leave and return through the correct door. This evidence also shows that D did not act without fault. Because uncontradicted evidence negates D's self-defense claim, the jury instruction error did not affect the verdict. Held, judgment affirmed.

**TITLE:** Fitzgerald v. State
**INDEX NO.:** L.3.
**CITE:** (2/12/2015), 26 N.E.3d 105 (Ind. Ct. App 2015)
**SUBJECT:** "Citizen's arrest" unlawful, but State disproved D's self-defense claim
**HOLDING:** In intimidation prosecution, State presented sufficient evidence to disprove D's self-defense claim. The charge stemmed from the staging of a fake robbery to cover up stolen funds from an employer. A Good Samaritan (Bingham) intervened to thwart the apparent robbery, and chased after D. After Bingham caught up with D and cornered him in a parking lot, D pulled a knife out of his pocket and told Bingham to "get the f*** away from me...it's not what you think." Court held that Bingham's detention of D based on mistaken belief that he had committed a robbery did not amount to a lawful "citizen's arrest" pursuant to Ind. Code § 35-33-1-4(a), because no robbery had in fact been committed. See U.S. v. Hillsman, 522 F.2d 454 (7th Cir. 1975).

However, State presented sufficient evidence to disprove D's self-defense claim. Although he had the right to be in the public parking lot where Bingham cornered him, he was not without fault. From Bingham's perspective, it appeared that D had committed a robbery. Moreover, record did not support he acted out of reasonable fear or apprehension of bodily harm. Bingham always remained five or six feet behind D and backed up once D pulled out a knife. Tr. Ct. was not obligated to believe D's self-serving testimony that he pulled knife because he was afraid of Bingham and had no intention of cutting or stabbing him. Held, conviction affirmed.

**TITLE:** Ford-El v. State
**INDEX NO.:** L.3.a.
**CITE:** (3d Dist. 1/19/89), Ind. App., 533 N.E.2d 157
**SUBJECT:** Self defense - instructions; use of non-deadly force
**HOLDING:** Instructing jury that they must find D was acting in "reasonable fear or apprehension of death or great bodily harm" in order to find him not guilty of battery was error since this standard applies only to use of deadly force in self-defense, Bryan, 450 N.E.2d 53; Hughes, 10 N.E.2d 629. Fact that Ct. also instructed on standard for self defense where force used was not deadly force ["whether D reasonably believes it is necessary to protect himself from imminent use of unlawful force"] did not cure error, since instructions remained confusing, misleading, & might have been understood to mandate conviction unless fear of death or great bodily harm was shown. Johnston, 105 N.E.2d 820; O'Neil, 22 N.E.2d 825. Where Ct. failed to instruct that jury must determine whether D's use of railroad spike was use of deadly force, that omission, together with above instruction removed factual issue of whether deadly force had been used from jury's determination, effectively invading province of jury. Reversed & remanded.

**TITLE:** French v. State
**INDEX NO.:** L.3.a.
**CITE:** (4-29-80), Ind., 403 N.E.2d 821
**SUBJECT:** Self-defense - Court must instruct jury about reasonable force
**HOLDING:** Tr. Ct. committed reversible error by failing to instruct jury that, as to self-defense, D may repel force by reasonable necessary force & that D will not be accountable for any error in judgment as to amount of force necessary, provided D acted honestly. It was also error to fail to apprise jury that existence of danger, necessity or apparent necessity, as well as amount of force required to resist attack can only be determined from D's standpoint at time & under existing circumstances. Lastly, Tr. Ct. erred in failing to instruct jury that D's testimony that he acted in fear of his life & that gun discharged prematurely when D bumped into car was not required to be believed. Held, judgment reversed & remanded; Pivarnik, J., dissenting.

**TITLE:** Gammons v. State
**INDEX NO.:** L.3.a.
**CITE:** (06/26/20), Ind., 148 N.E.3d 301
**SUBJECT:** Self-defense jury instruction - contemporaneous crime limitation did not apply
**HOLDING:** Under Indiana's self-defense statute, "a person is not justified in using force if the person," among other things, "is committing . . . a crime." Ind. Code § 35-41-3-2. Here, during Defendant's trial for attempted murder and carrying a handgun without a license, he asserted that he acted in self-defense when he fired six shots at a man who aggressively confronted him and whom he knew had a history of violence. Over Defendant's objection, the trial court instructed the jury using language that tweaked his tendered self-defense instruction and stated that "a person may not use force if," among other things, "he is committing a crime that is directly and immediately related to the confrontation." Noting and agreeing with Justice Boehm's concurring opinion in Mayes v. State, 744 N.E.2d 390, 396 (Ind. 2001), which warned that the "but for" test was too broad and could foreclose self-defense where the defendant should be free to argue it, the Indiana Supreme Court held that self-defense is only barred when there is "an immediate causal connection between the crime and the confrontation." Because the instructional error could have served as the basis for the jury's decision to convict, the Court reversed Defendant's conviction and remanded for a new trial.

**TITLE:** Geralds v. State
**INDEX NO.:** L.3.a.
**CITE:** (2nd Dist., 3-2-95), Ind. App., 647 N.E.2d 369
**SUBJECT:** Self defense - evidence of "surrounding circumstances" irrelevant
**HOLDING:** In involuntary manslaughter prosecution, Tr. Ct. did not err in excluding evidence of D's aid to Federal agents & his recent testimony against several gang members. When victim-burglar partially fell through D's ceiling, D fired automatic machine gun 20 to 25 times. D fired several additional rounds at perpetrator as he attempted to retreat. D's sole defense rested on theory of self-defense. Tr. Ct. excluded evidence proffered to show that D had reason to fear for his life, as result of assisting law enforcement officials to convict gang members involved in drug activity & acquisition of firearms. Because force employed by D was unreasonable & excessive, Ct. held that D indisputably destroyed any claim to self-defense that he may have possessed. Although D's fear was reasonable, his extreme overreaction & use of deadly force were not. Thus, exclusion of evidence of surrounding circumstances, if error at all, was harmless & had no prejudicial impact upon verdict. Held, judgment affirmed.

**TITLE:** Harmon v. State
**INDEX NO.:** L.3.
**CITE:** (3rd Dist.; 06-26-06), Ind. App., 846 N.E.2d 1056
**SUBJECT:** Self-defense -- applies to possession of firearm by serious violent felon (SVF) cases
**HOLDING:** Tr. Ct. abused its discretion by excluding self-defense evidence in trial for unlawful possession of a firearm by SVF. Indiana's prohibition against felon possessing a firearm was not intended to affect his or her right to use a firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist. Thus, if a firearm was taken by a felon from a location which was lawful rather than the felon carrying the firearm prior to felon's fear for safety, the felon may present evidence of self-defense if warranted by evidence.

Here, D was charged with Attempted Voluntary Manslaughter, Criminal Recklessness, Disorderly Conduct & Unlawful Possession of a Firearm by SVF. The SVF charge was bifurcated from the other charges. During trial on the Attempted Voluntary Manslaughter, Criminal Recklessness, & Disorderly Conduct charges, D testified that, in middle of a heated altercation between, on one hand, he & his fiancee & on the other, his neighbors & landlord, he broke into a locked gun case to obtain a handgun of his fiancee, with whom he lived. D testified he took possession of the firearm because he was outnumbered & saw his neighbor approaching his house with a gun & did not know his neighbor's intentions. D fired one shot in the air & dropped firearm. Jury acquitted D on Attempted Voluntary Manslaughter & Criminal Recklessness & found him guilty of Disorderly Conduct. These circumstances should have permitted D to have presented the same self-defense evidence during trial on Serious Violent felon.

Despite fact jury obviously believed D acted in self-defense based on his testimony, there is sufficient evidence that D was felon in possession of firearm, & thus, double jeopardy does not bar re-trial on SVF in Possession of Firearm charge. Held, conviction reversed & remanded for trial on SVF in possession of firearm.

**TITLE:** Harvey v. State
**INDEX NO.:** L.3.a.
**CITE:** (3rd Dist., 6-30-95), Ind. App., 652 N.E.2d 876
**SUBJECT:** Self-defense - erroneous instruction
**HOLDING:** Tr. Ct. committed reversible error in giving the following instruction concerning self defense: A person who is not in his home or fixed place of business & is carrying a handgun without a license cannot by law claim the protection of the law of self defense. Undisputed evidence at trial disclosed that D admitted to police that he did not have license to carry handgun used to commit homicide. Ct. rejected State's argument that since carrying handgun without license is criminal offense, literal application of self defense statute, Ind. Code 35-41-3-2(d)(1), both authorizes & requires instruction. Ct. found that statute, read as a whole, refutes such narrow construction. Its intent is to preclude defense where it is sought by one who has actively engaged in perpetration of crime, & that criminal activity produced confrontation wherein force was employed. Jones v. State, Ind., 491 N.E.2d 999. In Jones, Ct. held that whether D was justified in firing illegal sawed-off shotgun in self defense was question for jury. Here, instruction was in error because it ignored any nexus between crime & shooting, & conclusively denied D consideration of his claim of self-defense. Held, judgment reversed & remanded for new trial.

**RELATED CASES:** Jervis, 916 N.E.2d 969 (Ind. Ct. App 2009) (where D admitted he shot victim during an altercation while he was fleeing after breaking into an apartment, there is an unbroken causal chain between the break-in and the shooting, which precludes his reliance on self-defense; thus, trial counsel was not ineffective for failing to object to the portion of the self-defense instruction stating “a person is not justified in using force if: He is committing, or is escaping after the commission, of a crime.”).

**TITLE:** Henson v. State
**INDEX NO.:** L.3.a.
**CITE:** (4-14-03), Ind., 786 N.E.2d 274
**SUBJECT:** Refusal to give self-defense instruction - no imminent threat of violence
**HOLDING:** In battery by body waste prosecution, Tr. Ct. did not err in refusing to instruct jury that it could find D acted in self-defense. Claim of self defense requires D to have acted without fault, been in a place where he or she had right to be & been in reasonable fear or apprehension of bodily harm. White v. State, 699 N.E.2d 630 (Ind. 1998). Despite D's testimony that, based on prior incidents, prison guard was coming to "beat him," record showed that his actions were not without fault. Initial confrontation that gave rise to D's fear of retribution by guards was provoked by his initial confrontation & violent epithet directed at guards. Furthermore, there was nothing in record to sustain D's contention that he was reasonable in his belief of imminent bodily harm. D armed himself for premeditated attack on corrections officers before officers arrived.

A person claiming self-defense cannot reasonably base a belief that threat is imminent on actions of another who has withdrawn from confrontation. The 'reasonableness' of a D's belief that he was entitled to act in self-defense is determined from that point in time at which D takes arguably defensive action. That belief must be supported by evidence that alleged victim was imminently prepared to inflict bodily harm on the D. Where, as here, a D arms himself or herself with a weapon before imminent threat exists in premeditated strategy to retaliate for past violence (rather than to protect against imminent use of unlawful force), a self-defense instruction is not available. While criminal code excuses use of force in certain circumstances to protect against certain unlawful activity, it does not countenance & will not sanction premeditated retaliation for past violence. Held, transfer granted, Ct. App.' memorandum opinion vacated, judgment affirmed.

**TITLE:** Hill v. State
**INDEX NO.:** L.3.a.
**CITE:** (1/12/89), Ind., 532 N.E.2d 1153
**SUBJECT:** Self defense - shot following disabling first shot not justified
**HOLDING:** Where first shot disables alleged assailant, second shot is not justified as self-defense. Here, D fired first shot which knocked victim to hands & knees. D then proceeded to fire second shot. This situation parallels Schlegel, 150 N.E.2d 563, in which Ind. S. Ct. held that where victim is felled by first shot, even where that shot may be justified, second shot cannot be justified as self-defense. Held, affirmed. **Note:** Ct. did not discuss evidence, if any, re which shot caused death.

**TITLE:** Hirsch v. State
**INDEX NO.:** L.3.a.
**CITE:** (6-30-98), Ind., 697 N.E.2d 37
**SUBJECT:** Self-defense - denial of right to present evidence requires reversal
**HOLDING:** Failure to permit D to present all evidence relevant to his self-defense claim required reversal. Where self-defense is at issue, any fact which reasonably would place person in fear or apprehension of death or great bodily injury is admissible. Russell, 577 N.E.2d 567. In view of fact that D's credibility is of utmost importance to his defense, wrongful exclusion of any evidence which would tend to corroborate his testimony or lend credence to his defense would not be without prejudice to his substantial rights. Here, Tr. Ct. erred by barring D, who was claiming self-defense, from testifying to victim's refusal to stop fighting. D did not offer statement to prove truth of matter asserted, but to show that D was acting reasonably by continuing to pin victim on floor because D believed victim was going to continue fighting & that D was not initial aggressor or did not enter into combat with victim.

In addition, exclusion of testimony was not harmless because D's credibility was extremely important, & D was only person who could testify to his feelings, intent, perceptions & his actual belief that he was in imminent harm. Although another witness testified to victim's refusal to stop fighting, D's excluded testimony was not cumulative because State did not concede to substance of excluded testimony. Instead, State inferred, during its closing argument, that victim may not have made statement at all. Moreover, because D had initial burden of production to support self-defense claim, fundamental fairness required that he be given relatively untrammeled opportunity to do so. Held, transfer granted, conviction reversed & remanded for new trial.

**TITLE:** Hood v. State
**INDEX NO.:** L.3.a.
**CITE:** (2nd Dist., 12-06-07), Ind. App., 877 N.E.2d 492
**SUBJECT:** Self-defense - evidence D's fear was reasonable is relevant
**HOLDING:** In murder prosecution, Tr. Ct. committed reversible error by excluding evidence that corroborated D's self-defense claim. AReasonably believes,@ as used in the Indiana self-defense statute, requires both subjective belief that force was necessary to prevent serious bodily injury, & that such actual belief was reasonable. Thus, a D is entitled to support his claim of self-defense with evidence that his fear was reasonable. Here, D shot the victim multiple times during altercation. D claimed he shot the victim because he believed the victim was reaching for a gun. Tr. Ct. excluded D's companion's testimony that he too thought the victim was reaching for a gun. Because the companion's testimony of an imminent threat was corroborative of D's perception, it was relevant to a determination of objective reasonableness. Moreover, the fact that D shot the victim six times did not make the erroneous exclusion harmless. The victim's injuries do not necessarily disprove D claim of self defense. Held, voluntary manslaughter conviction reversed & remanded for new trial.

**TITLE:** Jackson v. State
**INDEX NO.:** L.3.a.
**CITE:** (1-20-78), Ind., 371 N.E.2d 698
**SUBJECT:** Self-defense - establishment of defense; requires fear of real danger
**HOLDING:** In order to establish self-defense, it must be shown that D acted without fault; that D had right to be where he was; & that D feared, or actually was in, real danger of death or great bodily harm. Once self-defense is pleaded, State is required to prove absence of self-defense. Here, evidence showed that victim slapped & choked D while they were still in car. However, when victim & D left car, victim was actually attempting to flee from D as D chased victim around car firing gun at him. Under these circumstances, jury was justified in finding that there was no self-defense & that D had become aggressor in altercation. Held, judgment affirmed.

**RELATED CASES:** Bryan, 450 N.E.2d 53 (right of self-defense passes when danger passes); Debose, 450 N.E.2d 71 (defense counsel was not incompetent in failing to tender instruction on self-defense where evidence indicated that victim was 30 years older, 60 pounds lighter & shorter than D); Tinsley, 358 N.E.2d 743 (in prosecution for second degree murder, Tr. Ct.'s self-defense instruction, including statement that one who is in no apparent danger & who has no reasonable ground for apprehension of danger cannot interpose defense of self-defense, was proper); Wardlaw, 286 N.E.2d 649 (person may act upon appearances that seem to be threatening his life, even though he may actually be mistaken); Lambert, App., 306 N.E.2d 115 (even assuming that victim was initial aggressor, evidence revealed that D's actions exceeded bounds allowed under law of self-defense & that D, at time of shooting which occurred when victim began to retreat & made gesture of surrender, had become aggressor to unreasonable degree).

**TITLE:** Lilly v. State
**INDEX NO.:** L.3.a.
**CITE:** (4/14/87), Ind., 506 N.E.2d 23
**SUBJECT:** Self-defense - proof
**HOLDING:** Evidence was sufficient to show D did not act in self-defense. Here, D was trimming hair when victim entered room. D turned, grabbed shotgun, cocked it, aimed it at victim, & pulled trigger. When D claims self-defense, D must prove 3 facts: (1) that D was in place where D had right to be; (2) that D acted without fault; & (3) that D had reasonable fear or apprehension of death or great bodily harm. Hinkle, 471 N.E.2d 108; Bryan, 450 N.E.2d 53; Ind. Code 35-41-3-2. When self-defense has been asserted, state bears burden of showing absence of one of these elements beyond a reasonable doubt. Bryan; Loyd, 398 N.E.2d 1260. State may carry burden by rebutting defense directly, by affirmatively showing D did not act in self-defense, or by simply relying upon sufficiency of evidence in chief. Davis, 456 N.E.2d 405. Reversal of conviction is required only if appellate Ct. finds no reasonable person could say that self-defense was negated by state beyond reasonable doubt. Almodovar, 464 N.E.2d 906. Ct. finds jury could reasonably conclude that D was not justified in believing deadly force was necessary to protect himself. Held, murder conviction affirmed.

**RELATED CASES:** Wade, 482 N.E.2d 704 (evidence was sufficient to sustain murder conviction & to negate D's self-defense even though D & decedent (X) argued, D asked X to leave & X was known to carry gun in pocket where X put his hand before D shot X 2 times with shotgun); McCraney, 447 N.E.2d 589 (self-defense claim rebutted where victim carried no weapon & jury could have inferred victim was extremely intoxicated/somewhat incapacitated); Brumfield, 442 N.E.2d 973 ( D acted unreasonably in shooting victim 4 times where victim had no weapon & did not appear to be threatening D in manner justifying such force); Harris, 382 N.E.2d 913 (sufficient evidence to rebut self-defense claim where D had attacked victim in past and victim did not return violence).

**TITLE:** Littler v. State
**INDEX NO.:** L.3.a.
**CITE:** (08-08-07), Ind., 871 N.E.2d 276
**SUBJECT:** Self defense - subjective & objective belief re: necessity of force
**HOLDING:** A person is justified in using deadly force only if the person reasonably believes that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. Ind. Code 35-41-3-2(a). Several other jurisdictions have recognized that self-defense includes both subjective & objective components. Ct. agreed & held that the phrase "reasonably believes," as used in the Indiana self-defense statute, requires both subjective belief that force was necessary to prevent serious bodily injury, & that such belief was one that a reasonable person would have under the circumstances. Held, transfer granted, Ct. App.' memorandum opinion vacated, reversed & remanded for new trial.

**RELATED CASES:** Huls, 971 N.E.2d 739 (Ind. Ct. App 2012) (D's proposed self defense instructions unduly emphasized that the validity of the use of force in self-defense "can only be determined from the standpoint of the accused" without also instructing them to equally consider whether D's belief was objectively reasonable under the circumstances).

**TITLE:** Moore v. State
**INDEX NO.:** L.3.a.
**CITE:** (1-8-81), Ind., 414 N.E.2d 558
**SUBJECT:** Self-defense - instruction on State's burden to negate self-defense not required
**HOLDING:** Tr. Ct. did not err in refusing to instruct jury that State had to establish beyond reasonable doubt that D had not acted in self-defense. Once self-defense is pleaded, State is required to prove absence of self-defense. However, such burden may be satisfied by reliance upon State's evidence in chief. Here, Tr. Ct. instructed jury on State's burden to prove all elements of crime beyond reasonable doubt. Thus, another instruction on burden of proof as to self-defense was unnecessary. Held, judgment affirmed; DeBruler, J., dissenting.

**TITLE:** Martin v. Ohio
**INDEX NO.:** L.3.a.
**CITE:** 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)
**SUBJECT:** Due process - burden of proof; defenses
**HOLDING:** Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt (BRD) of every fact necessary to constitute the crime with which he is charged." In re Winship (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368. Because states are primarily responsible for preventing & dealing with crime, Court is reluctant to disturb state's definition of criminal conduct & procedure, including burden of producing evidence & allocating burden of persuasion. Patterson v. NY (1977), 432 U.S. 197, 201-02, 97 S.Ct. 2319, 53 L.Ed.2d 281. In Patterson, Court held that where state had proved BRD, each element of murder, but placed on D burden of proving extreme emotional disturbance, which, if proved, reduced crime from murder to manslaughter. Here, D was charged with aggravated murder which was defined under Ohio law as "purposely & with prior calculation & design, caus[ing] the death of another." [Citation omitted.] D raised self defense. Jury was instructed that to convict it had to find, in light of all evidence, that each element of murder was proven BRD & that burden, with respect to these elements, did not shift. Jury was instructed that to convict it had to be convinced that none of the evidence, whether offered by state or D, raised a reasonable doubt as to any element of murder. Jury was further instructed that it could acquit if it found by preponderance of evidence that D acted in self defense. Held, burden of proof on elements of offense was not unconstitutionally shifted to D. Instructions, when read as whole, are adequate to convey that all evidence, including evidence going to self defense, must be considered in deciding whether state met its burden of proof. Powell, joined by Brennan & Marshall & joined in part by Blackmun, DISSENTS.

**TITLE:** Mayes v. State
**INDEX NO.:** L.3.a.
**CITE:** (3-13-01), Ind., 744 N.E.2d 390
**SUBJECT:** Self-defense - contemporaneous crime limitation
**HOLDING:** Notwithstanding Ind. Code 35-41-3-2, which provides that self-defense is not available to person who is committing crime, fact that D is committing crime at time he is allegedly defending himself is not sufficient standing alone to deprive D of defense of self-defense. Rather, there must be immediate causal connection between crime & confrontation. Evidence must show that but for D committing crime, confrontation resulting in injury to victim would not have occurred. Here, there was sufficient evidence before jury to conclude that crime of unlawful possession of handgun was causally connected to murder. After victim & her sister left D's home & walked away, D went back into his house & grabbed his jacket which contained handgun. Jury could have concluded that but for D's possession of unlicensed handgun, victim would still be alive because D's unlicensed handgun was required by law to be kept at his dwelling, on his property, or at his fixed place of business. Moreover, D fired five shots at victim, & at least one bullet struck her in back as she was either falling down or already on ground. Thus, Tr. Ct.'s jury instruction on self-defense, which tracked language of Ind. Code 35-41-3-2 nearly verbatim, was not erroneous. Held, judgment affirmed; Boehm & Dickson, JJ., concurring, noted that instruction's recitation of naked statutory language was not proper statement of law, & that majority's "but for" test is too broad & eliminates self-defense in situations where it should rightly be available.

**RELATED CASES:** Fuentes, 952 N.E.2d 275 (Ind. Ct. App 2011) (erroneous instruction was harmless because jury could not have properly found that D acted in self-defense when he shot victim a second time; after the first shot, victim went to his knees and put his arms and hands up in a defenseless position; D's right to self-defense therefore ceased); Randolph, App., 802 N.E.2d 1008 (there was overwhelming evidence before jury that D's claim of self-defense was without merit notwithstanding contemporaneous crime language contained in jury instruction); Henderson, App., 795 N.E.2d 473 (Tr. Ct. committed harmless error in failing to instruct jury that criminal activity by an accused must have causal connection to confrontation in which force was used in order to preclude use of self-defense); Smith, App., 777 N.E.2d 32(Tr. Ct. erred in refusing to tender D's instruction, which stated that person who was actively engaged in perpetration of crime may assert self-defense if criminal activity he was engaged in did not produce confrontation wherein force was employed).

**TITLE:** Patton v. State
**INDEX NO.:** L.3.a.
**CITE:** (2nd Dist., 11-22-05), Ind. App., 837 N.E.2d 576
**SUBJECT:** Self-defense instruction - omission of "no duty to retreat" language
**HOLDING:** In light of overwhelming evidence before jury that D's claim of self-defense was without merit, Tr. Ct.'s failure to instruct jury that D had no duty to retreat was harmless. Where evidence is in conflict upon question of who was the aggressor fairness seems to demand that it be balanced with an advisement that one who is not the aggressor is not required to retreat. French v. State, 403 N.E.2d 821, 825 (Ind. 1980). Here, language in instruction that a person has no duty to retreat before defending himself was not included in Tr. Ct.'s self-defense instruction, but D did not object at trial on that ground. D's defense at trial was that he was defending himself in a situation where he was confronted with deadly force. Although witnesses disagreed on whether D was the aggressor, three of the four witnesses testified D shot first, & twenty-three of thirty-two bullet casings recovered from scene were linked to gun D was using. Seven more casings were linked to the gun later found in residence of accomplice's girlfriend. In light of that evidence, Ct. could not say an instruction that D had no duty to retreat would have impacted jury's verdict. Held, judgment affirmed.

**TITLE:** Phillips v. State
**INDEX NO.:** L.3.a.
**CITE:** (3/7/90), Ind., 550 N.E.2d 1290
**SUBJECT:** Self-defense - reputation of victim for carrying gun
**HOLDING:** Tr. Ct. did not err in excluding evidence that murder victim had reputation for carrying gun. D was charged with murder & argued self-defense. State was granted motion in limine restricting evidence of & reference to victim's character or prior acts of misconduct. At trial, Tr. Ct. allowed testimony about victim's bad reputation for peace & quietude but rejected any testimony as to his reputation for carrying gun. Generally, evidence regarding character of victim is inadmissible. Begley, 416 N.E.2d 824. However, when self-defense is raised, evidence of victim's character is admissible for 2 distinct purposes, & type of proof allowed depends upon its purpose. Character of victim is relevant to show that D had reason to fear victim & to believe that he/she was in imminent danger. For this purpose, character of victim may be shown by evidence of specific bad acts, but only if D makes foundational showing that he/she had knowledge of them prior to charged incident. McCraney, 447 N.E.2d 589. Character evidence is also admissible to show that victim was initial aggressor, but this may be proved only by general reputation evidence & not by evidence of specific bad acts. [Citations omitted.] Here, D sought to establish that victim was initial aggressor, & argues that testimony admitted did in fact concern victim's general reputation, since he asked witness about reputation for carrying gun. Ind. S. Ct. rejects this characterization. Tr. Ct. here correctly allowed D's testimony that victim had reputation in community for being violent, & correctly rejected testimony as to victim's propensity for carrying weapons. Held, conviction affirmed.

**TITLE:** Quinn v State
**INDEX NO.:** L.3.a.
**CITE:** (6/19/19), Ind. Ct. App., 126 N.E.3d 924
**SUBJECT:** State's evidence rebutted D's self-defense claim
**HOLDING:** In attempted murder prosecution, State's evidence sufficiently negated Defendant's self-defense claim, where Defendant went to victim's home angry and planning to hurt victim, walked around outside home carrying a loaded gun, knocked several times and refused to respond when victim repeatedly asked who was outside, and drew his gun before victim opened the door. This evidence alone supports a finding that Defendant provoked, instigated, or willingly participated in the violence that subsequently ensued. Video evidence did not "indisputably contradict" the State's rebuttal of certain elements of Defendant's self-defense claim, specifically whether he was the initial aggressor and reasonably feared bodily injury or death.

**TITLE:** Shepard v. State
**INDEX NO.:** L.3.a.
**CITE:** (1st Dist. 8/1/83), Ind. App., 451 N.E.2d 1118
**SUBJECT:** Self-defense - prior communicated threats
**HOLDING:** Tr. Ct. erred in refusing to permit D to introduce evidence of threats communicated to D by West family in support of his self-defense theory. Here, Tr. Ct. granted state's motion in limine as it related to prior threats made to D by West clan & sustained state's objection to defense exhibit - an accurate transcript of D's statement to police containing description of threat made by a West to him prior to shoot-out. Existence of "real danger of death or great bodily harm" (King 234 N.E.2d 465), apparent necessity for use of force employed by D, & amount of force necessary to resist attack can only be determined from standpoint of D at the time & under all existing circumstances. Nuss, App., 328 N.E.2d 747. When D claims he/she acted in self-defense, "evidence legitimately tending to support" theory is admissible. Gunn, App., 365 N.E.2d 1234. D's belief of "apparent danger" does not require danger be actual, only that belief be in good faith. Franklin 364 N.E.2d 1019. Ct. notes threats were not offered for truth of matter asserted, but only to explain D's state of mind as it related to his claim of self-defense; thus, evidence was not inadmissible hearsay. See Southard, App., 422 N.E.2d 325. Held, conviction reversed.

**RELATED CASES:** Smith, 490 N.E.2d 300 (Crim L 419(3), 1170(1); Tr. Ct. erred in excluding some statements murder victim made to D during incident, but admitting D's statements; statements were not hearsay but were introduced to show circumstances presented to D which resulted in his acts causing victim's death; however, error was harmless because statements were cumulative of other statements & because jury reasonably could have found D did not act in self-defense based upon his conflicting statements); Henderson, 455 N.E.2d 1117 (testimony was hearsay & properly excluded).

**TITLE:** Tunstill v. State
**INDEX NO.:** L.3.a.
**CITE:** (03/21/91), Ind., 568 N.E.2d 539
**SUBJECT:** Sufficiency of evidence to rebut self defense
**HOLDING:** Evidence most favorable to verdict was sufficient to support finding State rebutted D's claim of self-defense. D was charged with murder & convicted of voluntary manslaughter & claimed State didn't meet burden to negate self defense beyond reasonable doubt. D & victim were friends, & victim stopped by D's house twice on day before incident, drinking both times & ingesting cocaine on second visit. In early morning of next day, D went to liquor store & on exiting brushed into victim. D greeted victim, whereupon victim kicked D in groin. D backed away, asking victim what was wrong & victim kicked him again. Victim kicked D again & D pushed him backward. D then pulled knife & while backing up, but swinging knife, said, "'[w]hat's wrong with you? You must want to die. Do you want to die, nigger?'" Victim continued advancing toward D & they "'clenched'." Victim staggered back & fell into parked car & died shortly thereafter from knife wound.

D argued stabbing of victim was based on reasonable fear or apprehension of death or serious bodily injury, but Ct. noted that he had not known victim to carry weapons & no weapons were found on or near victim. D did not appear to be harmed physically, & victim was very intoxicated from alcohol & cocaine. D testified that he had no intention of stabbing victim & that victim charged him & fell on knife, but pathologist testified that to support D's claim, knife would have had to be firmly held & victim would have had to impact knife with considerable force. Although it was undisputed that the victim initiated conflict & was intent on continuing it, Ct. held that jury could have found D's use of deadly force was not justified by evidence presented. Therefore, evidence to negate D's self-defense claim was sufficient. Held, conviction affirmed, remanded for new sentencing, J. Givan dissenting as to conviction. For discussion of sentencing issue, see Tunstill at E.5.c & E.5.d.2.

**RELATED CASES:** Sudberry, 982 N.E.2d 475 (Ind. Ct. App 2013) (State presented sufficient evidence to rebut D's claim of self-defense where D was a mutual combatant and did not communicate an intent to withdraw from fight with his brother, that he escalated the fight, and that he used more force than was reasonably necessary); Boyer, App., 883 N.E.2d 158 (evidence supported rejection of self-defense claim in prosecution for domestic battery; although D asserted that in scratching victim's arms and face she was attempting to escape and repel victim as he battered her, there was evidence that D's response was greater than reasonably necessary to counter victim's initial conduct in nudging D toward the exit of victim's residence, and D struck victim in face after a third party had interceded and ended the initial altercation); Ballard, App., 808 N.E.2d 729 (after closing & locking front door, 63 year-old could have retreated into safety of residence & contacted police for further help instead of retrieving handgun & engaging in further altercation); Martin, App., 784 N.E.2d 997 (State met its burden of negating at least one of elements of self defense beyond reasonable doubt where force used by D to protect his father was not proportionate to requirements or urgency of situation); Hollowell, App., 707 N.E.2d 1014 (fact that D was initially struck in mouth by victim was not life-threatening enough to justify self-defense with knife).

**TITLE:** Turner v. State
**INDEX NO.:** L.3.a.
**CITE:** (02/25/2022), 183 N.E.3d 343 (Ind. Ct. App. 2022)
**SUBJECT:** Parolee was entitled to claim self-defense despite being in violation of parole.
**HOLDING:** Defendant claimed self-defense to a charge of murder. At trial, over his objection, the State admitted evidence of his parole status to show he was not in a place he had a legal right to rebut his self-defense claim. Following earlier decisions of the Supreme Court in Mayes v. State, 744 N.E.2d 390 (Ind. 2001) and Gammons v. State, 148 N.E.3d 301 (Ind. 2020), the Court decided that a literal application of the requirement that one be in a place where one has a right to be could bring about unjust or absurd results and defeat "the policy of this state that people have a right to defend themselves and third parties from physical harm and crime" under the language of the self-defense statute. The Court thus held that when a person is not in a place where he or she has a right to be, a self-defense claimed is barred only if there is an immediate causal connection between the person's presence in that place and the confrontation. Because there was no evidence that Defendant violated parole in order to confront the victim, the trial court abused its discretion in determining that his parole status was relevant to his self-defense claim. But the error was harmless in light of overwhelming evidence showing it was not an act of self-defense. The Court held the trial court did not err in admitting other challenged evidence or by denying Defendant's motion to secure attendance of a witness incarcerated out of state when Defendant failed to take correct steps to do so before trial. Held, judgment affirmed.

**TITLE:** Washington v. State
**INDEX NO.:** L.3.a.
**CITE:** (11/12/2013), 997 N.E.2d 342 (Ind. 2013)
**SUBJECT:** Tr. Ct. correctly gave pattern jury instruction on defense of another person
**HOLDING:** Tr. Ct. did not abuse its discretion in using pattern jury instruction on defense of another because it appropriately balanced jury's duty to consider D's perception of danger against the reasonableness of his perception. See Shaw v. State, 534 N.E.2d 745, 747 (Ind. 1989).

Here, D's girlfriend went to a club to confront D because he was with another woman. The girlfriend took her and D's infant son to the scene. Once the girlfriend and the other woman began to fight, an officer pinned the girlfriend face down on a car hood. D jumped on the officer, put his arm around the officer's neck, and yelled, "Get off my baby mama," explaining at trial that he thought his son was pinned under the girlfriend.

D's tendered instruction correctly stated that the jury was to consider his perception of the dangerousness of the situation, but it did not state that his perception must have been reasonable. Held, transfer granted, Court of Appeals opinion vacated, and judgment affirmed.

**NOTE:** Court said that Shaw clarified French v. State, 403 N.E.2d 821 (1980), not impliedly overrule it. Court issued companion case, addressing same instruction issue; see Russell v. State, 997 N.E.2d 351 (Ind.2013).

**TITLE:** Whipple v. State
**INDEX NO.:** L.3.a.
**CITE:** (6/8/88), Ind., 523 N.E.2d 1363
**SUBJECT:** Self-defense - battering relationship; danger must be imminent
**HOLDING:** Victim of battering parent-child relationship was not entitled to self-defense instruction absent imminent danger of death or serious bodily harm. Law of self-defense is law of necessity; right of self-defense arises with, ends with, & may only be equal to necessity. Jennings 318 N.E.2d 358. Ind. Code 35-41-3-2(a) provides that deadly force is justifiable only when D reasonably believes it necessary to prevent imminent serious bodily injury. Inquiry involves 2 questions: (1) did D actually perceive necessity to act as he/she did to defend against imminent threat, & (2) were such perceptions objectively reasonable? Here, D & younger sister were victims of ongoing violent relationship with father. However, D lured mother into garage to kill her, & killed father as he slept. Deadly force is justified only where D, based upon prior experience or abuse, reasonably perceives imminent danger closer in time to use of deadly force than in instant case. Cf. State v. Galleges (1986), N.M.App., 719 P.2d 1268 (D entitled to self-defense instruction where husband, on day D killed him, had sexually abused D, struck child with belt buckle, & threatened to kill D) with Reed, 479 N.E.2d 1248 (D shot father & mother while both were sleeping). [Other citations omitted.] Earlier in month of killing D had received severe beating from father. However, because of remoteness in time between killing & last physical abuse, & because father was asleep & mother was in nonthreatening disposition at time of killing, D could not reasonably have perceived imminent danger. Held, self-defense instructions properly refused.

**RELATED CASES:** Howard, App., 755 N.E.2d 242 (D's testimony at trial failed to establish sufficient basis for instruction being given because there was no indication that D was in fear of bodily harm); White, App., 726 N.E.2d 831 (no error in refusing D's self-defense instruction; there was no evidence that D reasonably believed she was in imminent danger when she stabbed ex-husband).

**TITLE:** Wolf v. State
**INDEX NO.:** L.3.a.
**CITE:** (5/5/2017), 76 N.E.3d 911 (Ind. Ct. App 2017)
**SUBJECT:** Self-defense claim against battery charge properly rejected
**HOLDING:** Tr. Ct. properly rejected Defendant's claim of self-defense, where evidence established Defendant was a willing participant and the initial aggressor in fight with complaining witness (C.W.). While C.W.'s testimony varied slightly from his statements to police as to who fell to the ground first, it did not change materially, and there was not a complete lack of circumstantial evidence. Thus, the incredible dubiosity rule is inapplicable in this case. See Moore v. State, 27 N.E.3d 749 (Ind. 2015).

Defendant also argued that the Tr. Ct. erroneously found his act of calling C.W. names constituted sufficient provocation to justify C.W. grabbing his shirt. But because C.W.'s testimony is not incredibly dubious, then Defendant's self-defense claim cannot stand because the facts most favorable to the court's judgment show that C.W. did not touch Defendant until Defendant punched him. Thus, Defendant's argument that his name-calling did not constitute provocation for C.W. to grab him becomes moot because, "seeing the facts as [the Court] must, [C.W.] did not grab [Defendant]." Held, judgment affirmed.

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### Defense of third person (Ind. Code 35-41-3-1)

**TITLE:** Ervin v. State
**INDEX NO.:** L.3.b.
**CITE:** (11/28/2018), 114 N.E.3d 888 (Ind. Ct. App 2018)
**SUBJECT:** Failure to instruct jury on defense of property and others affirmed
**HOLDING:** D, finding his iPad to be missing, used an "App" to locate it. Following the App, D arrived at an intersection where the App informed him the iPad was to be located. D blocked the intersection with his vehicle and approached a truck, also at the intersection, pointing a gun at the driver and then shot at the truck as the truck backed up and made a U-turn and drove away. At trial, D argued he was acting in defense of property (retrieving his missing iPad) and defense of others (when the truck drove away erratically it had potential to harm others) and the jury should have been instructed accordingly. Court of Appeals held that evidence was sufficient to support D's Level 5 criminal recklessness conviction and that the State negated claims of defense of property and defense of others. D instigated the altercation and blocked the intersection he was not in a place he had a right to be.

The Court *sua sponte* vacated D's conviction for Level 6 felony pointing a firearm on double jeopardy grounds. Held, judgment affirmed in part and vacated in part.

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.c. Defense of property (Ind. Code 35-41-3-2)

**TITLE:** Ervin v. State
**INDEX NO.:** L.3.c.
**CITE:** (11/28/2018), 114 N.E.3d 888 (Ind. Ct. App 2018)
**SUBJECT:** Failure to instruct jury on defense of property and others affirmed
**HOLDING:** D, finding his iPad to be missing, used an "App" to locate it. Following the App, D arrived at an intersection where the App informed him the iPad was to be located. D blocked the intersection with his vehicle and approached a truck, also at the intersection, pointing a gun at the driver and then shot at the truck as the truck backed up and made a U-turn and drove away. At trial, D argued he was acting in defense of property (retrieving his missing iPad) and defense of others (when the truck drove away erratically it had potential to harm others) and the jury should have been instructed accordingly. Court of Appeals held that evidence was sufficient to support D's Level 5 criminal recklessness conviction and that the State negated claims of defense of property and defense of others. D instigated the altercation and blocked the intersection he was not in a place he had a right to be.

The Court *sua sponte* vacated D's conviction for Level 6 felony pointing a firearm on double jeopardy grounds. Held, judgment affirmed in part and vacated in part.

**TITLE:** Goodwin v. State
**INDEX NO.:** L.3.c.
**CITE:** (9/7/82), Ind., 439 N.E.2d 595
**SUBJECT:** Defense of property
**HOLDING:** Battery may be justified if it is to prevent or terminate a person's unlawful entry or attack upon another person's dwelling or curtilage. Here, state's instruction concerning reasonable force to protect property, Ind. Code 35-41-3-2, was proper where D entered victim's home in angry manner, was armed, cursed & threatened victim, & approached victim with arm cocked. Issue was whether D's later stabbing of victim constituted self-defense to victim's battery of D. Held, no error in giving instruction.

**RELATED CASES:** Bixler 471 N.E.2d 1093 (instruction given was approved in Smith, App., 403 N.E.2d 869); Suratt, App., 312 N.E.2d 487 (force which might be justified to prevent consummation of offense may not be justified to later apprehend culprit or recover property).

**TITLE:** Hayes v. State
**INDEX NO:** L.3.c.
**CITE:** (8/11/2014), 15 N.E.3d 82 (Ind. Ct. App 2014)
**SUBJECT:** Evidence did not support defense of property instruction
**HOLDING:** In pointing a firearm and intimidation prosecution, Tr. Ct. did not abuse its discretion in denying D's proposed instruction on defense of his dwelling. Although complaining witness (C.W.) had knocked on D's front door in an effort to serve him with legal documents, she had returned to her truck and was completing paperwork when D arrived in the front yard with two guns. At that point, C.W. got out of her truck to talk to D but remained on the public sidewalk at all times. Witness testified she was 100% sure that C.W. did not try to open the gate again. There is simply no evidence that C.W. was attempting to attack or unlawfully enter D's property when D pointed two guns at her. Thus, Ind. Code 35-47-4-3 (use of force to protect property) does not apply and Tr. Ct. properly rejected proposed instruction because it was not supported by the evidence.

Even if "no trespassing" signs in front windows were sufficient to prohibit C.W. from knocking on front door, C.W. had returned to her truck when D approached with a gun in each hand. D's conduct was not necessary to prevent or terminate C.W.'s entry onto his property. Held, judgment affirmed.

**TITLE:** Nantz v. State
**INDEX NO.:** L.3.c.
**CITE:** (4th Dist.; 1-11-01), Ind. App., 740 N.E.2d 1276
**SUBJECT:** Defense of property - use of deadly force
**HOLDING:** D may not point loaded firearm at person in order to defend property. "With respect to property other than dwelling or curtilage, person is justified in using reasonable force against another person . . . However, person is not justified in using deadly force . . ." Ind. Code 35-41-3-2(c). Deadly force means force that creates substantial risk of serious bodily injury. Ind. Code 35-41-1-17. In context of criminal recklessness charge, pointing loaded firearm is considered action that creates substantial risk of bodily injury to another person. Spurlock v. State, 675 N.E.2d 312 (Ind. 1996). Here, D waved or pointed loaded gun at complaining witness (CW) in order to protect his bulldozer. D claimed that he threatened deadly force but did not use deadly force as prohibited in self-defense statute. However, because gun could have accidentally discharged or CW could have grabbed gun causing serious injury or death to one or both of these men, D's pointing of firearm created substantial risk of serious bodily injury. Held, judgment affirmed.

**RELATED CASES:** Gomez, 56 N.E.3d 697 (Ind. Ct. App 2016) (domestic battery conviction affirmed; evidence supported conclusion that force used by D to defend property was unreasonable in light of urgency of situation & unreasonable to protect any alleged interest he may have had in rents from property).

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.e. Apprehension of Criminal

**TITLE:** Birtsas v. State
**INDEX NO.:** L.3.e.
**CITE:** (2nd Dist., 6-28-73), Ind. App., 297 N.E.2d 864
**SUBJECT:** Apprehension of criminal - police officer may use reasonable force during arrest.
**HOLDING:** Arresting officer has right to use such reasonable force as necessary to make arrest & to take his prisoner to jail, but he may not use unreasonable force in effectuating arrest. Here, at police station D refused to exit patrol car, causing officer to pull him out of car onto floor of security area. Straddling D, officer picked D up & told D to put his hands against wall so that he could be frisked & D refused. Officer grabbed D's hands & attempted to place them against wall & in doing so D grabbed officer's hand & bit it, drawing blood. Officer's response was to strike D in D's side. Officer's actions were reasonable under these circumstances. Held, judgment affirmed.

**TITLE:** Thrash v. State
**INDEX NO.:** L.3.e.
**CITE:** (2nd Dist., 1-13-98), Ind. App., 690 N.E.2d 355
**SUBJECT:** Defenses - use of force to effect arrest or prevent escape
**HOLDING:** In robbery and criminal confinement prosecution, Tr. Ct. properly denied D's instruction regarding use of force to effect arrest or prevent escape. At trial, D testified that complaining witness (CW) willingly got into D's car and handed him piece of cocaine in exchange for $50. After determining that substance was not cocaine, D demanded refund and forcibly tried to get his money back from CW. D argued that because he was victim of theft by deception, he was justified in attempting to effect arrest pursuant to Ind. Code 35-41-3-3. Statute notes that such action is justified if felony has been committed and individual has reason to believe that subject of detention has committed felony. D's instruction failed to instruct jury as to what felony CW allegedly committed. Further, D was simply availing himself of self-help debt collection, which is not tantamount to attempting to arrest CW or prevent CW's escape pursuant to statute. Finally, even if D's instruction was true statement of law, as matter of public policy, Ct. will not allow individuals who find themselves at bad end of drug deal to avail themselves of such self-help method of arrest. Ind. Code 35-41-3-3 was not intended to provide solace to those who find themselves wronged by breaking law. Held, judgment affirmed.

**RELATED CASES:** Brown, App., 830 N.E.2d 956 (Tr. Ct. did not err in refusing certain instructions & in refusing to allow D to present evidence in support of his claim that police officers used excessive force when he was arrested); Smith, 730 N.E.2d 705.

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.f. Legal authority (Ind. Code 35-41-3-1)

**TITLE:** Leatherman v. State
**INDEX NO.:** L.3.f.
**CITE:** (5/9/2018), 101 N.E.3d 879 (Ind. Ct. App. 2018)
**SUBJECT:** Participation in needle exchange program does not excuse illegal drug activity
**HOLDING:** Indiana's needle exchange program statute (Ind. Code § 16-41-7.5-9) prohibits mere possession of a needle obtained through the program or attendance at the program as bases for arrest or prosecution. But nothing in the statute condones unlawful conduct that transpires after an individual has obtained a needle from the exchange program. Here, D possessed methamphetamine and delivered it to a passenger in the vehicle he was driving. He was found in possession of two syringes and convicted of possession of paraphernalia. On appeal, D argued the Legal Authority defense pursuant to Ind. Code § 35-41-3-1, but Court held this defense was waived due to his failure to raise the issue at trial. Waiver notwithstanding, Court noted that the needle exchange statute does not carve out "immunity" from possession of paraphernalia charges. Held, judgment affirmed in part and reversed in part on other grounds.

**TITLE:** McReynolds v. State
**INDEX NO.:** L.3.f.
**CITE:** (1st Dist., 05-04-09), 901 N.E.2d 1149 (Ind. Ct. App. 2009)
**SUBJECT:** Parental discipline privilege not available to babysitter
**HOLDING:** Custodians other than parents, schoolteachers and persons *in loco parentis* have no authority to use reasonable corporal punishment in disciplining a child. Dayton v. State, 501 N.E.2d 482 (Ind. Ct. App. 1986). In loco parentis means "in the place of a parent," and refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. Snow v. England, 862 N.E.2d 664 (Ind. 2007).

Here, D was neither a stepparent nor romantically involved with CW's mother, although he lived in her home. He did not act as a father figure to CW or make parenting decisions but was only a babysitter who drove CW to school and helped him with his homework. When necessary, he asked mother's permission to discipline her children, although he did not do so on day of charged incident. At all times, D was subject to CW's mother's direction. Thus, D was not in loco parentis, and therefore the parental discipline privilege was not available to him. Because D's use of force against CW was unreasonable, Court affirmed his conviction for Class D felony battery of person less than fourteen. Held, judgment affirmed.

**TITLE:** Peaches v. Evansville
**INDEX NO.:** L.3.f.
**CITE:** (St. Dist., 5-9-79), Ind. App., 389 N.E.2d 322
**SUBJECT:** Self-defense / justification for act - Legal authority to use deadly force
**HOLDING:** Police officer was justified in relying on presumptive constitutionality of statute permitting use of deadly force in apprehension of person attempting to flee from scene of burglary. Thus, mother of person fatally shot by police officer could not recover from city, even if statute were unconstitutional. Held, judgment affirmed.

**TITLE:** Schalk v. State
**INDEX NO.:** L.3.f.
**CITE:** (02-28-11), 943 N.E.2d 427 (Ind. Ct. App. 2011)
**SUBJECT:** Claim of legal authority - attorney arranging controlled buy with informant
**HOLDING:** An attorney who arranged a controlled buy with a confidential informant ("CI") to discredit the CI's subsequent testimony against the attorney's client was not on the "same legal footing" as prosecutors or police officers who arrange controlled buys; thus, the attorney's conduct constituted a crime. Here, the CI bought methamphetamine from the attorney's client and was scheduled to testify against the client. While charges were pending against the client, the attorney arranged a drug buy with the CI to show that he was still dealing drugs and thus discredit the CI's testimony against the client.

The definition of law enforcement officer includes police officers, prosecutors, sheriffs and conversation officers, but it does not include defense attorneys. See Ind. Code 35-41-1-17. "While [counsel] contends that his only intent was to deliver the marijuana to law enforcement or the court for use in defending his client at trial, such a purpose does not immunize him from prosecution."

Moreover, no reasonable interpretation of the "citizen's arrest" statute, Ind. Code 35-33-1-4, could support D's claim that he did not commit a criminal act when he arranged a controlled drug buy with a confidential informant. The citizen's arrest statute says that any person may arrest another person if: 1) the other person committed a felony in his presence, 2) a felony has been committed in his presence and he has probable cause to believe that the other person has committed a felony, or 3) a misdemeanor involving a breach of the peace was committed in his presence and the arrest is necessary to quell the breach of peace. "D] does not suggest, and there is no evidence, that he ever tried to 'arrest' [the CI.]" Rather, [D] arranged an illegal drug buy."

Finally, Court rejected claim that client's right to counsel under the Sixth Amendment of the United States Constitution and Article I, 13 of the Indiana Constitution authorizes a defense attorney to arrange a drug buy to discredit a confidential informant who was scheduled to testify against the attorney's client in another case. The attorney is an officer of the court and has sworn to uphold the federal and state constitutions. Held, judgment affirmed.

**RELATED CASES:** Schalk, 985 N.E.2d 1092 (Ind. 2013) (D suspended from practice of law for at least nine months for his misconduct and unfounded attacks on those involved in criminal case and disciplinary proceeding; see full review at N.2.d).

**TITLE:** Smith v. State
**INDEX NO.:** L.3.f.
**CITE:** (4th Dist. 2/24/86), Ind. App., 489 N.E.2d 140
**SUBJECT:** Legal authority - parental discipline; defense to battery
**HOLDING:** Evidence was sufficient to sustain D's conviction for Class A misdemeanor battery where he beat his 15-year-old daughter for 10 minutes with a belt because her report card included 3 failing grades. Here, D also contends conviction violated his due process right of parental authority found in Ind. Code 35-41-3-1. In order to qualify as legal defense, parental discipline must be reasonable & not cruel or excessive. Hinkle, (1891), 127 Ind. 490; Hornbeck, (1896), 16 Ind. App. 484. Ct. finds duration & intensity of beating, together with numerous wounds evident in photographs supported Tr. Ct.'s determination that discipline was unreasonable & beyond bounds of legal authority. Ct. rejects D's contention that statutes involved are unconstitutionally vague. Held, conviction affirmed.

**RELATED CASES:** Cooper, App., 831 N.E.2d 1247 (no error in refusing D's proposed instruction on legal authority of parent to discipline her child; whether D had legal authority to discipline was not at issue, as State argued that D's conduct exceeded bounds of reasonable discipline); Johnson, App., 804 N.E.2d 255 (evidence was sufficient for Tr. Ct. to have found that D's treatment of her daughter was excessive & did not constitute reasonable parental discipline; see full review at K.3.a); Dyson, App., 692 N.E.2d 1374 (parent who is prohibited from interacting with his or her child except when supervised may not legally use physical force to discipline that child when not supervised; parental discipline defense afforded D no protection because his alleged attempt to discipline his son did not occur in context of supervised visitation); Dayton, App., 501 N.E.2d 482 (Schools 176; Tr. Ct. properly rejected as incorrect statement of law D's tendered instruction that custodian may use reasonable corporal punishment when disciplining child; only custodians who are parents, school teachers, or persons in loco parentis have authority to discipline; D was married to battery/neglect victim's mother, but he was not child's parent or guardian).

**TITLE:** State v. Fettig
**INDEX NO.:** L.3.f.
**CITE:** (2nd Dist., 04-15-08), Ind. App. 884 N.E.2d 341
**SUBJECT:** Dismissal of battery charge affirmed - corporal punishment in schools
**HOLDING:** Tr. Ct. did not abuse its discretion by dismissing battery charge against teacher. Ind. Code 35-34-1-4(5) provides that an information may be dismissed when facts stated do not constitute an offense. A Tr. Ct. considering a motion to dismiss need not rely on text of charging information but can hear and consider evidence in determining whether or not a D can be charged with crime alleged. Zitlaw v. State, 880 N.E.2d 724 (Ind. Ct. App. 2008). Here, Tr. Ct. found that gym teacher used a measure of touching during a classroom disturbance to restore order and redirect focus of class. No weapon was used, no closed fists, no repeated blows or verbal abuse; just an open-handed touching to the face of a fifteen-year-old student which caused her face to sting. Ind. Code 20-33-8-8(b) provides that teachers have the right to take disciplinary action as necessary to conduct orderly and effective education. Moreover, the judiciary has the ability to determine whether a teacher has acted within the bounds of her authority to discipline when striking a student. Considering these facts, in context of right of teachers to be free from criminal prosecution for physical punishment that is neither cruel nor excessive, Tr. Ct. did not abuse its discretion in dismissing battery charge against D. Held, judgment affirmed; Kirsch, J., dissenting, believes that "State should have its day in court."

**RELATED CASES:** Ceasar, 964 N.E.2d 911 (Ind. Ct. App. 2012) (agreeing with dissent in Fettig, Ct. held that whether an individual has a statutory defense to charges in an information goes beyond the issues that may be decided by a motion to dismiss and instead is a matter to be decided at trial); Barocas, 949 N.E.2d 1256 (Ind. Ct. App. 2011) (Ct. reversed battery conviction against teacher who "flicked" a special education student's tongue with her finger to control student's behavior of sticking out her tongue; D's force against student was not cruel or excessive, nor did it rise to the level of unreasonable force).

**TITLE:** Willis v. State
**INDEX NO.:** L.3.f.
**CITE:** (06-10-08), Ind. 888 N.E.2d 177
**SUBJECT:** Legal authority - State failed to negate parental discipline privilege
**HOLDING:** In battery prosecution, State failed to negate D's defense of parental discipline privilege. To sustain a conviction for battery where a claim of parental privilege has been asserted, State must prove that either: (1) the force that parent used was unreasonable; or (2) the parent's belief that such force was necessary to control her child and prevent misconduct was unreasonable. In determining whether the force is reasonable for the control, training or education of a child, the following factors may be considered: (1) whether the actor is a parent; (2) the age, sex, and physical and mental condition of the child; (3) the nature of his offense and his apparent motive; (4) the influence of his example upon other children of the same family or group; (5) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command; and (6) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm. This list is not exhaustive.

Here, D's twelve-year-old son had ongoing disciplinary problems when he stole his mother's clothing and gave it to another boy at school. When confronted by his mother about the clothing, her son lied. D warned her son that if he did not tell the truth he would be punished. Again, the child lied. D instructed her son to remove his pants and she struck him five to seven times with a belt or an extension cord, leaving bruises on his arm and thigh. Most parents would consider as serious their child's behavior in being untruthful and taking property of others. Moreover, D had tried progressive forms of discipline, like grounding, that failed to work. Lastly, the child testified that the swats hurt "for a minute" but did not hurt the next day when he returned to school. Considering the totality of the circumstances, State failed to disprove the defense of parental discipline privilege beyond a reasonable doubt. Held, transfer granted, Court of Appeals' opinion at 866 N.E.2d 374 vacated, judgment reversed; Sullivan, J., dissenting on basis that the majority's opinion changes the policy on child abuse and that a policy change should be left to the legislative and executive branches, not the judiciary.

**RELATED CASES:** Pava, 142 N.E.3d 1071 (Ind. Ct. App. 2020) (battery on child statute was not unconstitutionally vague as applied to D, because it sets forth a scienter requirement and because the Indiana Supreme Court in Willis implemented a reasonableness standard to assess the parental discipline privilege which provides sufficient notice of what conduct crosses the line from mere discipline of a child to battery); Hanks, 119 N.E.3d 1067 (Ind. Ct. App. 2019) (State presented sufficient evidence to refute parental privilege defense where D struck his six year-old child in the face after the child lied and stole cigarettes from D); Fernanders, 112 N.E.3d 222 (Ind. Ct. App. 2018) (State presented sufficient evidence to refute parental privilege defense where D spanked his six-year-old daughter on her bare buttocks with a belt, multiple times, with sufficient force to leave large bruises and to cause her to limp afterward; D used an unreasonable amount of force when disciplining his child for repeatedly speaking out of turn in her first-grade class at school); Hart, 93 N.E.3d 803 (Ind. Ct. App. 2018) (jury could have reasonably concluded the slapping and kicking of D's 14 year-old son was not to discipline, but rather an angry reaction); Carter, 67 N.E.3d 1041 (Ind. Ct. App 2016) (sufficient evidence for D's conviction for battery resulting in bodily injury, despite parental discipline privilege, where D beat 14-year-old daughter 4 times with belt, injuring her back, buttocks, and arm); Hunter, 950 N.E.2d 317 (Ind. Ct. App. 2011) (fact that child's step-mother and half-brothers were at home makes the near-naked

conversation and punishment unnecessarily embarrassing and degrading; further, nothing suggests the discipline was used as an example to influence the half-brothers' behavior; finally, D hit child with belt with enough force that a scab on her thigh and her swollen middle fingers still hurt more than three months later); Matthew, App., 892 N.E.2d 695 (under these circumstances, sufficient evidence exists to support the Tr. Ct.'s finding that D's hitting her daughter, J.M., repeatedly with a closed fist and a belt – both in the bathroom and then, after J.M. escaped, in the bedroom – was not unreasonable; Baker, C.J., dissenting on basis that although agreeing in principle with the majority, the Indiana Supreme Court's holding in Willis requires reversal).

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.g. Provocation

**TITLE:** Bryan v. State
**INDEX NO.:** L.3.g.
**CITE:** (6/28/83), Ind., 450 N.E.2d 53
**SUBJECT:** Provocation
**HOLDING:** Evidence was sufficient to prove D knowingly killed victim where D strangled her with wire after allegedly wrestling baseball bat from her. Here, D contends ex-wife's statement that she planned to remove children from state so he would never see them again caused him to kill her in sudden heat. Ct. holds such a statement is not sufficient provocation to reduce homicide to manslaughter. Provocation must be adequate to arouse emotions of an ordinary person so as to obscure reasoning powers. See Hooks 409 N.E.2d 618; Dickens 295 N.E.2d 613; 15 I.L.E. Homicide Section 32; 40 Am.Jr.2d Homicide Section 61; 40 C.J.S. Homicide Section 46. Held, conviction affirmed.

**RELATED CASES:** Robinson 453 N.E.2d 280 (evidence was sufficient to sustain D's conviction for murder where D repeatedly hit 3-year-old in head with chair because she failed to explain why she wet the bed; Ct. rejects D's contention that he acted in sudden heat/was provoked, *citing* Hedrick 430 N.E.2d 1151 & Love 369 N.E.2d 1073).

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.h. Battered spouse syndrome/ Effect of Battery (Ind. Code. 35-41-3-11)

**TITLE:** Barrett v. State
**INDEX NO.:** L.3.h.
**CITE:** (1st Dist., 12-31-96), Ind. App., 675 N.E.2d 1112
**SUBJECT:** Battered women's syndrome admissible to negate intent to commit crime
**HOLDING:** In neglect of dependent prosecution, Tr. Ct. erred in excluding evidence of battered women's syndrome (BWS), which D offered to show that she did not knowingly or intentionally neglect her child. D offered testimony of social worker to show how BWS could affect D's state of mind & perception of danger to her dependent. State argued that BWS evidence is only relevant in cases involving issue of self-defense. Ct. disagreed, noting that BWS evidence has been admitted to show why victim might recant allegations against her abuser, Dausch, 616 N.E.2d 13; to refute D's testimony that he had friendly relationship with victim prior to her death, Isaacs, 659 N.E.2d 1036; & as mitigating factor for sentencing D for killing her abuser, Allen, App., 566 N.E.2d 1047. These cases demonstrate that presence of self-defense issue is not determinative factor in deciding admissibility of BWS. In this case, BWS testimony was relevant & necessary to determine D's mental state and, therefore, whether she acted knowingly or intentionally in neglecting her dependent. D was denied opportunity to present evidence essential to her defense, which is mandated by Sixth Amendment to U.S. Constitution. Smiley, App., 649 N.E.2d 697. Held, judgment reversed & remanded. Note: D argued that Tr. Ct. erred in giving tendered jury instruction specifying BWS as defense to crime charged. Ct. found that evidence supported giving instruction on BWS but affirmed refusal of D's tendered instruction because BWS is not an affirmative defense & is admissible solely to refute State's evidence regarding intent.

**TITLE:** Higginson v. State
**INDEX NO.:** L.3.h.
**CITE:** (02/04/2022), Ind. Ct. App., 183 N.E.3d 340
**SUBJECT:** Effects of battery statute may be used to support self-defense claims
**HOLDING:** Trial court erred in granting the State's motion to exclude defense expert's anticipated testimony in support of Defendant's claim of self-defense. After being charged with murdering her husband, Defendant filed her notice of intent to raise a claim of self-defense and to introduce effects-of-battery evidence pursuant to Indiana Code § 35-41-3-11(b)(2). Under this statute, effects-of-battery evidence "refers to a psychological condition of an individual who has suffered repeated physical or sexual abuse inflicted by another individual." After administering a variety of tests, Defendant's expert diagnosed Defendant with PTSD and noted that she had suffered from a major depressive disorder in the past. When deposed by the State, the expert answered "No" when asked whether Defendant's PTSD had prevented her from understanding the wrongfulness of her conduct when she killed her husband. The trial court granted the State's subsequent motion to exclude expert's testimony on the basis that her anticipated testimony, specifically that Defendant's PTSD "affected her ability to appreciate the wrongfulness of her conduct," was inadmissible to support a claim of self-defense.

On interlocutory appeal, Defendant argued, Ind. Code § 35-31.5-2-109 contemplates the use of psychological evidence to establish that a person is suffering from the effects of battery in a self-defense case. Court agreed, holding "[i]t would make very little sense for Indiana Code section 35-41-3-11 to state that it allows the use of effects-of-battery evidence... in self-defense claims while actually limiting the use of that evidence to insanity defenses. To entirely forbid the use of [this evidence] in self-defense cases that fall under Ind. Code § 35-41-3-11 would render the self-defense portion of the statute superfluous." The Court also concluded the defense expert may testify as to the general reasonableness of one's apprehension of fear, given the psychological trauma that comes from battery, but may not reach an ultimate factual determination regarding Defendant's specific belief, which is exclusive to the jury. Held, judgment reversed and remanded for further proceedings.

**RELATED CASES:** Passarelli, 201 N.E.3d 271 (Ind. Ct. App. 2022) (distinguishing Higginson as permitting expert PTSD testimony specifically under the effects of battery statute and not in every case where self-defense is raised).

**TITLE:** Isaacs v. State
**INDEX NO.:** L.3.h.
**CITE:** (12-29-95), Ind., 659 N.E.2d 1036
**SUBJECT:** Battered woman's syndrome evidence introduced against D admissible
**HOLDING:** Tr. Ct. did not abuse discretion in admitting expert testimony on battered woman's syndrome introduced against D. During State's rebuttal, psychiatrist's testimony was admitted over D's relevancy objection, even though expert had not spoken to either D or victim. State's purpose for introducing expert testimony was to refute notion that D & victim had friendly relationship prior to victim's death. Ct. held that testimony could have reasonably discredited D's attempt to bolster his accident/self-defense theory by allowing jury to conclude that their relationship was not friendly. Evidence therefore cast doubt on D's assertion that he would not have intended to kill his wife. Held, no error.

**RELATED CASES:** Iqbal, App., 805 N.E.2d 401 (no error in admitting expert testimony of domestic battery, which was used by State to explain why victim allowed D into home despite previous assault); Carnahan, App., 681 N.E.2d 1164 (Tr. Ct. did not abuse discretion in admitting expert testimony regarding BWS, particularly involving cycle of violence & reasons battered women do not leave their husbands, to explain why complaining witness (CW) recanted her earlier allegation of abuse).

**TITLE:** Marley v. State
**INDEX NO.:** L.3.h.
**CITE:** (5-30-01), Ind., 747 N.E.2d 1123
**SUBJECT:** Effects of battery statute - subject to requirements for maintaining insanity defense
**HOLDING:** Tr. Ct. did not err in requiring D to raise her defense of dissociative state resulting from battered women's syndrome (BWS) only within confines of Effects of Battery statute, Ind. Code 35-41-1-3.3 & Ind. Code 35-41-3-11, which requires filing notice of insanity defense. Effects of battery applies to D who either raises insanity defense or claims self-defense, &, in conjunction with either, raises issue that D was at time of alleged offense suffering from effects of battery as result of past course of conduct of individual who is victim of alleged crime. Ind. Code 35-41-3-11. Statute also requires victim of crime to be . . . abused individual's cohabitant or former cohabitant. Ind. Code 35-41-1-3.3(2).

Here, D lived with one of victims, her uncle who molested her years ago. When uncle told D that she wanted molesting, D killed victim & severely injured another who was present. Defense expert diagnosed D with post-traumatic stress disorder, dysthymia, polysubstance abuse, & mixed personality disorder. Where, as here, D claims that BWS has affected her ability to appreciate wrongfulness of her conduct, legislature has determined that she must proceed under & comply with requirements of insanity defense statute. Because D was not merely trying to negate intent element through evidence of BWS but claimed "dissociative state" as result of BWS, she was asserting insanity defense, & was therefore properly held subject to requirements of insanity statute. Indiana has long held that D may not submit evidence relating to mental disease or defect except through insanity defense.

Ct. also held that retroactive application of effects of battery statute to D's case did not violate State & Federal prohibitions against ex post facto laws, as it did not deprive D of defense or lesser punishment. Further, Ct. disagreed with Ct. App.' conclusion that "cohabitant" does not necessarily mean sexual partner. Term "cohabitant" requires not only living together under one roof, but also has element of ongoing relationship of at least lovers. In this case, although record did not support "cohabitation" between D & her uncle at time victim was killed, evidence was sufficient to support relationship of "former cohabitants" as provided in statute. Held, transfer granted, Ct. App.' opinion at 729 N.E.2d 1011 vacated, judgment affirmed.

**RELATED CASES:** Higginson, 183 N.E.3d 340 (Ind. Ct. App. 2022) (to entirely forbid the use of effects-of-battery evidence, or psychological trauma, in self-defense cases that fall under IC 35-41-3-11, would render the self-defense portion of the statute superfluous).

**TITLE:** People v. Humphrey
**INDEX NO.:** L.3.h.
**CITE:** 13 Cal.4th 1073; 921 P.2d 1; 5 Cal.Rptr. 96 (Cal. 1996)
**SUBJECT:** Battered Women Syndrome Evidence -- Self-Defense
**HOLDING:** California Supreme Court holds that in self-defense case, juries may consider battered women syndrome evidence in deciding both whether the D actually believed that it was necessary to use deadly force, and in determining whether that belief was objectively reasonable. Focus of the latter inquiry is whether a reasonable person in the D's circumstances would have perceived a threat of imminent injury or death.

**TITLE:** Schermerhorn v. State
**INDEX NO.:** L.3.h.
**CITE:** (9/20/2016), 61 N.E.3d 375 (Ind. Ct. App 2015)
**SUBJECT:** Alleged victim's actions against third party irrelevant under effects of battery defense
**HOLDING:** In an issue of first impression regarding the effects of battery defense, Court ruled that D could not introduce evidence of her husband's alleged abuse of a third party.

After D's husband confronted D about her drinking, D punched husband and then slashed his arm with a knife. D was charged with criminal recklessness and domestic battery. She asserted a defense under the effects of battery statute, Ind. Code § 35-41-2-11, claiming that husband had abused her; she also claimed that on one occasion, while in her presence, husband physically abused his son from a prior relationship. At trial, she sought to introduce an audio recording of the incident, which the Tr. Ct. denied.

The Tr. Ct. properly denied the request to introduce the audiotape. As a general rule, evidence that a victim battered a third party may be relevant to show a D's reasonable fear of the victim for purposes of self-defense. However, the plain language of the effects of battery statute limits the defense to the alleged victim's conduct toward the D, not a third party. Thus, husband's alleged acts against his son where irrelevant to D's effects-of-battery defense. Moreover, even if Tr. Ct. should have admitted the audio recording, its exclusion was harmless. Held, judgment affirmed.

**TITLE:** State v. Edwards
**INDEX NO.:** L.3.h.
**CITE:** 60 S.W.3d 602 (Mo.Ct. App. 2001
**SUBJECT:** Self-Defense - Battered Spouse
**HOLDING:** Where claim of self-defense is predicated on battered spouse syndrome, jury should be instructed to evaluate evidence in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would perceive and react to events.

# L. DEFENSES

## L.3. Self-defense/justification for act (Ind. Code 35-41-3-1 to 3)

### L.3.i. Other

**TITLE:** Andrews v. State
**INDEX NO.:** L.3.i.
**CITE:** (1st Dist. 3/31/87), Ind. App., 505 N.E.2d 815
**SUBJECT:** Lawful objective/good motive
**HOLDING:** Lawful objective will not justify employment of means which are unlawful. Roth v. Local Union 1460 of Retail Clerks Union 24 N.E.2d 280 (lawful objective does not justify disorderly/unlawful picketing). Evidence of good motive for commission of crime does not constitute defense even when specific intent is required. 22 C.J.S. Criminal Law Section 31 (1961); 1 Wharton's Criminal Evidence Section 166 (12th ed. 1955). Here, D was convicted of recklessly remaining in voting booth longer than 1 minute. D was staging protest against absence of write-in ballots in IN. D's motivation is irrelevant & Ct. finds sufficient evidence to uphold his conviction. Held, no error.

**TITLE:** Hall v. State
**INDEX NO.:** L.3.i.
**CITE:** (5/27/86), Ind., 493 N.E.2d 433
**SUBJECT:** Religious beliefs no defense to reckless homicide
**HOLDING:** Reckless homicide does not have statutory defense excusing responsibility for death resulting from reckless acts, even if such acts are based on religious beliefs. Legislature has distinguished between child neglect which results in serious bodily injury & neglect which results in child's death. Prayer is not permitted as a defense when caretaker engages in omissive conduct which results in child's death. In footnote, Ct. notes legislature may not have intended child neglect statute to encompass neglect which results in death of dependent, expecting such cases to be charged under homicide provisions. Although Ct. affirms Ds' reckless homicide convictions, Ct. finds neglect of dependent convictions cannot stand, for neglect is the instrumentality by which reckless homicide was committed. Howard 481 N.E.2d 1315 (convictions for both neglect & battery violated double jeopardy; cause remanded with instructions to vacate sentence imposed for battery). Held, convictions & sentences for neglect of dependent vacated; reckless homicide convictions affirmed.

**TITLE:** United States v. Oakland Cannabis Buyer's Cooperative
**INDEX NO.:** L.3.i.
**CITE:** 532 U.S. 483, 121 S.Ct. 1711 (2001)
**SUBJECT:** Medical necessity defense, marijuana, Supremacy Clause
**HOLDING:** Holding: No "medical necessity exception" exists to the Controlled Substances Act.

California voters passed a referendum entitled the Compassionate Use Act of 1996 which created an exception to California laws against marijuana possession and cultivation for patients and caregivers who possess marijuana for medical purposes on a physician's recommendation. The U.S. sued the respondents to enjoin the manufacture and distribution of marijuana. The Court rejected the view that there is a "medical necessity" exception creating a defense to prosecution for manufacturing and distributing marijuana under the Controlled Substances Act.

# L. DEFENSES

## L.4. Consent of victim

**TITLE:** Hopper v. State
**INDEX NO.:** L.4.
**CITE:** (3/5/85), Ind., 475 N.E.2d 20
**SUBJECT:** Consent of victim - element of offense
**HOLDING:** Evidence was sufficient to sustain D's conviction for kidnapping. Here, Ds contend officer (posing as trucker) consented to his confinement as part of a plan to apprehend cattle rustlers, thus a material element of confinement (lack of consent) was not proven. The Ct. rejects Ds' contention. " `One who knows of a crime contemplated against himself may remain silent & permit matters to go on, for the purpose of apprehending a criminal, without being held to have assented to the act.' 21 Am. Jur.2d Criminal Law Section 189 (1981). To follow the concept advocated by [Ds] would eliminate most police undercover operations." Held, conviction affirmed.

**TITLE:** Smith v. State
**INDEX NO.:** L.4.
**CITE:** (5/14/85), Ind., 477 N.E.2d 857
**SUBJECT:** Consent to burglary
**HOLDING:** Tr. Ct. did not err in denying D's tendered instruction concerning consent. If there is appropriate evidence to show owner consented to burglary, such an instruction may be proper. Thompson v. State (1862), 18 Ind. 386. Consent is no defense to burglary charge if D is given consent to enter by one having no authority to give consent. Here, Ct. finds reasonable person in D's position would not have believed consent given by son of burglary victim (who neither resided nor got along with victim) was valid. As to D's argument that victim consented to burglary of guns in attempt to defraud insurance company, Ct. finds D attempted to remove other items from home besides guns. Held, conviction affirmed.

**TITLE:** Stafford v. State
**INDEX NO.:** L.4.
**CITE:** (2d Dist. 10/26/83), Ind. App., 445 N.E.2d 402
**SUBJECT:** Consent of victim - sex crimes; mental capacity
**HOLDING:** Evidence was sufficient to support D's conviction for rape; state proved victim was incapable of giving consent. Here, 25 year-old victim had mental age of 6 or 7. Ct.-appointed psychiatrist testified victim could verbally consent to intercourse but her general judgment level would interfere with a true consent. Victim's family doctor testified she would be unable to give meaningful consent to sexual intercourse based upon her mental age, her desire to please & her fear & uncertainty if she were undressed & alone with a man who attempted to engage her in sexual intercourse. Victim's understanding of reproductive process was rudimentary, at best. Ct. notes neither Ind. Code 35-42-4-1(a)(3) nor case law provides guidance re phrase "victim is so mentally disabled or deficient that consent to sexual intercourse cannot be given." Ct. relies on IL cases to find state proved victim was unable to consent. See People v. McMullen (Ill.App. 1980), 414 N.E.2d 214; People v. O'Neal (Ill.App. 1977), 365 N.E.2d 1333. Held, conviction affirmed.

**RELATED CASES:** Hall, App., 504 N.E.2d 298 (Ct. upholds finding that 14-year-old victim, who tested at 2d grade level, was incapable of consent; case sets forth factors determinative of her mental condition); Douglas, App., 484 N.E.2d 610 (criminal deviate conduct on 4-year-old boy reversed, "mentally disabled or deficient" does not include children of normal intelligence; see card at K.3.e.2.

**TITLE:** Woodson v. State
**INDEX NO.:** L.4.
**CITE:** (10/3/85), Ind., 483 N.E.2d 62
**SUBJECT:** Consent of victim - rape; sufficiency
**HOLDING:** Tr. Ct. did not err in giving instruction (partially set forth in opinion) re consent. Here, D contends instruction permitted jury to convict him without any evidence of actual resistance by victim. Victim need not physically resist when resistance is prevented by threats & fear of injury. Ballard 385 N.E.2d 1126; Vickers 385 N.E.2d 1126; Dixon 348 N.E.2d 401. Compelled submission may be shown by evidence other than acts of resistance. Jenkins 372 N.E.2d 166. D threatened victim with knife. She violently resisted him only when he started to strangle her. Held, conviction affirmed.

**TITLE:** Watkins v. State
**INDEX NO.:** L.4.
**CITE:** (3/19/84), Ind., 460 N.E.2d 514
**SUBJECT:** Instructions - defenses; consent
**HOLDING:** Tr. Ct. did not err in refusing to give D's tendered instruction that rape victim must resist to degree indicating sex acts are non-consensual. Here, Ct. notes D had no defense of consent under facts of case. Ct. gave proper instruction re resistence. D's instruction implied victim must utilize physical force to resist assailant, which is inaccurate statement of the law. Held, no error.

**RELATED CASES:** Roland, 501 N.E.2d 1034 (D's tendered instruction (set forth in opinion) re consent was adequately covered by instructions given by Tr. Ct. & summarized in opinion); Harris 480 N.E.2d 932 (Crim L 59(16); instruction re resistance (set forth in opinion) was proper statement of law).

# L. DEFENSES

## L.5. Entrapment (Ind. Code 35-41-3-9)

**TITLE:** Albaugh v. State
**INDEX NO.:** L.5.
**CITE:** (12-17-99), Ind., 721 N.E.2d 1233
**SUBJECT:** Entrapment -- police caused D to drive while intoxicated
**HOLDING:** State failed to prove beyond reasonable doubt that officer did not cause D to drive his truck while intoxicated. In order to rebut D's entrapment defense, State may prove either that D's prohibited conduct was not product of police efforts or that D was predisposed to engage in such conduct. McGowan, 674 N.E.2d 174. Here, D's truck broke down about one-quarter of mile down road from his home. Due to snowy & cold conditions, D walked home & he & his girlfriend decided to leave truck on side of road until morning. D & his girlfriend spent rest of evening drinking. At about 1:30 a.m., officers came to D's home & repeatedly ordered him to move his truck because it was safety hazard on road. Police followed D to his truck although they did not help him get it started. When D started driving home, he ran truck into corn field. At this point, police suspected D was intoxicated & took him to station for breathalyzer, which he failed. Because D & his girlfriend were settled in for evening & had decided not to move truck until following morning, D was not predisposed that evening to drive his vehicle while intoxicated. In addition, evidence was insufficient to establish beyond reasonable doubt that D's conduct in driving while intoxicated was not product of officer using persuasion or other means likely to cause D to engage in conduct. Held, Ct. App.' memorandum opinion vacated & conviction reversed; Dickson, J., dissenting on basis that D had choice among various means by which to have vehicle moved.

**TITLE:** Allen v. State
**INDEX NO.:** L.5.
**CITE:** (2/5/88), Ind., 518 N.E.2d 800
**SUBJECT:** Entrapment - raised by pretrial statement of intention
**HOLDING:** Where D had stated intention to raise entrapment defense, Tr. Ct. did not err in admitting state's rebuttal evidence. D, charged with drug dealing, stated during pretrial discovery that he intended to raise entrapment defense. At trial, state introduced evidence of D's prior drug convictions, despite fact that D did not at any time introduce evidence of entrapment. In order to obtain jury instruction on entrapment, D must indicate intention to raise such defense in time for state to present rebuttal evidence, including prior convictions. Townsend 418 N.E.2d 554. It would be "unfair" to preclude state from introducing all predisposition evidence until D has introduced evidence of entrapment. It is immaterial that D did not, in fact, submit entrapment evidence. Held, Tr. Ct. did not err in admitting evidence of D's prior drug convictions once he indicated intent to raise entrapment defense. DeBruler, J., DISSENTS, *citing* Walls v. State (1976), Miss., 362 So.2d 322.

**TITLE:** Baird v. State
**INDEX NO.:** L.5.
**CITE:** (3/18/83), Ind., 446 N.E.2d 342
**SUBJECT:** Entrapment
**HOLDING:** State fails to rebut D's entrapment defense when it presents no evidence of D's predisposition to commit offense & proscribed activity is entirely initiated by police & their agent (a minor recruited specifically to purchase alcoholic beverage from store clerk). Here, Tr. Ct. found only available defense under statutes dealing with sale of alcohol to minors (Ind. Code 7.1-5-7-1 et seq.) was request for & showing of proof of proper age. In affirming conviction, Ct. App. considered defense under statute & case law & determined that entrapment statute contains 2 elements: (1) involvement of police/agents; & (2) predisposition. The Ct. App. decided that the second element did not have to be considered if police involvement did not rise to level of persuasively affecting the otherwise free will of D. Ind. S. Ct. vacates decision of Ct. App. (440 N.E.2d 1143). Case law does not support Ct. App.' interpretation of statute. Entrapment exists when D has been induced or hired by government agency to commit a crime he/she had no predisposition to commit. Held, transfer granted; Ct. App. decision vacated; judgment of Tr. Ct. reversed & cause remanded to Tr. Ct. with instructions to enter judgment of not guilty.

**TITLE:** Chupp v. State
**INDEX NO.:** L.5.
**CITE:** (5th Dist., 7-8-05), Ind. App., 830 N.E.2d 119
**SUBJECT:** D's sentencing entrapment claim rejected
**HOLDING:** During undercover sting operation, a cooperating source working with police department sold eighteen pounds of marijuana to D. As a result, D pleaded guilty to dealing in marijuana as a Class C felony. On appeal, D argued that Ct. should adopt concept of "sentencing entrapment," which authorizes sentence reduction where the D, predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment. See Salama v. State, 690 N.E.2d 762 (Ind. Ct. App 1998).

By knowingly, voluntarily & intelligently pleading guilty to dealing in marijuana in excess of ten pounds as a Class C felony, D knowingly relinquished any claim that he should be sentenced as if the amount involved were not more than ten pounds. Lee v. State, 816 N.E.2d 35 (Ind. 2004). If D believed that State somehow manipulated circumstances surrounding his conviction, he had the choice to either be bound by a knowing and voluntary plea or to challenge the police conduct at trial. Although due process concerns might, under some circumstances, allow a D to challenge terms of his plea agreement, police conduct here did not reach levels of over-involvement referred to by concurring opinion in Hampton v. United States, 425 U.S. 484 (1976), or "outrageous" conduct involved in Rochin v. California, 342 U.S. 165 (1952). Further, Seventh Circuit has rejected defense of sentencing entrapment/manipulation and has held that a suspect has no constitutional right to be arrested when police have probable cause. U.S. v. Garcia, 79 F.3d 74 (7th Cir. 1996). Held, judgment affirmed.

**RELATED CASES:** Bowman, 51 N.E.3d 1174 (Ind. 2016) ("sentencing factor manipulation" inapplicable to drug charges against D, whose decision to reside near school was completely voluntary).

**TITLE:** Ferge v. State
**INDEX NO.:** L.5.
**CITE:** (2-28-02), Ind. App., 764 N.E.2d 268
**SUBJECT:** Entrapment - State failed to show D predisposed to commit crime
**HOLDING:** State did not present sufficient evidence to rebut D's entrapment defense. D was convicted of patronizing a prostitute. Officer testified that she made deal with D whereby she would perform fellatio on him for twenty dollars. D was told to meet her in alley across street. However, D did not go to alley, but instead drove away until stopped by police nine blocks later. It was clear that suggestion of criminal activity was made by officer after D offered her ride. D's action in driving away from alley is evidence that he did not intend to make deal with officer for sexual activity, as well as evidence that he was not predisposed to commit crime of patronizing prostitute. If D shows police inducement & State fails to show predisposition on part of D to commit crime charged, entrapment is established as matter of law. Dockery v. State, 644 N.E.2d 573 (Ind. 1994). Held, judgment reversed.

**TITLE:** Griesemer v. State
**INDEX NO.:** L.5.
**CITE:** (3/5/2015), 26 N.E.3d 606 (Ind. 2015)
**SUBJECT:** Entrapment defense rebutted - D not induced to patronize prostitute
**HOLDING:** In prosecution for patronizing a prostitute, State rebutted D's entrapment defense by showing he was not induced by police to commit the offense. There is no entrapment if the State shows either: 1) there was no police inducement, or 2) the D was predisposed to commit the crime. Riley v. State, 711 N.E.2d 489 (Ind. 1999). To rebut the inducement element, the State must prove police efforts did not produce D's prohibited conduct because those efforts lacked "a persuasive or other force." Williams v. State, 412 N.E.2d 1211 (Ind. 1980).

Here, D stared at an undercover detective posing as a prostitute, circled back in his car and stopped near her to ask if she needed a ride. The detective told him she was trying to make some money. He nodded toward his passenger seat, so she asked how much money he had. D again nodded toward the passenger seat and later said he had $20. She said she could “do head” for that amount, he nodded yes and she told him to drive down the street to pick her up, where he was arrested. Court found the undercover detective did not exert a persuasive or other force over D; instead, she merely presented him with "an opportunity to commit the offense," which Ind. Code § 35-41-3-9(b) expressly declares "does not constitute entrapment." That the crime itself may be tempting, without more, is not inducement. If Court were to find entrapment on these facts, it would "effectively put an end to prostitution stings. We are not willing to so limit the activity of undercover officers to the detriment of safety and quality of life in many neighborhoods." Held, transfer granted, Court of Appeals opinion at 10 N.E.3d 1015 vacated, judgment affirmed. Rucker, J., joined by Dickson, J., dissenting, believes that the undercover detective induced D to commit the offense, noting "she was the first to mention money, the first to mention performance of a sexual act, and the first to mention trading a sexual act for money." Further, there was no evidence permitting an inference that D was predisposed to commit patronizing a prostitute, thus entrapment was established as a matter of law.

**RELATED CASES:** Mobley, 27 N.E.3d 1191 (Ind. Ct. App 2015); Nichols, 31 N.E.3d 1038 (Ind. Ct. App 2015) (officer's policing efforts did not induce D to commit prostitution; officer merely asked D questions about getting more than a private dance outside of the strip club; she readily responded "yeah" when detective asked if "fondl[ing]" and sex were a possibility and readily proposed a price for that activity).

**TITLE:** Hardy v. State
**INDEX NO.:** L.5.
**CITE:** (4th Dist. 11/23/82), Ind. App., 442 N.E.2d 378
**SUBJECT:** Entrapment - instruction
**HOLDING:** Entrapment instruction advising jury: "You must determine whether there was such persuasion as would entrap an innocent person" is an incorrect statement of IN law. Harrington, App., 413 N.E.2d 622. Giving of instruction is reversible error because it could have served as basis for conviction. Here, undercover police officers were introduced to D by informant. No drug transaction was discussed. Police & informant contacted D a second time at his residence about obtaining drugs. D said soon he would be able to sell quantities of drugs stolen from a drugstore. D was approached a third time by officers requesting to buy drugs. D had no drugs but offered to take officers to a place where drugs could be purchased. D was unsuccessful in obtaining drugs. Officers pressed D to sell them drugs & he agreed to sell them percodan the next day. When police officers again contacted D, he said he'd used all the percodan but had some preludin & quaaludes he could sell. Officers purchased 9 tablets for $10. D was arrested & charged with delivery of a controlled substance. State's proposed instruction (quoted above) was primary instruction on entrapment defense. Ct. finds if jury accepted instruction at face value, they would erroneously have applied an objective standard to D's behavior, comparing him to a fictional innocent mind. Entrapment addresses subjective intent of D. Hardin 358 N.E.2d 134. Other instructions referring to intent of D as criterion for determining entrapment do not cure error. Held, conviction reversed.

**RELATED CASES:** Gitary, App., 503 N.E.2d 1241 (Crim L 814(8); entrapment instructions, set forth in opinion, were proper statement of law).

**TITLE:** Hudgins v. State
**INDEX NO.:** L.5.
**CITE:** (1/19/83), Ind., 443 N.E.2d 830
**SUBJECT:** Entrapment
**HOLDING:** An entrapment exists when a government agent or someone working for him persuades D to commit crime charged. Drollinger, 409 N.E.2d 1084; Stewart, 390 N.E.2d 1018. Entrapment does not occur when government does no more than provide D with opportunity to commit offense D is predisposed to commit. Drollinger; Stewart. Here, third party (who did not know informant's status) introduced informant to D. D *cites* Gray 231 N.E.2d 793 (no evidence showing D ever involved in narcotics trafficking or had any intent to sell narcotics before being approached by informant). Ct. finds D was predisposed to sell drugs before meeting informant. See also Thompson 290 N.E.2d 724 (entrapment defense unavailable to D when third party who does not know true identity of government agent sends agent to D who then commits offense). Held, no entrapment.

**RELATED CASES:** Clayton, 491 N.E.2d 534 (Crim L 569; no entrapment despite fact D had refused to sell drugs to informant several times before & had shared drugs with informant at no cost); Voirol, App., 412 N.E.2d 861 (circumstances of sale do not support inference of predisposition; cases involving circumstances showing predisposition discussed). See Whalen, App., 442 N.E.2d 14, discussing & distinguishing Voirol & Gray.

**TITLE:** Jacobson v. U.S.
**INDEX NO.:** L.5.
**CITE:** 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992)
**SUBJECT:** Entrapment - predisposition
**HOLDING:** Government failed, as matter of law, to establish that D was predisposed to commit offense of receiving child pornography through mails, where D, who had previously ordered 2 magazines depicting nude boys at time when they were legal, ordered magazines depicting child pornography only after 26 months of receiving communications from government agents acting through various fictitious organizations. Prosecution's evidence falls into 2 of predisposition categories: (1) evidence developed prior to government's mail campaign, & (2) evidence developed during course of investigation. Sole piece of pre-investigation evidence is D's order & receipt of magazine depicting nude boys at time when receipt of such magazines was legal. Evidence indicating inclination to act within broad range, not all of which is criminal, has little probative value. Further, evidence of predisposition to do what was once legal does not, by itself, show predisposition to break law. Evidence gathered during investigation also fails to carry government's burden. D's responses to many communications & questionnaires were at most indicative of certain personal inclinations, & hardly support an inference that he would commit crime of receiving child pornography through mails. Evidence that D was ready & willing to commit offense came only after 26-month government campaign to convince him that he either did or should have right to receive materials offered, & rational jurors could not say beyond reasonable doubt that D was predisposed to commit offense prior to & independent of government's efforts. O'Connor, Rehnquist, Kennedy, & Scalia, JJ., DISSENT.

**TITLE:** Kats v. State
**INDEX NO.:** L.5.
**CITE:** (3d Dist. 9/10/90), Ind. App., 559 N.E.2d 348
**SUBJECT:** Entrapment - insufficient evidence of predisposition
**HOLDING:** State's evidence was insufficient to rebut D's entrapment defense. Evidence showed that confidential informant (CI) & officer went to house which CI said was D's, & CI went into house & came out & handed officer package of cocaine. Later, CI got $300 from officer for drug purchase from D but returned it when he did not complete buy. Still later, officer met with CI & D, gave D $300, & later same day received cocaine from D, at which point D was arrested. Search of D revealed 3 more grams of cocaine, & marijuana & cocaine were found in car. Underneath D's seat were cut down straw & razor blade. D was convicted of dealing, & on appeal argues that state did not adequately rebut his entrapment defense. Entrapment is raised once evidence indicates that police were involved in the criminal activity. Fearrin, App., 551 N.E.2d 472. There is no dispute here that government was involved. Burden then shifts to state to show that D was predisposed to commit offense. In US v. Fusko (CTA7 1989), 869 F.2d 1048, 5 factors were set out to aid in determining predisposition: (1) D's character or reputation; (2) whether government originally suggested criminal activity; (3) whether D was engaged in criminal activity for profit; (4) whether D evidenced reluctance to commit offense, which was overcome by government persuasion; & (5) nature of inducement or persuasion offered by government. Here, D's name had never come up in discussions with CI, & D had no prior record. D testified that CI suggested drug transaction to him, & neither testimony of CI nor tape of conversations was offered to rebut this. Evidence did not show that D was engaged in dealing for profit. Earlier "buy" was evidenced only by officer's testimony that CI came out of house & handed him cocaine, & D denied that he had sold drugs to CI on that occasion. D testified that he had approached CI to borrow money, & that CI talked him into making drug sale & insisted that he personally hand cocaine to undercover officer, despite D's reluctance to do so. This was not rebutted. Finally, D's testimony indicated that CI used D's dire financial circumstances to persuade him to engage in deal. Majority finds no evidence to rebut D's entrapment defense. Held, conviction reversed. Garrard, J., DISSENTS, pointing to evidence that D knew drug terminology, was inferentially involved in prior sale & attempted sale, & had drugs & paraphernalia in car at time of arrest. **NOTE:** Both this case & Fearrin demonstrate Ct. App.'s unwillingness to find predisposition where state does not offer testimony of CI or other evidence as to how transaction was arranged.

**TITLE:** Mathews v. United States

**INDEX NO.:** L.5.

**CITE:** 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)

**SUBJECT:** Entrapment - D not required to admit all elements of offense

**HOLDING:** Valid entrapment defense has 2 related elements: government inducement of crime, & lack of predisposition to engage in criminal conduct. Sorrells v. U.S. (1932), 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413. Here, D raised entrapment defense but refused to admit all elements of offense (including mens rea). D is entitled to instruction as to any recognized defense for which there exists evidence sufficient for reasonable jury to find in D's favor. Stevenson v. U.S. (1896), 162 U.S. 313. Federal appellate cases have permitted raising of inconsistent verdicts. Johnson v. U.S. (1970), 138 U.S. App. D.C. 174, 426 F.2d 651. Court rejects government's assertion that permitting D to rely on inconsistent defenses will encourage perjury, lead to jury confusion, & subvert truthfinding function at trial. Nor is Court willing to impose requirement of consistency to which no other defense is subject merely because entrapment defense is not of "constitutional dimension." Held, even if D denies one or more elements of crime, D is entitled to entrapment instruction whenever there is sufficient evidence from which reasonable jury could find entrapment. Kennedy, not participating; Brennan, CONCURS; Scalia, CONCURS; White, joined by Blackmun, DISSENTS.

**TITLE:** McGowan v. State
**INDEX NO.:** L.5.
**CITE:** (12-19-96), Ind., 674 N.E.2d 174
**SUBJECT:** Entrapment defense - State's burden
**HOLDING:** In rebutting entrapment defense, State must disprove beyond reasonable doubt only one, but not both, of elements set out in Ind. Code 35-41-3-9. Thus, to overcome entrapment defense, State must prove beyond reasonable doubt that either D's prohibited conduct was not product of police efforts or that D was predisposed to engage in such conduct. Held, transfer granted, Ct. App.' opinion at 671 N.E.2d 872 expressly adopted, conviction affirmed.

**TITLE:** McKrill v. State
**INDEX NO.:** L.5.
**CITE:** (8/31/83) Ind., 452 N.E.2d 946
**SUBJECT:** Entrapment - evidence of predisposition
**HOLDING:** Tr. Ct. did not err in accepting D's guilty plea where there was sufficient evidence to show predisposition & overcome potential entrapment defense. Here, evidence of predisposition was sufficient to overcome prima facie showing of entrapment [D knew where to obtain drug quickly & price of drug, was familiar with drug terminology & was ready & willing to participate in drug sale]. Martinez 451 N.E.2d 39; Marts 432 N.E.2d 18; Grimm 374 N.E.2d 501; see Stewart 390 N.E.2d 1018. Circumstances which may be considered re predisposition include D's possession of large quantity of contraband, ability to obtain supply within minutes; knowledge of price & sources; familiarity with drug terminology; possession of apparatus for manufacture; manner of sale itself; D's readiness to participate; several different schemes to accomplish sale; multiple sales; solicitation, assurances & other conduct evidencing willingness/desire to participate in future sales. Sowers, App., 416 N.E.2d 466. Held, denial of PCR affirmed.

**RELATED CASES:** Turner, 993 N.E.2d 640 (Ind. Ct. App 2013) (D's familiarity with drug jargon and prices and his offer to sell more cocaine in future was sufficient to establish D's predisposition to sell cocaine); Jordan, App., 692 N.E.2d 481 (evidence sufficient to rebut D's entrapment defense & supported finding of predisposition to sell cocaine); McGowan, App., 671 N.E.2d 872, adopted 674 N.E.2d 174 (evidence was sufficient to rebut D's entrapment defense & supported finding of predisposition to sell cocaine); Quick, App., 660 N.E.2d 598 (D was not coerced into selling LSD to officer & officer's conduct did not constitute entrapment); Young, App., 620 N.E.2d 21 (Predisposition evidence does not have to come from events preceding official solicitation, & where D quoted prices & quantities for "eight balls" & "sixteenths", knew of sources to buy drugs, asked for piece of cocaine in return for services, & offered to coordinate future drug buys, evidence was sufficient to show predisposition & rebut entrapment defense); Hopper 475 N.E.2d 20 (Crim L 569; evidence shows Ds were predisposed to steal cattle); Huff App., 443 N.E.2d 1234 (Crim L 739.1(1); Drugs 119; evidence supports finding D was predisposed to sell drugs).

**TITLE:** Poe v. State
**INDEX NO.:** L.5.
**CITE:** (2/22/83), Ind., 445 N.E.2d 94
**SUBJECT:** Entrapment - instruction
**HOLDING:** Refusal to give entrapment instruction is not error where state has presented evidence of predisposition to commit charged crime & D has not presented any contradictory evidence. Cyrus 381 N.E.2d 472. Here, D charged with & convicted of arson & conspiracy to commit arson (as well as habitual). State presented evidence of predisposition which D did not refute with contradictory evidence. Held, no error in refusal to give entrapment instruction.

**RELATED CASES:** Strong, App., 591 N.E.2d 1048 (even in context of undisputed police participation in criminal activity, if evidence of D's predisposition to commit crime is presented, D is not entitled to entrapment instruction unless he presents evidence showing lack of predisposition); Hensley 489 N.E.2d 62 (no error in refusal to give entrapment instruction where D filed notice of alibi, presented alibi evidence at trial & evidence did not support giving of entrapment instruction).

**TITLE:** Salama v. State
**INDEX NO.:** L.5.
**CITE:** (5th Dist., 1-27-98), Ind. App., 690 N.E.2d 762
**SUBJECT:** Entrapment & sentence entrapment claims sufficiently rebutted
**HOLDING:** State sufficiently rebutted D's claim of entrapment. To rebut defense of entrapment, State must prove either that accused's conduct was not product of law enforcement efforts or that accused was predisposed to engage in prohibited conduct. Headlee, App., 678 N.E.2d 82. Here, although D's brother was individual who asked officer if he could obtain large quantity of food stamps, D initiated contact by attempting to negotiate regarding price of food stamps, & in later transaction, gave officer $2,500 for $5,000 worth of food stamps. This evidence demonstrates both D's willingness to proceed with transaction & his knowledge that $2,500 was for purchase of food stamps.

In addition, D was not entrapped into elevation of welfare fraud to Class C felony based on food stamps' value totaling more than $2,500. D relied upon federal cases authorizing sentence reduction where D who is predisposed to commit minor or lesser offense is entrapped to commit greater offense subject to greater punishment. United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994). However, Indiana does not yet recognize doctrine of sentence entrapment, & even if it did, doctrine would not provide relief in this case because evidence was sufficient to rebut D's claim. Held, judgment affirmed.

**RELATED CASES:** Scott, App., 772 N.E.2d 473 (fact that D answered "no" when asked if she had ever made methamphetamine before was simply insufficient to negate State's evidence of predisposition).

**TITLE:** Shelton v. State
**INDEX NO.:** L.5.
**CITE:** (1st Dist., 2-11-97), Ind. App., 679 N.E.2d 499
**SUBJECT:** Defense of entrapment
**HOLDING:** Tr. Ct.'s pretrial orders did not erroneously deprive Ds of opportunity to raise defense of entrapment. Order required Ds to submit evidence of lack of predisposition to raise entrapment defense at trial. It is incumbent upon D to affirmatively raise defense of entrapment. Strong, App., 591 N.E.2d 1048. Defense is raised once evidence includes showing of police involvement in criminal activity; no formal pleading of defense is required. Id. Even in context of undisputed police participation in criminal activity, if evidence of D's predisposition to commit crime is presented, D is not entitled to instruction on entrapment defense unless he presents evidence showing lack of predisposition. Id. Here, Tr. Ct.'s order merely placed burden of going forward with some evidence of lack of predisposition upon Ds in order to satisfy their obligation to raise entrapment defense. Police officers in this case did not directly participate in criminal activity of road hunting, but merely placed decoy deer off road where Ds could see it. Under these circumstances, Tr. Ct. did not commit reversible error in requiring Ds to go forward with evidence to raise entrapment defense. Held, judgment affirmed.

**TITLE:** State v. Vallejos
**INDEX NO.:** L.5.
**CITE:** 945 P.2d 957 (N.M. 1997)
**SUBJECT:** Entrapment -- Objective & Subjective
**HOLDING:** New Mexico recognizes three distinct forms of entrapment defense. The most common form is traditional subjective entrapment, which focuses on D's predisposition to commit offense. There are also two forms of objective entrapment. Under one, the Court may find, as a matter of law, that the state exceeded the standards of proper investigation, either through the use of unconscionable methods, or the pursuit of illegitimate purposes. Under the other form, the jury may find that police conduct created a substantial risk that an ordinary, unpredisposed person would have been caused to commit the crime.

**TITLE:** Taylor v. State
**INDEX NO.:** L.5.
**CITE:** 5th Dist., 1-31-94), Ind. App., 629 N.E.2d 852
**SUBJECT:** Refusal to give entrapment instruction was error
**HOLDING:** Where D sufficiently showed police involvement in controlled drug buy & offered some evidence to rebut State's showing of predisposition, Tr. Ct. abused discretion in denying instruction on entrapment. D was involved as confidential informant (CI) with drug task force, & when force learned he was selling drugs, it arranged controlled buy from him with other CI. Although where evidence of predisposition has been presented & D does not present contradictory evidence, entrapment instruction is not necessary, Johnston, 530 N.E.2d 1179, Ct. rejected argument that D did not present any real contradictory evidence. Evidence of predisposition included facts D was admitted drug user who knew drug terminology; D knew about make-up of drug community; he knew how & from whom to obtain cocaine; & he knew specific targets of investigation & that he needed money to gain admittance to place where cocaine was bought. D testified that he was under great deal of pressure to identify dealers & that to gain credibility among them & set up buys for task force, he had to engage in dealing himself. He said officer gave impression that he could set up deals for this purpose. Ct. distinguished Johnston, because in that case D presented no evidence to rebut predisposition, & noted State conceded D's evidence could have warranted entrapment instruction. While giving of instructions is discretionary, Tr. Ct. has duty to give to jury "`all matters of law which are necessary for their information in giving their verdict'," (Ind. Code 35-37-2-2(5). Even if defense evidence is weak & inconsistent, Ds are generally entitled to instruction on any theory of defense that has some foundation in evidence. Tendered instruction was correct statement of law, there was some evidence to support it, & substance of instruction was not covered elsewhere. Held, reversed & remanded, Hoffman, J., dissenting.

**TITLE:** U.S. v. Brooks
**INDEX NO.:** L.5.
**CITE:** 215 F.3d 842 (8th Cir. 2000)
**SUBJECT:** Entrapment -- Informer's Tactics in Arranging Drug Sale
**HOLDING:** Coercive tactics by which a paid informer persuaded a drug addicted D to sell to officer portion of heroin that informer had originally sold to D constituted entrapment as a matter of law. Informer, who was paid by law enforcement for each sale he set up, had been D's ongoing supplier of heroin. After recent sale, informer contacted D and asked him to resell portion of his heroin to third party, a law enforcement officer. D refused three such requests but relented when the informer threatened to cut off his heroin supply. Although law enforcement officers were unaware that the heroin the D sold to them had originally been sold to him by the informer, and that the informer used coercive tactics, the government was responsible for the actions of the informer, its agent. The informer's conduct constitutes entrapment as a matter of law, and evidence regarding the D's later behavior is irrelevant to the issue of his predisposition at the time of the informer's first efforts at inducement.

**TITLE:** U.S. v. Knox
**INDEX NO.:** L.5.
**CITE:** 112 F.3d 802 (5th Cir. 1997)
**SUBJECT:** Entrapment -- Predisposition Includes Being Both Willing and Able
**HOLDING:** Fifth Circuit Federal Court of Appeals holds that, in order to establish predisposition in case where D raises entrapment defense, government must show not only that D was willing to commit crime, but that he was able to do so absent government's involvement. Although government offered evidence that D was willing to engage in money laundering when approached by government agents, they did not offer evidence that he knew how to do so prior to agents' inducements. Held, D was entrapped; conviction reversed. Accord: U.S. v. Hollingsworth, 27 F.3d 1196 (7th Cir. 1994) (predisposition includes both "mental" and "positional" elements).

**TITLE:** United States v. Luisi
**INDEX NO.:** L.5.
**CITE:** (4/10/2007), 1st Cir., 2007 U.S. App. LEXIS 8225; 03-1470,
**SUBJECT:** Entrapment available despite two degrees of separation
**HOLDING:** First Circuit Court of Appeals held that evidence that a government informer merely requested a third party to pressure the accused to commit a crime was sufficient to establish the federal entrapment defense. Court rejected the government's more restrictive interpretation of circuit precedent on third-party entrapment. Some circuits categorically deny the entrapment defense in all third-party situations where the middleman is unaware that he is helping the government.

The government succeeded in turning a "capo" in the Philadelphia mob. The government then sicced this informer on another capo -- D -- who was supervising the mob's criminal activities in Boston. The informer endeavored to get D to engage in a cocaine deal with an undercover FBI agent, but D would not commit, saying that he had sworn off drug dealing. The informer appealed to the boss back in Philadelphia to order D to go through with the drug deal, with evidence indicating that the informer's call to the boss was made at the direction of the FBI. Tr. Ct. refused D's request for an instruction informing the jurors that, if they found that the informer had induced the boss, the boss's order could be construed as government action. The jury, however, ended up sending a note to the judge asking whether the boss's "request" of D "if determined to be excessive pressure" qualified as government inducement because it resulted from the actions of the undercover agent. The Tr. Ct. decided that a third-party entrapment defense cannot lie unless the government "instructed" the third-party intermediary to pressure D. Court here distinguished from its own ruling in U.S. v. Bradley, 820 F.2d 3 (1st Cir. 1987), which involved what is sometimes referred to as "vicarious entrapment" where a middleman merely tells D about an inducement that the government had used to target the middleman. Court found that this was not a vicarious entrapment case because the target of the inducement was the accused, not the middleman. This case is more like "derivate entrapment" cases, in which a government agent uses an unsuspecting middleman as a means of passing on an inducement to the accused.

**TITLE:** U.S. v. Ramirez-Rangel

**INDEX NO.:** L.5.

**CITE:** 103 F.3d 1501 (9th Cir. 1997); *overruled* in part by Watson v. U.S. 552 U.S. 74 (2007)

**SUBJECT:** Sentencing Entrapment -- Machine Gun Provided by Government

**HOLDING:** Sentence enhancement for using machine gun in relation to federal drug trafficking offense cannot apply where machine gun was provided by government agents, and D can show that he was unaware that it was machine gun. D was brought together with law enforcement officers by confidential informant who told officers that D wanted to trade drugs for machine guns. Ds spoke little English, and officers spoke little Spanish, so the actual transaction was conducted by means of hand-signals and a few basic English and Spanish words. D did not use any word meaning machine gun during transaction. At trial, D claimed he was not aware he was trading for machine guns, which carried 5 – 30-year sentencing enhancement, and sought disclosure of confidential informant so that he could obtain testimony that machine guns had never been mentioned. Remanded for in camera hearing on whether informer's testimony would be relevant and helpful to D's claim.

**TITLE:** U.S. v. Thomas
**INDEX NO.:** L.5.
**CITE:** 134 F.3d 975 (9th Cir. 1998)
**SUBJECT:** Entrapment -- Evidence of prior good acts
**HOLDING:** D who raises entrapment defense, and thus puts at issue his predisposition to commit charged offense, may introduce evidence of his prior good acts under R.Ev. 404(b). D here should have been allowed to testify that he had never been arrested or convicted of any offense prior to current charges. State argues that lack of arrest and conviction record are not "proof" that D has been law-abiding citizen. Majority acknowledges this but points out that it does make it more probable, which is all that is required under R.Ev. 401 to make it relevant. Alternatively, majority would admit lack of criminal record under R.Ev. 405(b), which allows specific instances of D's conduct to be admitted when character is essential element of defense, because character is essential element of entrapment defense.

**TITLE:** Wallace v. State
**INDEX NO.:** L.5.
**CITE:** (10/20/86), Ind., 498 N.E.2d 961
**SUBJECT:** Entrapment - participation required
**HOLDING:** Ct. rejects D's contention that his involvement in drug transaction was too minor to warrant conviction because he merely introduced drug buyer to drug seller. Trier of fact may infer participation from several factors considered together: presence, failure to oppose crime, companionship with principal, & conduct before, during & after offense which tends to show complicity. Hudak 446 N.E.2d 615. Here, Ct. finds drug purchases at issue would not have occurred without D. Police contacted D only after he suggested they call him next time they needed drugs. D gave original estimate for cost of "trees" (barbituates), which was close to figure paid & introduced officers to seller & accompanied them to location where seller obtained drugs. Held, conviction affirmed.

# L. DEFENSES

## L.7. Legal bars to prosecution (see, also B.10)

### L.7.a. Collateral estoppel/res judicata

**TITLE:** Becker v. State
**INDEX NO.:** L.7.a.
**CITE:** (8/22/2013), 992 N.E.2d 697 (Ind. 2013)
**SUBJECT:** Res judicata barred State's attempt to increase D's Sex Offender Registration requirements
**HOLDING:** Indiana Supreme Court reversed 2011 granting of State's motion to correct error.

The State, through the DOC, intervened to challenge an earlier 2011 agreed order by which State acknowledged D had satisfied his sex offender registration (SOR) duties. DOC intervened because just two weeks after the agreed order, Lemmon v. Harris, 949 N.E.2d 803 (2011), ruled that the heightened registration requirements for sexually violent predators did not violate prohibition on ex post facto laws. Thus, Tr. Ct. ruled that requiring D to abide by heightened registration requirements did not violate ex post facto prohibition.

However, the effect of this ruling was to vacate Tr. Ct.'s 2008 ruling that the heightened registration requirements were, in fact, ex post facto as to D. The prosecutor did not appeal this 2008 ruling.

Court acknowledged that in light of Lemmon, Tr. Ct.'s 2008 ruling was erroneous. However, because the prosecutor and the DOC were in privity with respect to D's SOR obligations, principles of res judicata barred DOC from relitigating D's registration duties. Thus, DOC was bound by the 2008 order. Held, judgment reversed.

**TITLE:** Bobby v. Bies

**INDEX NO.:** L.7.a.

**CITE:** (06-01-09), U.S., 08-598, 129 S.Ct. 2145

**SUBJECT:** Double jeopardy - preclusion doctrine; State can relitigate mental retardation of condemned inmate

**HOLDING:** A state prisoner who was sentenced to death before Atkins v. Virginia, 536 U.S. 304 (2002), outlawed the death penalty for mentally retarded Ds, and whom the state courts acknowledged suffered from a level of mental retardation that had some weight as a mitigating factor, may now be subjected to an Atkins proceeding to determine whether the extent of his mental impairment allows his execution. The State court's determination that D's mental retardation was a mitigating factor does not trigger Double Jeopardy Clause's doctrine of issue preclusion because only prevailing parties may avail themselves of that doctrine and the prisoner was condemned to death the first time around. State did not vigorously contest D's evidence of mental retardation offered in mitigation at sentencing, but now has a chance to go back and relitigate the matter now that proof of mental retardation precludes imposition of the death penalty. Double Jeopardy preclusion doctrine "does not bar a full airing of the issue whether Bies qualifies as mentally retarded under *Atkins*." Court noted that in Atkins, it left it up to the states to devise their own frameworks for determining whether mental retardation renders a particular D ineligible for execution. Held, Sixth Circuit Court of Appeals' opinion at 519 F.3d 324 reversed and remanded.

**TITLE:** Bravo-Fernandez, et al. v. United States
**INDEX NO.:** L.7.a.
**CITE:** (11/29/2016), 137 S. Ct. 352 (U.S. 2016)
**SUBJECT:** Inconsistent verdicts do not collaterally estop retrial of vacated conviction
**HOLDING:** The collateral estoppel/issue preclusion part of the Double Jeopardy Clause does not bar retrial of a vacated bribery conviction where the same jury acquitted D of conspiracy to commit bribery. The burden lies on a defendant to show that the issue he seeks to shield from reconsideration by retrial was actually decided by a prior jury's verdict of acquittal. Schiro v. Farley, 510 U.S. 222, 233 (1994). When the same jury returns irreconcilably inconsistent verdicts on the issue in question, a defendant cannot meet that burden. Thus, the acquittal on the conspiracy charge creates no preclusive effect on the count for which D was convicted. United States v. Powell, 469 U.S. 57, 68-69 (1984). Held, cert. granted, First Circuit opinion at 790 F.3d 41 affirmed, and judgment affirmed.
Ginsburg, J., for the unanimous Court; Thomas, J., concurring.

**TITLE:** Buggs v. State
**INDEX NO:** L.7.a.
**CITE:** (2nd Dist., 03-23-06), Ind. App., 844 N.E.2d 195
**SUBJECT:** Collateral estoppel - retrial for murder/attempted robbery after acquittal of felony murder
**HOLDING:** Double jeopardy did not prohibit D's retrial for murder and attempted robbery after his acquittal in first trial of felony murder and conspiracy to commit robbery. Griffin v. State, 717 N.E.2d 73 (Ind. 1999). In first trial, jury hung on murder and attempted robbery charges. A D who is retried following a hung jury is not placed in jeopardy twice for the same offense because the initial jeopardy that attaches to a charge is simply suspended by the jury's failure to reach a verdict. Davenport v. State, 734 N.E.2d 622 (Ind. Ct. App 2002). Furthermore, the doctrine of implied acquittal does not apply to the attempted robbery charge because D was acquitted of felony murder, the greater offense. As to D's claim that retrial on murder and attempted robbery charges violates actual evidence test articulated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), Court declined to extend Richardson actual evidence test to this situation and instead applied doctrine of collateral estoppel.

Collateral estoppel forbids government from relitigating certain facts in order to establish the fact of the crime. Segovia v. State, 666 N.E.2d 105 (Ind. Ct. App 1996). Here, analyzing this particular combination of acquittal and deadlocks, Court concluded that jury in first trial could have only decided that D did not kill victim while committing or attempting to commit robbery. Although collateral estoppel did not bar relitigation of issue of whether D killed victim, and did not prevent State from retrying D for an attempted robbery that occurred after victim's death, Court held that D cannot be convicted of attempted robbery for attempting to rob victim after killing him. Distinguishing Robinson v. State, 693 N.E.2d 548 (Ind. 1998), Court noted it is simply not possible for a D to commit all the elements of attempted robbery on a person who is already dead. Robinson held that the taking could occur after victim's death if force occurred while victim was alive and did not hold that entire robbery could be committed after victim was dead. Held, judgment affirmed in part, attempted robbery conviction reversed. But see Garrett v. State, 992 N.E.2d 710 (Ind. 2013) (actual evidence test applies to cases where jury acquits a D of one charge but cannot reach a verdict on a second charge, and where D is subsequently convicted of second charge on retrial; doctrine of collateral estoppel does not sufficiently protect D against potential double jeopardy violation).

**RELATED CASES:** Cleary, 23 N.E.3d 664 (Ind. 2015) (despite Garrett (above), Ct. rejected D's argument that Indiana's double jeopardy clause barred retrial after Tr. Ct. refused to enter judgment of conviction on previous jury verdict on lesser included misdemeanor offenses; second trial on greater offenses that deadlocked the first jury was "simply a continuation of the jeopardy"); Berkman, 976 N.E.2d 68 (Ind. Ct. App 2012) (refusing to apply Richardson to successive prosecutions); Coleman, 946 N.E.2d 1160 (Ind. Ct. App 2011) (double jeopardy does not preclude the State from retrying D where in the first trial the jury acquitted D of murder with respect to one victim but failed to return a verdict on a charge of attempted murder with respect to another victim; whether D acted in self-defense when he shot the first man was not necessarily decided in the first trial by the jury's acquittal as to the death of the second man)

**TITLE:** Commonwealth v. States
**INDEX NO.:** L.7.a.
**CITE:** 595 Pa. 453 (Pa. 2007)
**SUBJECT:** Collateral estoppel; double jeopardy - judge's factual ruling precluded retrial
**HOLDING:** Pennsylvania Supreme Court held a trial judge's declaration of a mistrial on some charges after the jury hung, coupled with the judge's simultaneous acquittal of D on a related charge on a factual ground on which the remaining counts hinged, erected a double jeopardy bar to a retrial on the unresolved charges. Court explained that a retrial would require relitigation of an issue that was resolved by the acquittal in the joint jury/bench trial. D obtained severance of a charge of causing a fatal accident while not properly licensed, arguing that the jury would be prejudiced by the fact that he lacked a valid driver's license. That charge was tried to the bench, whereas charges of vehicular homicide while driving under the influence of alcohol and other charges were simultaneously tried to a jury. After the jury reported being deadlocked, Tr. Ct. declared a mistrial on charges before them, but acquitted D on the charge before it, saying that it was not convinced beyond a reasonable doubt that D was driving the vehicle. Court held that in light of the Tr. Ct.'s definitive finding that the State failed to prove that D was the driver of the car, the Fifth Amendment barred the State from attempting to convince a second jury otherwise in a retrial on the remaining charges. Further, the fact that a retrial would require the State to present evidence on who was driving the vehicle and urge a second jury to reach a result contrary to the result previously reached by another fact finder made the case a classic collateral estoppel situation.

**TITLE:** Davis v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist., 2-25-98), Ind. App., 691 N.E.2d 1285
**SUBJECT:** Collateral estoppel - requires valid & final judgment
**HOLDING:** D's prior acquittal of murder of first victim did not preclude retrial & conviction of murder of second victim even though both murders may have been part of same criminal episode. Collateral estoppel means simply that when issue of ultimate fact has once been determined by valid & final judgment, that issue cannot again be litigated between same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436 (1970). Here, at first trial, jury found that D acted in self-defense when he shot first victim but could not come to determination concerning shooting of second victim. At second trial, jury was again asked to determine whether D acted in self-defense when he shot second victim. Because question asked at second trial was same question which resulted in hung jury in first trial & different question than one which resulted in acquittal in first trial, question had not been determined by valid & final judgment. Thus, collateral estoppel did not preclude retrial of second count of murder. Held, conviction affirmed.

**TITLE**: Edwards v. State
**INDEX NO.:** L.7.a.
**CITE:** (2nd Dist.; 03-20-07), Ind. App., 862 N.E.2d 1254
**SUBJECT:** Collateral estoppel- appellate court bound by earlier decision involving same parties
**HOLDING:** The Ct. App. is bound by its earlier decision that a taped conversation between the murder victim & a police officer was inadmissible. In determining whether to allow the use of collateral estoppel, the Tr. Ct. must engage in a two-part analysis: (1) whether the party in the prior action had a full & fair opportunity to litigate the issue, & (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case. Here, as D was in jail awaiting trial on a murder & an attempted murder charge, he conspired with another to kill the three witnesses to the murder & attempted murder. Two of the three witnesses were actually killed. D was convicted of the murder & attempted murder which was appealed. In an unpublished opinion, the Ct. App. held that it was error to admit a conversation between one of the subsequent murder victims & an officer. Both D & State were parties to the prior appeal & fully & fairly litigated the issue of whether D forfeited his confrontation rights by murdering the witness. It would not be unfair to apply collateral estoppel to the facts of this case- the law has not changed regarding forfeiture by wrongdoing as applied in the unpublished opinion guaranteeing the same result were Court to revisit the issue here. However, error in admitting hearsay was harmless. Held, judgment affirmed.

**TITLE:** Jennings v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist.; 7-28-99), Ind. App., 714 N.E.2d 730
**SUBJECT:** Collateral estoppel - applicable in motion to suppress
**HOLDING:** Tr. Ct. erred in denying D's motion to suppress evidence based on collateral estoppel. Collateral estoppel operates to bar relitigation of issue or fact where issue or fact was adjudicated in former suit & same issue or fact is presented in subsequent suit. Although Ind. no longer requires that person taking advantage of prior adjudication would have also been bound had prior judgment been decided differently, principal consideration with defensive use of collateral estoppel is whether party against whom prior judgment is pled had full & fair opportunity to litigate issue & whether it would otherwise be unfair under circumstances to permit use of collateral estoppel. Wilcox, App., 664 N.E.2d 379. In determining whether collateral estoppel applies in particular case, Ct. must first determine what issue or fact was decided by first judgment, & second, must examine how that determination bears on subsequent action. Smith, App., 670 N.E.2d 360.

Here, D & passenger 1 were charged with drug offenses based on drugs found during same searches of D's car. In Superior Ct., passenger 1 filed motion to suppress alleging that searches of D's car were improper because they were based upon evidence seized as result of improper search of passenger 2's purse. Superior Ct. granted motion to suppress & dismissed case. In Circuit Ct., D filed motion to suppress alleging collateral estoppel precluded use of evidence obtained as fruit of search of passenger 2's purse which was already determined to be illegal by Superior Ct. Although D was owner & driver of car & person passenger 2 implicated in owning drugs found in her purse, critical issue, search of passenger 2's purse, & events leading to search of passenger 2's purse were same in both D's & passenger 1's cases. In addition, because motion to suppress resulted in dismissal of case, Superior Ct.'s granting of motion was final judgment. Thus, State was collaterally estopped from arguing legality of searches of D's vehicle because issue had already been litigated in Superior Ct. Held, judgment reversed.

**RELATED CASES:** Perez-Grahovac, App., 894 N.E.2d 578 (where D failed to introduce hearing on co-D's motion to suppress in another court who granted the motion without findings of facts or conclusions of law, the D failed to prove that the Tr. Ct. was collaterally estopped from denying his motion to suppress); Martin, App., 740 N.E.2d 137 (following Reid & holding that simply because one court held that co-D's sentence violated double jeopardy did not require D's court to hold same); Reid, App., 719 N.E.2d 451 (disagreeing with Jennings & holding that there is no nonmutual collateral estoppel in criminal cases; State could argue different theory in each co-D's trial).

**TITLE:** Parker v. State

**INDEX NO.:** L.7.a.

**CITE:** 09/22/2022, Ind. Ct. App., 196 N.E.3d 244

**SUBJECT:** Federal court's grant of motion to suppress based on same facts did not have preclusive effect in state court

**HOLDING:** The police pulled over Defendant's car in a "felony car stop" because it resembled the description of a car seen at the scene of a home invasion burglary 30 minutes earlier. Five officers approached Defendant's car with guns drawn. Defendant followed officers' directions to get out and was immediately handcuffed. Defendant informed the arresting officer that he had a handgun on his hip. He was eventually cleared of the burglary, but was charged in state court with Level 4 felony possession of a firearm as a serious violent felon. And because Defendant was on federal probation, he was charged with possession of a firearm by a felon in federal court based on the same facts. Defendant filed a motion to suppress in both state and federal court. The federal district court granted the motion, finding that no reasonable suspicion existed, the officers' mistake in stopping Defendant was not reasonable, and the felony stop procedure amounted to an arrest without probable cause. When he received the federal ruling, Defendant amended his motion to suppress in state court, arguing that the trial court was bound by the district court's suppression ruling. The state court denied Defendant's motion to suppress and certified its order for interlocutory appeal. Defendant argued that the trial court erred by failing to give preclusive effect to the federal district court's decision granting his motion to suppress in the federal case. The Court of Appeals disagreed, finding that "defensive" collateral estoppel did not apply here because two different governments, federal and state, brought charges against Defendant. Because there was neither identity of parties nor mutuality of estoppel between the parties to the federal action and the state action, Defendant was not entitled to the preclusive effect of defensive collateral estoppel. Turning to the merits of the suppression issue, the Court of Appeals held that the traffic stop was reasonable under the Fourth Amendment and Indiana Constitution because it was supported by reasonable suspicion and Defendant's brief detention "did not become an arrest simply because the officers drew their weapons and handcuffed Parker." Held: judgment affirmed.

**TITLE:** Schiro v. Farley
**INDEX NO.:** L.7.a.
**CITE:** 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994)
**SUBJECT:** Capital Sentencing - Double Jeopardy (DJ); Collateral Estoppel (CE)
**HOLDING:** Subjecting D to capital sentencing proceeding in which alleged aggravator was intentional killing in course of rape, where jury had returned guilty verdict on felony murder & no verdict on "knowing" killing, did not violate DJ or CE principles. DJ prohibits multiple punishments or successive prosecutions. In Bullington v. MO, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), U.S.S.Ct. held that capital sentencing proceeding was sufficiently like trial so that successive proceedings were prohibited. Initial capital sentencing proceeding is not successive prosecution, however. For CE to bar sentencing proceedings, D must prove that jury verdict rested on determination that he did not have intent to kill. In light of D's confession to killing, instruction that jury must find intent to kill to convict D of murder, & uncertainty as to whether jury believed it could return more than one verdict, S.Ct. finds that D has not met that burden. Held, affirmed. Blackmun & Stevens, JJ., DISSENT.

**TITLE:** Segovia v. State
**INDEX NO.:** L.7.a.
**CITE:** (3rd Dist., 5-31-96), Ind. App., 666 N.E.2d 105
**SUBJECT:** Collateral estoppel - conspiracy to commit arson after acquittal of felony murder
**HOLDING:** Prosecution for conspiracy to commit arson was barred by D's acquittal of felony murder in prior proceeding. Even though two offenses are not same for double jeopardy purposes, State was collaterally estopped in second trial from attempting to prove that D was involved in arson. Collateral estoppel forbids government from relitigating certain facts in order to establish fact of crime. Little v. State, 501 N.E.2d 412 (Ind. 1986). Here, to acquit D of felony murder in first trial, jury necessarily had to determine that D did not set or assist another in setting fire. In order to prove conspiracy charge, State had to prove overt act of arson. Because fact that D was not involved in arson was necessarily decided in first trial, State was stopped from attempting to prove he was involved in arson in second trial. Held, conviction reversed.

**RELATED CASES:** McWhorter, 993 N.E.2d 1141(Ind. 2013) (after grant of post-conviction relief on voluntary manslaughter conviction due to flawed jury instruction, on remand there is no prohibition for retrial on either voluntary manslaughter or reckless homicide); Griffin,717 N.E.2d 73 (collateral estoppel did not bar retrial on robbery charge because acquittal on felony murder charge could have been based on issue other than jury finding D did not commit robbery) Smith, App., 670 N.E.2d 360 (although D was previously acquitted in one county on charges arising from same drug sting operation, collateral estoppel did not bar prosecution in second county; evidence did not demonstrate that D was entrapped during entire series of drug transactions).

**TITLE:** Shumate v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist.; 10-27-99), Ind. App., 718 N.E.2d 1133
**SUBJECT:** Probation revocation - barred by res judicata
**HOLDING:** Res judicata, but not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence. Second probation revocation hearing, based on same alleged violation that resulted in revocation of probation that was later set aside, does not violate prohibition against double jeopardy. Childers, App., 656 N.E.2d 514. However, res judicata bars relitigation of claim after final judgment has been rendered, when subsequent action involves same claim between same parties. In order to prove relitigation is barred by res judicata, four elements must be satisfied: (1) former judgment must have been rendered by Ct. of competent jurisdiction; (2) former judgment must have been rendered on merits; (3) matter now in issue was or could have been determined in prior action; & (4) controversy adjudicated in former action must have been between same parties to present suit or their privies. Here, appellate Ct. decision reversing probation revocation due to insufficient evidence was judgment on merits for purposes of res judicata. Thus, any further proceedings relating to revocation of D's probation, based on same violation of probation at issue in first revocation proceeding, were barred by res judicata. Held, judgment reversed.

**RELATED CASES:** Dexter, 991 N.E.2d 171 (Ind. Ct. App 2013) (even if four-pronged test from Shumate applies, Indiana Supreme Court's decision reversing D's habitual-offender enhancement was not a final judgment on the merits, thus State was not barred from retrying him under doctrine of res judicata).

**TITLE:** State v. Canon
**INDEX NO.:** L.7.a.
**CITE:** 602 N.W.2d 316 (Wis.Ct. App. 1999)
**SUBJECT:** Collateral Estoppel -- Issue Resolved by Acquittal Cannot Be Relitigated in Perjury Trial
**HOLDING:** Where jury acquitted D on DUI charge, state is collaterally estopped from prosecuting him for perjury based on testimony at his DUI trial that, while intoxicated, he was not the driver of the vehicle. Because he did not contest his intoxication, the only issue in DUI trial was whether he was the driver. By its acquittal, the jury necessarily found that he was not. A new jury could not convict him of perjury without making a new determination that he was the driver. The Court rejected the state's argument that the acquittal's collateral estoppel effect is countered because it was obtained through the D's fraud.

**TITLE:** United States v. Castillo-Basa

**INDEX NO.:** L.7.a.

**CITE:** 478 F.3d 1025; 05-50768 (9th Cir. 2007)

**SUBJECT:** Collateral estoppel bars perjury charge against D who testified falsely and gained acquittal

**HOLDING:** The Ninth Circuit Court of Appeals held that D who, in an earlier prosecution, took the stand to challenge a single element of the charged offense cannot, following his acquittal, be prosecuted for perjury after the government located evidence that demonstrated that D's testimony at the earlier trial was false. Court's ruling was based on collateral estoppel principles embodied in the Fifth Amendment's double jeopardy clause.

D initially was charged with illegally reentering the country after having been deported, in violation of federal statutory law. The government, however, could not locate an audio record of D's deportation hearing. D -- in both a sworn declaration and testimony at trial -- stated that, on the day his deportation hearing was scheduled, no one came to bring him from his cell. Although district court refused to give requested instruction that the jury specifically required a finding that D was present at the deportation hearing to meet an element of the charge, D was acquitted anyway. Soon after, the government found the tape of D's deportation hearing and charged him with perjury. Relying on Ashe v. Swenson, 397 U.S. 436 (1970), Court determined second prosecution was barred by common-law principles of collateral estoppel. Although an accused's presence at a deportation hearing is not technically one of the facts that a jury must determine in a re-entry prosecution, Court decided "given the evidence and the arguments before it, the jury could not have acquitted Castillo-Basa without deciding that he had not been afforded a deportation hearing, and thus that he had not been physically present at any such hearing." "[A] jury need not directly decide the veracity of a D's testimony in the first trial for collateral estoppel to bar a subsequent perjury prosecution -- it is enough that the jury decide an issue that is 'sufficiently similar' to an issue in the prospective second prosecution and that the similar issues are 'sufficiently material' in both instances." Court stressed that D's testimony at his re-entry trial was the principle evidence presented to contest the government's evidence. A dissent was entered.

**TITLE:** Wilcox v. State
**INDEX NO.:** L.7.a.
**CITE:** (1st Dist., 4-24-96), Ind. App., 664 N.E.2d 379
**SUBJECT:** Collateral estoppel - criminal nonsupport after favorable civil adjudication
**HOLDING:** Doctrine of collateral estoppel, which operates to bar subsequent relitigation of same fact or issue adjudicated in former proceeding, did not apply to preclude relitigation of D's ability to pay child support. In civil contempt proceeding, Tr. Ct. found that D was not in contempt of Ct. for failure to pay support from 11/93 through 1/94, because he did not have financial ability to meet his support obligations. In criminal case, State alleged that D willfully & intentionally withheld child support from 11/93 through 6/94. Although issue in both proceedings was whether D was financially able to provide support, Ct. rejected claim that there was identity of issues between two proceedings. Additional 5-month period of nonpayment supported State's allegation in criminal case & could have been pivotal to jury's conclusion that D intentionally refused to provide support for his child. Record showed that during 5-month period, D failed to obtain employment & failed to seek relief from preliminary injunction which froze his assets. Thus, issues between two adjudications were not coextensive & issue presented in second action was not subsumed within issue determined in first adjudication. Held, affirmed in part, remanded for resentencing; Chezem, J., concurring.

**RELATED CASES:** Olson and Mahoney, 135 N.E.3d 988 (Ind. Ct. App. 2019) (juvenile court's finding of no probable cause does not bar proceedings for co-defendants charged in adult court); Bailey, App., 716 N.E.2d 67(Tr. Ct. erred by dismissing criminal recklessness charge against D based on doctrine of collateral estoppel).

**TITLE:** Wood v. State

**INDEX NO:** L.7.a.

**CITE:** (5/20/2013), 988 N.E.2d 374 (Ind. Ct. App 2013)

**SUBJECT:** Collateral estoppel precluded guilty plea for possession by SVF after acquittal in first phase of bifurcated trial

**HOLDING:** After first phase of D's trial for possession of a firearm by a SVF, jury returned a verdict acquitting D of knowing or intentional possession. Prohibition against double jeopardy and doctrine of collateral estoppel prohibited Tr. Ct. from allowing State to be given a second chance, in second phase of bifurcated trial, to prove he possessed the same handguns. Because D could not face a seond jury trial for possession of those firearms, neither could he plead guilty to that crime, thus Court reversed his conviction. See Menna v. N.Y., 423 U.S. 61 (1975). Held, judgment reversed and remanded.

# L. DEFENSES

## L.7. Legal bars to prosecution (see, also B.10)

### L.7.b. Statute of limitations (Ind. Code 35-41-4-2)

**TITLE:** Cowan v. Sup. Ct., Kern County
**INDEX NO.:** L.7.b.
**CITE:** 14 Cal. 4th 367; 926 P.2d 438 (Cal. 1996)
**SUBJECT:** D May Waive Statute of Limitations To Take Advantage of Plea Bargain
**HOLDING:** California Supreme Court holds that D may waive statute of limitations to take advantage of plea agreement requiring him to plead guilty to time-barred lesser offense. Tr. Ct. had jurisdiction over time-barred offense by virtue of valid greater charge.

**TITLE:** Greichunos v. State
**INDEX NO.:** L.7.b.
**CITE:** (4th Dist. 12/27/83), Ind. App., 457 N.E.2d 615
**SUBJECT:** Statute of limitations - applicable statute
**HOLDING:** Tr. Ct. erred in denying D's motion to dismiss information (filed 2/18/82) charging him with second degree arson committed 4/16/75. Applicable statute of limitations (S/L) is one in effect at time prosecution is instituted. Streepy (1931) 202 Ind. 685. Here, at time offense was committed, prosecutions for treason, murder, arson & kidnapping could be commenced "at any time after the commission of the offense (Ind. Code 35-1-3-1)." Effective 10/1/77, the S/L for Class B felonies was 5 years (Ind. Code 35-41-4-2). Ct. rejects state's contention that Streepy creates ex post facto problems. Under Streepy, a newly enacted S/L cannot revive a previously barred prosecution. Savings clause contained in Acts 1977, P.L. 340, Section 150 indicates no legislative intent to maintain former S/L. There is no vested right in S/L, which is merely a remedy/mode of procedure. State has burden of proving crime charged was committed within S/L. Fisher 291 N.E.2d 76; Atkins, App., 437 N.E.2d 114. An information which fails to allege facts sufficient to constitute an exception to S/L is subject to dismissal. Obie 106 N.E.2d 452; Terrell (1905), 165 Ind. 443. Held, reversed & remanded with instructions to dismiss.

**RELATED CASES:** Parmley, App., 699 N.E.2d 288 (D's conviction for child molesting for act which allegedly occurred on 12/7/89 & for which he was charged more than 5 years later was not barred by applicable statute of limitations).

**TITLE:** Harris v. State

**INDEX NO.:** L.7.b.

**CITE:** (8/13/2013), 992 N.E.2d 887 reh'g granted on other grounds 9 N.E.3d 679 (Ind. Ct. App 2013)

**SUBJECT:** Statute of limitations precluded untimely amendment to charging information

**HOLDING:** After jury acquitted D of rape and hung on class C felony sexual misconduct with a minor charge, statute of limitations barred State from amending the sexual misconduct charge by adding deviate sexual conduct as alternative basis for charge. Alleged crime occurred on December 25, 2005, and class C felony has a period of limitations of five years. See Ind. Code 35-41-4-2(a)(1). After first trial, the State moved to amend its remaining count against D by adding "or deviate sexual conduct" on September 20, 2011, nearly a year after the period of limitations for the alleged deviate sexual conduct expired.

Proposed amendment constitutes a matter of substance and includes a new and additional offense. Just as the State would be barred from bringing a new or refiled charge of deviate sexual conduct, it is barred from bringing the charge through an amendment. The statute of limitations cannot be circumvented because of the procedural availability of amending informations or the happenstance of a mistrial. Held, denial of State's motion to amend information affirmed.

**TITLE:** Heitman v. State
**INDEX NO.:** L.7.b.
**CITE:** (1/18/94), Ind. App., 627 N.E.2d 1307
**SUBJECT:** Statute of limitations -- D leaves Indiana but cooperated with authorities
**HOLDING:** Ind. Const. Art. 1 Section 23 states that General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon same terms, shall not equally belong to all citizens. General Assembly may not enact statute which classifies and is unreasonable, arbitrary or rests upon some ground of difference not having fair and substantial relation to object of legislation Johnson, 404 N.E.2d 585. Here, D was accused of molesting his daughter. Before and during investigation while he was in Pennsylvania, D remained in constant contact with ex-wife and Indiana authorities. He was charged in September 1990 for child molesting occurring between January 1984 and June 1985. D claimed equal protection clause was violated because statute provides five-year statute of limitation and more that five years passed before he was charged. Ct. held that if suspect leaves Indiana and is evading extradition or is otherwise avoiding authorities, statute of limitation tolls. If suspect has left Indiana but cooperates fully with Indiana authorities, and returns voluntarily to Indiana to face charges against him, statute of limitations does not toll. Therefore, since D was not avoiding service of process and fully cooperated with authorities while living in Pennsylvania, statute of limitations did not toll. Held, conviction reversed and D released from custody.

**TITLE:** Heitman v. State
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist., 1-18-94), Ind. App., 627 N.E.2d 1307
**SUBJECT:** Statute of Limitations (SL) not tolled by D's absence
**HOLDING:** If suspect has left State but does not avoid authorities & cooperates & returns voluntarily to face charges, SL is not tolled during his absence. D & wife divorced, & D & two children moved to Pennsylvania. One daughter eventually returned to Ind. in 1987. She alleged D had molested her, but later recanted charge. In 1988, she renewed allegations D had molested her in 1984 & 1985. Before & during investigation of charges, D remained in contact with ex- wife & Ind. authorities, even paying police detective's expenses to investigate. After detective went to Pennsylvania, no further action was taken for two years, but in 1990, D was charged with child molesting & incest for incidents allegedly occurring in 1984 & 1985. He was convicted on both counts.

D argued that Ind. Code 35-41-4-2(g)(1), providing that SL is tolled for any period when accused is not usually & publicly resident in State or conceals himself to avoid process, unconstitutionally violates equal protection guarantee of Ind. Const. art I, § 23. Ct. noted purpose of SL is to ensure against inevitable prejudice & injustice to D that delay in prosecution creates, & it strikes balance between D's interest in repose & State's need to adequately investigate & prepare case, Scott, App., 461 N.E.2d 141. Art. I, § 23 prevents legislature from enacting statutes that classify & are unreasonable, arbitrary, or rest on some ground or difference not having fair & substantial relation to their purpose.

Ct. found that if statute were applied to toll SL in D's case, it would be unconstitutional, because mere fact person lives outside State does not by itself have substantial relation to State's ability to bring person to justice. Ct. also found, however, that statute was capable of interpretation that would make it constitutional. Language in statute "that process cannot be served upon him" could modify "is not usually resident in Ind." as well as "so conceals himself," because two clauses are separated by "or." Ct. concluded this interpretation comported with purpose of legislation balanced competing interests, & classified suspects based on amenability to process. Ct. held proper interpretation to be: "If a suspect leaves Indiana and is evading extradition or is otherwise avoiding authorities, the statute of limitations tolls. If a suspect has left Indiana but cooperates fully with Indiana authorities, and returns voluntarily to Indiana to face charges against him, the statute of limitations does not toll."

Applying interpretation to D's case, Ct. found SL was not tolled because he fully cooperated with authorities & State would have had no difficulty filing information against him earlier. Because SL was not tolled, & last instance of alleged misconduct occurred more than five years prior to charge, charges against D were barred. Held, convictions vacated & release ordered.

**RELATED CASES:** Roberts, App., 712 N.E.2d 23 (SL tolled when D did not keep in contact with authorities when he left state).

**TITLE:** Hobson v. State
**INDEX NO.:** L.7.b.
**CITE:** (3d Dist. 7/23/86), Ind. App., 495 N.E.2d 741
**SUBJECT:** Statute of limitations - when tolled
**HOLDING:** Period of limitations was tolled by filing of information. Here, D argues period was not tolled until his arrest, 11 days after filing of information. Under Ind. Code 35-41-4-2(e), prosecution is considered commenced on earliest of (1) date of filing indictment/information; (2) date of issuance of valid arrest warrant; (3) date of arrest. Ct. rejects D's reliance on Scott, App., 461 N.E.2d 141, finding 7-year delay between filing of information & D's arrest triggered Ct.'s speedy trial analysis. Nonetheless, Ct. finds it does not matter which date is used, as evidence is sufficient to establish prosecution was commenced within period of limitations. Held, conviction affirmed.

**RELATED CASES:** DeHart, App., 471 N.E.2d 312 (where there is continuing duty to do some act, statute of limitations does not apply where some portion of offense is within period of limitations).

**TITLE:** Lamb v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 9-2-98), Ind. App., 699 N.E.2d 708
**SUBJECT:** Statute of limitations - elevating charge by virtue of prior conviction
**HOLDING:** Because D was charged with class D felony dealing in marijuana, regardless of whether charge was elevated by virtue of prior conviction, five-year period of limitation provided by Ind. Code 35-41-4-2(a) applied. Thus, State's prosecution for class D felony was timely brought because it filed original & amended charging information well within five years. Statute provides that prosecution for offense is barred unless it is commenced within five years after commission of class B, C, or D felony, or within two years after commission of misdemeanor. Information charged D on one page with dealing in marijuana as class A misdemeanor, & on separate page with dealing in marijuana with prior conviction, as class D felony.

D argued that because information was filed after two-year misdemeanor limitations period but before expiration of five-year felony limitations period, State was barred from prosecuting him for misdemeanor dealing, & question of "prior conviction" never arose, making conviction of felony dealing unattainable. Ct. noted that although State was barred from convicting D of misdemeanor dealing, prosecution for class D felony dealing was not necessarily barred. Because D was put on notice within limitations period that State was charging him with felony dealing, period of limitation's goals of justice & fairness were met. In separating felony dealing count into two parts, State was not charging D with two offenses or even two counts, but was merely trying to follow law designed to protect D's right to have jury not hear of prior convictions before making decision regarding his guilt or innocence of dealing. In concluding that State may prosecute D for felony dealing, Ct. noted that if State proves all elements of felony dealing except prior conviction, D shall not be convicted of felony dealing or misdemeanor dealing. Held, denial of motion to dismiss affirmed.

**TITLE:** Lebo v. State
**INDEX NO.:** L.7.b.
**CITE:** (11/16/2012), 977 N.E. 2d 1031 (Ind. Ct. App 2012)
**SUBJECT:** Statute of limitations - concealment; continuing crime
**HOLDING:** Tr. Ct. did not abuse its discretion by denying D's Motion to Dismiss alleging that the State's charges are barred by the statute of limitations. The State must commence prosecution of a misdemeanor offense within two years after its commission. This statute of limitations is tolled if the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not ahve been discovered by that authority by exercise of due diligence. The circumstances of concealment must be charged and proven at trial. Here, on September 6, 2011, the State charged the D with two counts of failure to report child abuse or neglect, Class B misdemeanors. The State alleged that between August 1, 2007 and October 28, 2008, D had reason to believe that K.T., a minor child, was a victim of abuse or neglect and failed to report such and concealed her failure by instructing her players not to discuss team matters or rumors with anyone, and that the State did not have evidence to file charges until afer an investigative report in October 2010 and could not ahve discovered the evidence with due diligence. Because the charges make the proper specific allegation which are supported by the probable cause, the State can proceed with the charges, letting the jury to determine whether the statute of limitations was tolled. Moreover, even if the statute of limitations were not tolled, the crime of failing to report child abuse is a continuaing crime. An individual is not relieved of his or her duty to report unless a report has already been made to the best of the individual's belief. Thus, the filing of this charges is not barred by the statute of limitations. Held, judgment affirmed; Baker, J., concurring on the basis that the statute of limitation may be tolled but failure to report is not a continuing crime.

**RELATED CASES:** Gilliland, 979 N.E. 2d 1049 (Ind. Ct. App 2012) (By failing to make a report regarding child abuse during the time the Jr. Varsity volleyball coach worked at his school, D, the athletic director, concealed the fact that he had a duty to report the alleged misconduct between the coach and a player; thus, the statute of limitations was sufficiently tolled to bring the charges within the proper time period; Bailey, J., dissenting, in part, on the basis that concealment cannot arise from remaining silent about one's own crime and the concealment, here, did not occur until D's affirmative statement on November 21, 2008 to police that he had no knowledge of misconduct).

**TITLE:** Marshall v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 08-15-05), Ind. App., 832 N.E.2d 615
**SUBJECT:** Burglary conviction time barred; "discovery" not "establishment" of identity key
**HOLDING:** Tr. Ct. misapplied the statute of limitations when it allowed the State to convict D of Class B felony burglary. Ind. Code 35-41-4-2 states that a prosecution for a class B felony is barred unless brought within five years of the offense. Section (b) of the statute allows an exception if prosecution is commenced within a year after either the initial discovery of the offender with DNA evidence or when the offender's identity could have been discovered by the exercise of due diligence. Here, State had fingerprint evidence connecting D to the offense outside the statute of limitations' exception period but argued they were not able to "establish" D's identity until it obtained the final DNA test results due to technology advances. Ct. noted Ind. Code 35-41-4-2(b) does not use the word "establish" but rather "discovers" or "could have discovered." A separate exception under Ind. Code 35-41-4-2(h)(2) emphasizes this distinction & provides a mechanism for the State to toll time to establish a D committed an offense. The statute allows tolling if an accused person conceals evidence of an offense & evidence sufficient to charge him is unknown to the prosecution & undiscovered by due diligence. For Ind. Code 35-41-4-2(b) to be applicable in light of State's pre-DNA discovery of D's identity, the statute would need to omit the "discovery" trigger as in Ind. Code 35-41-4-2(h). Held, judgment reversed on this ground while affirmed on other grounds relating to other charges.

**TITLE:** Minton v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 1-29-04), Ind. App., 802 N.E.2d 929
**SUBJECT:** Statute of limitations - child molesting/sexual misconduct with minor
**HOLDING:** D challenged his convictions for multiple counts of child molesting & sexual misconduct with a minor as being in violation of ex post facto, the Privileges & Immunities Clause of the Indiana Constitution & double jeopardy. Child molesting statute, Ind. Code 35-41-4-2, was amended in 1993 to extend the statute of limitations for child molesting from five years to until the alleged victim turned 31 years old. The public law creating the amendment contained a non-code provision restricting its application to crimes committed after June 30, 1988. Some of D's convictions related to behavior in 1992 prior to the amendment. Case *cited* by D, Stogner v. California, 123 S.Ct. 2446, 2449 (2003), supported with approval decisions where Cts. upheld extensions of unexpired statute of limitations. Ct. also relied on Indiana precedent establishing that a period of limitation is granted in the grace of the sovereign & may be modified as long as the accused is not entitled to acquittal before the subsequent law is enacted. Streepy v. State, 202 Ind. 685, 177 N.E. 897 (1931).

Ct. rejected D's claim that Privileges & Immunities Clause in Art. I, § 23 of Indiana Constitution was violated, & its principle that all criminal Ds be treated fairly & equally. Using two-part test in Collins v. Day, 644 N.E.2d 72 (Ind. 1994), Ct. found that the legislation was reasonably related to inherent characteristics distinguishing the unequally treated classes & the statute uniformly applies to all similarly situated persons. D did not show the reason given by the State for the discrepancy -- the longer limitation allows a child to recover repressed memories -- to be an arbitrary or manifestly unreasonable legislative classification. Held, judgment affirmed.

**TITLE:** Pavan v. State
**INDEX NO.:** L.7.b.
**CITE:** (11/17/2016), 64 N.E.3d 231 (Ind. Ct. App 2016)
**SUBJECT:** Statute of limitations' tolling provision not intended to decriminalize consensual incestuous sex for family members over age 31
**HOLDING:** Trial counsel was not ineffective for failing to pursue a statute-of-limitations defense to an incest charge involving D's 34-year-old biological aunt. Charges were filed within the general five-year statute of limitations applicable to class C felonies, but Ind. Code § 35-41-4-2(e) provides that prosecution for incest is barred "unless commenced before the date the alleged victim reaches thirty-one years of age."

The purpose of Ind. Code § 35-41-4-2(e) is to extend the statute of limitations to allow victims of certain sex crimes to report their abuse upon reaching adulthood, not to shorten the applicable statute for any crime or wholly decriminalize an otherwise illegal sex act based on the age of the other party. The statute criminalizing incest, Ind. Code § 35-46-1-3, does not support D's assertion that it is not illegal to engage in consensual incestuous sex when the other person involved is over age thirty-one. Court rejected D's "absurd and illogical" interpretation of the statutes, concluding trial counsel cannot be deemed ineffective for failing to pursue a meritless defense. Held, denial of petition for post-conviction relief affirmed.

**TITLE:** Quinn v. State
**INDEX NO.:** L.7.b.
**CITE:** (10/8/2015), 45 N.E.3d 39 (Ind. Ct. App. 2015)
**SUBJECT:** No statute of limitations violation
**HOLDING:** In an issue of first impression, D was not entitled to dismissal on statute-of-limitations grounds, even though he was charged 25 years after he committed his offenses, because the State acted with due diligence in discovering DNA evidence that tied him to the crimes. See Ind. Code § 35-41-4-2(b).

In 1988, E.F., who was ten, was raped while confined in a car. Because her face was covered during the attack, she could not identify her assailant. Lab technicians found sperm on some of her clothes, but then-available testing could not link it to a specific person. The case was closed. At the time, the lab had no formal retention policy, but an analyst could retain and store items if he or she desired. In 2000, the prosecutor destroyed the evidence he possessed while the original lab analyst stored the items in her possession, E.F.'s clothes. In September of 2011, E.F. contacted a former investigator about the case. He reached out to lab personnel, who found the clothes. In June of 2012, the lab tested the clothes and matched D's DNA profile on CODIS. A subsequent buccal swab confirmed D was the source of the sperm. In March of 2013, the State charged D with child molesting and criminal confinement, both B felonies, which he moved to dismiss.

At the time D was charged, Ind. Code § 35-41-4-2(b)(2) (2009) provided, in relevant part that a "prosecution for a Class B . . . 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 . . . could have discovered evidence sufficient to charge the offender with the offense through DNA . . . analysis by the exercise of due diligence." (Emphasis added).

The State met the due diligence requirement. The lab lacks the resources to test every stored item to create a DNA profile. Thus, it is reasonable for the lab to test, as here, only upon a request from law enforcement. Likewise, the sheriff lacks resources to leave every case open for periodic investigation. Thus, it is reasonable for the sheriff to close cases once all avenues have been exhausted and to reopen them, as here, only upon receiving new information. Further, D agrees that once the lab determined that the clothes still existed, it acted diligently to test the clothes and connect them to D. Held, judgment affirmed.

**TITLE:** Sloan v. State
**INDEX NO.:** L.7.b.
**CITE:** (06-01-11), 947 N.E.2d 917 (Ind. 2011)
**SUBJECT:** Statute of limitations - end of tolling after D's acts of concealment
**HOLDING:** Period in which prosecution must be commenced does not include any period in which D conceals evidence of offense, and evidence sufficient to charge him with that offense is unknown to prosecuting authority and could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2(h)(2). Here, D regularly molested his step-niece between the ages of six to thirteen. D told complaining witness (CW) after every occurrence that if she told anyone she would go to jail. CW revealed the molestations at the age of thirty and D moved to dismiss the Class C felony charge on grounds it was filed well after the applicable five-year statute of limitations. Court disagreed with Court of Appeals' conclusion that concealment by means of threats not to tell ended when the molestations ceased. The relevant inquiry is when the prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the D. See Crider v. State, 531 N.E.2d 1151 (Ind. 1988). This is when tolling ends and the limitations period begins to run. Until the Legislature speaks on the issue, public policy and a strict reading of the statute favor the prosecution of alleged crimes over the protection of Ds who have intimidated victims or otherwise concealed evidence. Held, transfer granted, Court of Appeals' opinion at 926 N.E.2d 1095 vacated, denial of motion to dismiss affirmed. Sullivan and Rucker, JJ., dissenting, do not agree that statute begins to run when D ceases threats, but thinks tolling period should cease when victim no longer reasonably fears material retaliation for reporting crimes.

**TITLE:** Smith v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 4-22-97), Ind. App., 678 N.E.2d 1152
**SUBJECT:** Conviction for offense time barred - fundamental error
**HOLDING:** Where charging information charges offense within limitation period but proof clearly establishes that offense was not committed within proper period of limitations, D is entitled to be discharged on that count & failure to do so constitutes fundamental error. It is part of State's burden to establish that offense was committed within period of limitations. Fisher v. State, 259 Ind. 633, 291 N.E.2d 76 (1973); Atkins v. State, 437 N.E.2d 114 (Ind. Ct. App 1982). Here, conviction for sexual battery could not stand because State failed to bring charge within five-year period of limitations provided in Ind. Code 35-41-4-2(a)(1). Held, convictions affirmed in part, reversed in part, & remanded.

**RELATED CASES:** Jewell, App., 877 N.E.2d 864 (Even though D did not raise a statute of limitations defense at trial, State was barred from prosecuting him for sexual misconduct with a minor as a Class D felony, because State filed information for this count after expiration of the five-year limitations period).

**TITLE:** State v. Chrzan
**INDEX NO.:** L.7.b.
**CITE:** (4th Dist., 4-14-98), Ind. App., 693 N.E.2d 566
**SUBJECT:** Statute of limitations - concealment
**HOLDING:** Period in which prosecution must be commenced does not include any period in which accused conceals evidence of offense, & evidence sufficient to charge him with that offense is unknown to prosecuting authority & could not have been discovered by that authority by exercise of due diligence. Ind. Code 35-41-4-2. Accused must positively act to conceal fact that crime has been committed & not just accused's own guilt. Here, during last two years as grain elevator manager & until D resigned on January 13, 1994, he allegedly misappropriated funds. On January 18, 1994, D wrote two checks to replacement manager claiming they were payment for beans that he bought. Prosecutor did not file charges until January 16, 1996, which was two years & three days after alleged misappropriation. Although statute of limitations for misappropriation is two years, D's manipulation of financial records during two years prior to his resignation as manager & writing of two checks on January 18, 1994, were positive acts on part of D to conceal fact that crime had been committed. Thus, Tr. Ct. erroneously granted D's motion to dismiss. Held, judgment reversed & remanded for further proceedings.

**RELATED CASES:** Sipe, App., 797 N.E.2d 336 (D's statute of limitations challenge to his child molesting convictions failed, because D successfully concealed his crimes by intimidating the victim & time did not begin to run until victim notified authorities of abuse); Kifer, App., 740 N.E.2d 586 ( D's alteration & disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt); Crider, 531 N.E.2d 1151 (statute did not run until victim made disclosure to authorities; D had successfully concealed fact of his crimes by positive acts of intimidation of victims).

**TITLE**: State v. Lindsay
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist., 03-09-07), Ind. App., 862 N.E.2d 314
**SUBJECT:** Corrupt business influence charge barred by statute of limitations
**HOLDING:** Tr. Ct. properly dismissed charge of corrupt business influence (RICO) against D. State argued that given the ongoing nature of a RICO offense, the class C felony RICO charge was filed within the applicable five-year statute of limitation. "Racketeering activity" means to commit any of the crimes listed in Ind. Code 35-45-6-1, including official misconduct, perjury, obstruction of justice, or intimidation. State recharacterized D's 2003 & 2004 false informing offenses as "official misconduct" in order to bring the offenses within the purview of the predicate offenses required to establish a continuation of the pattern of racketeering activity. However, conduct giving rise to false informing charges, i.e., D's alleged false statements in 2003-2004 concerning 1988 murders, were not related to D's performance of his official duties as a federal police officer working in Florida, which is required to constitute offense of official misconduct. There was no other conduct which would support a charge of official misconduct or any of the other offenses which could be deemed to be a continuation of a pattern of racketeering activity.

Simple fact that D moved to Florida in 1996 is not indicative of an intent to avoid service of process & did not constitute an act of concealment so as to toll the statute of limitations. Heitman v. State, 627 N.E.2d 1307 (Ind. Ct. App 2007). Even assuming allegations of D's repeated threats & acts of intimidation directed toward witnesses are true, the statute of limitation would have ceased to be tolled, at the latest, after he moved to Florida in 1996 & no longer had contact with those witnesses. Thus, five-year statute of limitation was not tolled by acts of concealment. Held, judgment affirmed.

**RELATED CASES:** Barnett, 176 N.E.3d 542 (Ind. Ct. App. 2021) (Tr.Ct. did not err in finding that some of the neglect charges should be dismissed because they were filed outside the limits of the statute of limitations and Ds did not commit any act to conceal the alleged crime).

**TITLE:** State v. Sturman
**INDEX NO.:** L.7.b.
**CITE:** (7/14/2016), 56 N.E.3d 1187 (Ind. Ct. App 2015)
**SUBJECT:** Reckless homicide SOL runs on date of death, not date of act
**HOLDING:** In an issue of first impression, the Tr. Ct. abused its discretion in dismissing D's reckless homicide charge on statute-of-limitation grounds because it erroneously determined the statute began to run on the date D committed the act that led to the person's death, not the date the person died.

D prescribed massive amounts of pain killers to D.E.H., who died from "pharmacologic intoxication." D wrote the final prescription on July 29, 2010; D.E.H. died on August 6, 2010. The State charged D with reckless homicide on August 5, 2015. Finding that the five-year statute of limitations began to run the date D wrote the final prescription – July 29, 2010 – the Tr. Ct. found that the August 5, 2015 charge did not fall within the limitations period and thus dismissed the charge.

A statute of limitation begins to run only when the crime is complete, and in the case of reckless homicide, the crime is not complete until the victim dies. See Illinois v. Mudd, 507 N.E.2d 869, 871 (Ill.Ct. App. 1987) (reckless homicide case). Thus, the State could not charge D with reckless homicide until the date D.E.H died, August 6, 2010. Cf. Alderson v. State, 145 N.E. 572, 573 (1924) ("A homicide consists of not only striking the fatal blow . . . but is not complete until the victim has [actually] died"). Therefore, the August 5, 2015, filing of the reckless homicide charge fell within the five-year limitations period. Held, dismissal of count reversed.

**TITLE:** Study v. State
**INDEX NO.:** L.7.b.
**CITE:** (2/4/2015), 24 N.E.3d 947 (Ind. 2015)
**SUBJECT:** Statute of Limitations – tolling requires positive act of concealment
**HOLDING:** Tr. Ct. erred by denying D's motion to dismiss the March 2006 robbery count because the charge was filed outside of the five-year statute of limitations. A prosecution for a Class B felony is barred unless it is commenced within five years after the commission of the offense. However, the period within which a prosecution must be commenced does not include any period in which the accused person conceals evidence of the offense and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence. Ind. Code 35-41-4-2(h)(2). Despite an amendment to the concealment-tolling provision, Court will continue to follow the long line of cases limiting the concealment-tolling provision to only positive acts that conceal that an offense has been committed and not just concealment of any evidence of guilt.

Here, D was charged with multiple bank robberies, including one that occurred outside of the five-year statute of limitations. The State alleged that he concealed his crime by wearing a mask, hiding the getaway car, clothes worn during the crime, items taken from a victim, the weapon used, and evidence linking the robbery to other robberies. But none of these actions served to prevent law enforcement from discovering that a bank had been robbed, and in fact, law enforcement immediately knew of the robbery and began investigating. As such, D's actions did not toll the statute of limitations and his robbery charge should have been dismissed. Held, transfer granted, judgment reversed, in part, and remanded for Tr. Ct. to vacate the conviction and sentence for Count XI and dismiss the charge, and Court of Appeals' memorandum opinion summarily affirmed on all issues except for the issue regarding the interpretation and application of the concealment-tolling provision.

**RELATED CASES:** Amos, 83 N.E.3d 1221 (Ind. Ct. App 2017) (distinguishing Dvorak (above), Court held that D's regular communications with his investors constituted an attempt to delay or prevent discovery of his commission of the alleged crimes of securities fraud and offer or sale of unregistered security, and thus constituted positive acts of concealment for purposes of tolling the statute of limitations), Dvorak, 78 N.E.3d 25 (Ind. Ct. App 2017) (Tr. Ct. erred by denying D's motion to dismiss counts of offer or sale of an unregistered security and acting as an unregistered agent because the charges were filed outside the 5-year statute of limitations; D did not engage in any positive act calculated to conceal the fact that he was not registered and the security was not registered with the Secretary of State).

**TITLE:** Swopshire v. State
**INDEX NO.:** L.7.b.
**CITE:** (9/27/2021), Ind. Ct. App., 177 N.E.3d 98
**SUBJECT:** Statute of limitations - sexual misconduct with a minor
**HOLDING:** Applying procedural amendment that enlarges the limitations period does not violate Ex Post Facto Clause so long as the statute is passed before the given prosecution is barred. Minton v. State, 802 N.E.2d 929, 933-35 (Ind. Ct. App. 2004). Here, the earliest date alleged in State's sexual misconduct with minor charges against Defendant is March 6, 2009. The five-year limitations period for offenses on that date would have expired in March of 2014. However, effective July 1, 2013, prior to the expiration of the State's ability to charge any of the offenses as alleged here, the Legislature expanded the limitations period to ten years. Accordingly, applying the 2013 amendment to the State's charges as alleged does not violate the federal or state Ex Post Facto clauses, and the State had until March of 2019 under the 2013 amendment to file its charges. But Court agreed with Defendant that even under the ten-year limitations period of the 2013 amendment, some of the dates alleged in four out of five counts had expired prior to the effective date of the 2019 amendment (7/1/19), which extended the limitations period until the date that the alleged victim of the offense reaches age 31. Once the statute of limitations for a crime has expired, the crime cannot be revived by an amendment to the statute of limitations. Stogner v. California, 539 U.S. 607 (2003). Court also rejected Defendant's claim under Privileges and Immunities Clause Article 1, Section 23 of Indiana Constitution, holding that a person who is alleged to have committed an offense on a date that requires the application of one statute of limitations is not similarly situated to a person who is alleged to have committed the same offense but on a different date under a different statute of limitations. Held, remanded with instructions to limit the State's alleged time frames in Counts 1, 2, 3, and 5 to offenses occurring on or after July 1, 2009.

**TITLE:** Umfleet v. State
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist. 7/11/90), Ind. App., 556 N.E.2d 339
**SUBJECT:** Statute of limitations - concealment
**HOLDING:** Tr. Ct. erred in denying D's motion to dismiss where prosecution was not commenced within 5-year statute of limitations. Statute of limitations provides that limitations period does not include any period in which accused person conceals evidence of offense & evidence sufficient to convict him/her is not known to prosecutor & could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2. Exception must be construed narrowly & in favor of accused. Holmes, App., 393 N.E.2d 242. Concealment must result from D's positive acts. Id. In denying D's motion to dismiss, Tr. Ct. referred to fact that victim did not recognize that acts were wrong, & that when she did, she was afraid that D would get in trouble & lose his job. However, there was no indication that D had told her that his conduct was not wrong or that she should not tell anyone about it. Tr. Ct. also mentioned D's continual denial that any molestation took place, but D's denial of involvement in any abuse was not positive act to conceal fact that offense had been committed. Record does not reveal any conduct on D's part that could be considered positive act to conceal fact that crime was committed. Held, denial of motion to dismiss reversed. **Note:** In 1 count, D was charged with act of fondling within 18-month period that fell only partly inside limitations period. Ct. App. found that, because state failed to prove that alleged act took place within limitations period, charge should have been dismissed.

**RELATED CASES:** Sloan, 947 N.E.2d 917 (Ind. 2011) (to extent Umfleet may be interpreted as contrary to Ct's holding, it is expressly disapproved); Kifer, App., 740 N.E.2d 586 ( D's alteration & disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt); Crider, 531 N.E.2d 1151 (statute did not run until victim made disclosure to authorities; D had successfully concealed fact of his crimes by positive acts of intimidation of victims).

**TITLE:** Wallace v. State
**INDEX NO.:** L.7.b.
**CITE:** (8-16-01), Ind., 753 N.E.2d 568
**SUBJECT:** Statute of limitations - child molesting
**HOLDING:** Child molesting convictions first charged in 1998 for alleged acts done in 1988-89 were barred by five-year statute of limitations that was in effect in 1998. Ind. Code 35-41-4-2(a)(1) (1998). Here, between date of alleged offenses & time D was charged, the statute of limitations was amended to allow prosecution for certain classes of child molesting to be commenced at any time before alleged victim reaches 31 years of age. Ind. Code 35-41-4-2-(c)(1). The applicable statute of limitations is that which was in effect at the time the prosecution was initiated. Patterson v. State, 532 N.E.2d 604 (Ind. 1988). Further, D was convicted of child molesting under Ind. Code 35-42-4-3(c) (sexual conduct with child between ages of twelve & fifteen) which was subject to the then- existing five-year statute of limitations, which was obviously not met in this case. Held, transfer granted, convictions reversed; Boehm, & Dickson, JJ., dissenting, argued that while the five-year statute of limitations was applicable, D waived issue by not raising it with Tr. Ct.).

**TITLE:** Willner v. State
**INDEX NO.:** L.7.b.
**CITE:** (11-10-92), Ind., 602 N.E.2d 507
**SUBJECT:** Statute limitations pleading in Information - Bribery
**HOLDING:** Information adequately advised D that State intended to rely on his status as office holder to extend statute of limitations, reversing Ct. App. decision at 588 N.E.2d 581. Act relied on for charged bribery occurred in May 1982. Amended Information was not filed until 1990 & did not mention anything about statute of limitations. Ind. Code 35-41-4-2 provided that statute of limitations was five years, but subsection (d)(3) provided for tolling of limitations period, for any period that D was elected or appointed to office. Generally, State is required to allege facts sufficient to bring charges within statute of limitations, & although Information did allege D was officeholder when crime was committed, it did not allege how long thereafter he remained in office. Although Ct. App. held that omission was fatal to State's charge, Ind. S.Ct. disagreed, noting that record was clear that D remained in office until sentenced on instant offense. Ct. found that this was matter of public record of which Tr. Ct. could take judicial notice, & that D was certainly aware of it. D was not misled about facts State intended to prove at trial & was not prejudiced by failure to allege that he remained in office. Held, transfer granted, Ct. App. opinion vacated, & remanded for consideration of other issues raised on appeal, Debruler, J., dissenting.

**RELATED CASES:** Reeves, 938 N.E. 2d 10 (Ind. Ct. App. 2010) (where State failed to allege in the charging information facts that supported the concealment of evidence exception to the statute, the Tr. Ct. abused its discretion by denying D's motion to dismiss).

# L. DEFENSES

## L.7. Legal bars to prosecution (see, also B.10)

### L.7.a. Collateral estoppel/res judicata

**TITLE:** Becker v. State
**INDEX NO.:** L.7.a.
**CITE:** (8/22/2013), 992 N.E.2d 697 (Ind. 2013)
**SUBJECT:** Res judicata barred State's attempt to increase D's Sex Offender Registration requirements
**HOLDING:** Indiana Supreme Court reversed 2011 granting of State's motion to correct error. The State, through the DOC, intervened to challenge an earlier 2011 agreed order by which State acknowledged D had satisfied his sex offender registration (SOR) duties. DOC intervened because just two weeks after the agreed order, Lemmon v. Harris, 949 N.E.2d 803 (2011), ruled that the heightened registration requirements for sexually violent predators did not violate prohibition on ex post facto laws. Thus, Tr. Ct. ruled that requiring D to abide by heightened registration requirements did not violate ex post facto prohibition.

However, the effect of this ruling was to vacate Tr. Ct.'s 2008 ruling that the heightened registration requirements were, in fact, ex post facto as to D. The prosecutor did not appeal this 2008 ruling.

Court acknowledged that in light of Lemmon, Tr. Ct.'s 2008 ruling was erroneous. However, because the prosecutor and the DOC were in privity with respect to D's SOR obligations, principles of res judicata barred DOC from relitigating D's registration duties. Thus, DOC was bound by the 2008 order. Held, judgment reversed.

**TITLE:** Bobby v. Bies

**INDEX NO.:** L.7.a.

**CITE:** (06-01-09), U.S., 08-598, 129 S.Ct. 2145

**SUBJECT:** Double jeopardy - preclusion doctrine; State can relitigate mental retardation of condemned inmate

**HOLDING:** A state prisoner who was sentenced to death before Atkins v. Virginia, 536 U.S. 304 (2002), outlawed the death penalty for mentally retarded Ds, and whom the state courts acknowledged suffered from a level of mental retardation that had some weight as a mitigating factor, may now be subjected to an Atkins proceeding to determine whether the extent of his mental impairment allows his execution. The State court's determination that D's mental retardation was a mitigating factor does not trigger Double Jeopardy Clause's doctrine of issue preclusion because only prevailing parties may avail themselves of that doctrine and the prisoner was condemned to death the first time around. State did not vigorously contest D's evidence of mental retardation offered in mitigation at sentencing, but now has a chance to go back and relitigate the matter now that proof of mental retardation precludes imposition of the death penalty. Double Jeopardy preclusion doctrine "does not bar a full airing of the issue whether Bies qualifies as mentally retarded under *Atkins*." Court noted that in Atkins, it left it up to the states to devise their own frameworks for determining whether mental retardation renders a particular D ineligible for execution. Held, Sixth Circuit Court of Appeals' opinion at 519 F.3d 324 reversed and remanded.

**TITLE:** Bravo-Fernandez, et al. v. United States
**INDEX NO.:** L.7.a.
**CITE:** (11/29/2016), 137 S. Ct. 352 (U.S. 2016)
**SUBJECT:** Inconsistent verdicts do not collaterally estop retrial of vacated conviction
**HOLDING:** The collateral estoppel/issue preclusion part of the Double Jeopardy Clause does not bar retrial of a vacated bribery conviction where the same jury acquitted D of conspiracy to commit bribery. The burden lies on a defendant to show that the issue he seeks to shield from reconsideration by retrial was actually decided by a prior jury's verdict of acquittal. Schiro v. Farley, 510 U.S. 222, 233 (1994). When the same jury returns irreconcilably inconsistent verdicts on the issue in question, a defendant cannot meet that burden. Thus, the acquittal on the conspiracy charge creates no preclusive effect on the count for which D was convicted. United States v. Powell, 469 U.S. 57, 68-69 (1984). Held, cert. granted, First Circuit opinion at 790 F.3d 41 affirmed, and judgment affirmed.
Ginsburg, J., for the unanimous Court; Thomas, J., concurring.

**TITLE:** Buggs v. State
**INDEX NO:** L.7.a.
**CITE:** (2nd Dist., 03-23-06), Ind. App., 844 N.E.2d 195
**SUBJECT:** Collateral estoppel - retrial for murder/attempted robbery after acquittal of felony murder
**HOLDING:** Double jeopardy did not prohibit D's retrial for murder and attempted robbery after his acquittal in first trial of felony murder and conspiracy to commit robbery. Griffin v. State, 717 N.E.2d 73 (Ind. 1999). In first trial, jury hung on murder and attempted robbery charges. A D who is retried following a hung jury is not placed in jeopardy twice for the same offense because the initial jeopardy that attaches to a charge is simply suspended by the jury's failure to reach a verdict. Davenport v. State, 734 N.E.2d 622 (Ind. Ct. App 2002). Furthermore, the doctrine of implied acquittal does not apply to the attempted robbery charge because D was acquitted of felony murder, the greater offense. As to D's claim that retrial on murder and attempted robbery charges violates actual evidence test articulated in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), Court declined to extend Richardson actual evidence test to this situation and instead applied doctrine of collateral estoppel.

Collateral estoppel forbids government from relitigating certain facts in order to establish the fact of the crime. Segovia v. State, 666 N.E.2d 105 (Ind. Ct. App 1996). Here, analyzing this particular combination of acquittal and deadlocks, Court concluded that jury in first trial could have only decided that D did not kill victim while committing or attempting to commit robbery. Although collateral estoppel did not bar relitigation of issue of whether D killed victim, and did not prevent State from retrying D for an attempted robbery that occurred after victim's death, Court held that D cannot be convicted of attempted robbery for attempting to rob victim after killing him. Distinguishing Robinson v. State, 693 N.E.2d 548 (Ind. 1998), Court noted it is simply not possible for a D to commit all the elements of attempted robbery on a person who is already dead. Robinson held that the taking could occur after victim's death if force occurred while victim was alive and did not hold that entire robbery could be committed after victim was dead. Held, judgment affirmed in part, attempted robbery conviction reversed. But see Garrett v. State, 992 N.E.2d 710 (Ind. 2013) (actual evidence test applies to cases where jury acquits a D of one charge but cannot reach a verdict on a second charge, and where D is subsequently convicted of second charge on retrial; doctrine of collateral estoppel does not sufficiently protect D against potential double jeopardy violation).

**RELATED CASES:** Cleary, 23 N.E.3d 664 (Ind. 2015) (despite Garrett (above), Ct. rejected D's argument that Indiana's double jeopardy clause barred retrial after Tr. Ct. refused to enter judgment of conviction on previous jury verdict on lesser included misdemeanor offenses; second trial on greater offenses that deadlocked the first jury was "simply a continuation of the jeopardy"); Berkman, 976 N.E.2d 68 (Ind. Ct. App 2012) (refusing to apply Richardson to successive prosecutions); Coleman, 946 N.E.2d 1160 (Ind. Ct. App 2011) (double jeopardy does not preclude the State from retrying D where in the first trial the jury acquitted D of murder with respect to one victim but failed to return a verdict on a charge of attempted murder with respect to another victim; whether D acted in self-defense when he shot the first man was not necessarily decided in the first trial by the jury's acquittal as to the death of the second man)

**TITLE:** Commonwealth v. States
**INDEX NO.:** L.7.a.
**CITE:** 595 Pa. 453 (Pa. 2007)
**SUBJECT:** Collateral estoppel; double jeopardy - judge's factual ruling precluded retrial
**HOLDING:** Pennsylvania Supreme Court held a trial judge's declaration of a mistrial on some charges after the jury hung, coupled with the judge's simultaneous acquittal of D on a related charge on a factual ground on which the remaining counts hinged, erected a double jeopardy bar to a retrial on the unresolved charges. Court explained that a retrial would require relitigation of an issue that was resolved by the acquittal in the joint jury/bench trial. D obtained severance of a charge of causing a fatal accident while not properly licensed, arguing that the jury would be prejudiced by the fact that he lacked a valid driver's license. That charge was tried to the bench, whereas charges of vehicular homicide while driving under the influence of alcohol and other charges were simultaneously tried to a jury. After the jury reported being deadlocked, Tr. Ct. declared a mistrial on charges before them, but acquitted D on the charge before it, saying that it was not convinced beyond a reasonable doubt that D was driving the vehicle. Court held that in light of the Tr. Ct.'s definitive finding that the State failed to prove that D was the driver of the car, the Fifth Amendment barred the State from attempting to convince a second jury otherwise in a retrial on the remaining charges. Further, the fact that a retrial would require the State to present evidence on who was driving the vehicle and urge a second jury to reach a result contrary to the result previously reached by another fact finder made the case a classic collateral estoppel situation.

**TITLE:** Davis v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist., 2-25-98), Ind. App., 691 N.E.2d 1285
**SUBJECT:** Collateral estoppel - requires valid & final judgment
**HOLDING:** D's prior acquittal of murder of first victim did not preclude retrial & conviction of murder of second victim even though both murders may have been part of same criminal episode. Collateral estoppel means simply that when issue of ultimate fact has once been determined by valid & final judgment, that issue cannot again be litigated between same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436 (1970). Here, at first trial, jury found that D acted in self-defense when he shot first victim but could not come to determination concerning shooting of second victim. At second trial, jury was again asked to determine whether D acted in self-defense when he shot second victim. Because question asked at second trial was same question which resulted in hung jury in first trial & different question than one which resulted in acquittal in first trial, question had not been determined by valid & final judgment. Thus, collateral estoppel did not preclude retrial of second count of murder. Held, conviction affirmed.

**TITLE**: Edwards v. State
**INDEX NO.:** L.7.a.
**CITE:** (2nd Dist.; 03-20-07), Ind. App., 862 N.E.2d 1254
**SUBJECT:** Collateral estoppel- appellate court bound by earlier decision involving same parties
**HOLDING:** The Ct. App. is bound by its earlier decision that a taped conversation between the murder victim & a police officer was inadmissible. In determining whether to allow the use of collateral estoppel, the Tr. Ct. must engage in a two-part analysis: (1) whether the party in the prior action had a full & fair opportunity to litigate the issue, & (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case. Here, as D was in jail awaiting trial on a murder & an attempted murder charge, he conspired with another to kill the three witnesses to the murder & attempted murder. Two of the three witnesses were actually killed. D was convicted of the murder & attempted murder which was appealed. In an unpublished opinion, the Ct. App. held that it was error to admit a conversation between one of the subsequent murder victims & an officer. Both D & State were parties to the prior appeal & fully & fairly litigated the issue of whether D forfeited his confrontation rights by murdering the witness. It would not be unfair to apply collateral estoppel to the facts of this case- the law has not changed regarding forfeiture by wrongdoing as applied in the unpublished opinion guaranteeing the same result were Court to revisit the issue here. However, error in admitting hearsay was harmless. Held, judgment affirmed.

**TITLE:** Jennings v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist.; 7-28-99), Ind. App., 714 N.E.2d 730
**SUBJECT:** Collateral estoppel - applicable in motion to suppress
**HOLDING:** Tr. Ct. erred in denying D's motion to suppress evidence based on collateral estoppel. Collateral estoppel operates to bar relitigation of issue or fact where issue or fact was adjudicated in former suit & same issue or fact is presented in subsequent suit. Although Ind. no longer requires that person taking advantage of prior adjudication would have also been bound had prior judgment been decided differently, principal consideration with defensive use of collateral estoppel is whether party against whom prior judgment is pled had full & fair opportunity to litigate issue & whether it would otherwise be unfair under circumstances to permit use of collateral estoppel. Wilcox, App., 664 N.E.2d 379. In determining whether collateral estoppel applies in particular case, Ct. must first determine what issue or fact was decided by first judgment, & second, must examine how that determination bears on subsequent action. Smith, App., 670 N.E.2d 360.

Here, D & passenger 1 were charged with drug offenses based on drugs found during same searches of D's car. In Superior Ct., passenger 1 filed motion to suppress alleging that searches of D's car were improper because they were based upon evidence seized as result of improper search of passenger 2's purse. Superior Ct. granted motion to suppress & dismissed case. In Circuit Ct., D filed motion to suppress alleging collateral estoppel precluded use of evidence obtained as fruit of search of passenger 2's purse which was already determined to be illegal by Superior Ct. Although D was owner & driver of car & person passenger 2 implicated in owning drugs found in her purse, critical issue, search of passenger 2's purse, & events leading to search of passenger 2's purse were same in both D's & passenger 1's cases. In addition, because motion to suppress resulted in dismissal of case, Superior Ct.'s granting of motion was final judgment. Thus, State was collaterally estopped from arguing legality of searches of D's vehicle because issue had already been litigated in Superior Ct. Held, judgment reversed.

**RELATED CASES:** Perez-Grahovac, App., 894 N.E.2d 578 (where D failed to introduce hearing on co-D's motion to suppress in another court who granted the motion without findings of facts or conclusions of law, the D failed to prove that the Tr. Ct. was collaterally estopped from denying his motion to suppress); Martin, App., 740 N.E.2d 137 (following Reid & holding that simply because one court held that co-D's sentence violated double jeopardy did not require D's court to hold same); Reid, App., 719 N.E.2d 451 (disagreeing with Jennings & holding that there is no nonmutual collateral estoppel in criminal cases; State could argue different theory in each co-D's trial).

**TITLE:** Schiro v. Farley
**INDEX NO.:** L.7.a.
**CITE:** 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994)
**SUBJECT:** Capital Sentencing - Double Jeopardy (DJ); Collateral Estoppel (CE)
**HOLDING:** Subjecting D to capital sentencing proceeding in which alleged aggravator was intentional killing in course of rape, where jury had returned guilty verdict on felony murder & no verdict on "knowing" killing, did not violate DJ or CE principles. DJ prohibits multiple punishments or successive prosecutions. In Bullington v. MO, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), U.S.S.Ct. held that capital sentencing proceeding was sufficiently like trial so that successive proceedings were prohibited. Initial capital sentencing proceeding is not successive prosecution, however. For CE to bar sentencing proceedings, D must prove that jury verdict rested on determination that he did not have intent to kill. In light of D's confession to killing, instruction that jury must find intent to kill to convict D of murder, & uncertainty as to whether jury believed it could return more than one verdict, S.Ct. finds that D has not met that burden. Held, affirmed. Blackmun & Stevens, JJ., DISSENT.

**TITLE:** Segovia v. State
**INDEX NO.:** L.7.a.
**CITE:** (3rd Dist., 5-31-96), Ind. App., 666 N.E.2d 105
**SUBJECT:** Collateral estoppel - conspiracy to commit arson after acquittal of felony murder
**HOLDING:** Prosecution for conspiracy to commit arson was barred by D's acquittal of felony murder in prior proceeding. Even though two offenses are not same for double jeopardy purposes, State was collaterally estopped in second trial from attempting to prove that D was involved in arson. Collateral estoppel forbids government from relitigating certain facts in order to establish fact of crime. Little v. State, 501 N.E.2d 412 (Ind. 1986). Here, to acquit D of felony murder in first trial, jury necessarily had to determine that D did not set or assist another in setting fire. In order to prove conspiracy charge, State had to prove overt act of arson. Because fact that D was not involved in arson was necessarily decided in first trial, State was stopped from attempting to prove he was involved in arson in second trial. Held, conviction reversed.

**RELATED CASES:** McWhorter, 993 N.E.2d 1141(Ind. 2013) (after grant of post-conviction relief on voluntary manslaughter conviction due to flawed jury instruction, on remand there is no prohibition for retrial on either voluntary manslaughter or reckless homicide); Griffin,717 N.E.2d 73 (collateral estoppel did not bar retrial on robbery charge because acquittal on felony murder charge could have been based on issue other than jury finding D did not commit robbery) Smith, App., 670 N.E.2d 360 (although D was previously acquitted in one county on charges arising from same drug sting operation, collateral estoppel did not bar prosecution in second county; evidence did not demonstrate that D was entrapped during entire series of drug transactions).

**TITLE:** Shumate v. State
**INDEX NO.:** L.7.a.
**CITE:** (5th Dist.; 10-27-99), Ind. App., 718 N.E.2d 1133
**SUBJECT:** Probation revocation - barred by res judicata
**HOLDING:** Res judicata, but not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence. Second probation revocation hearing, based on same alleged violation that resulted in revocation of probation that was later set aside, does not violate prohibition against double jeopardy. Childers, App., 656 N.E.2d 514. However, res judicata bars relitigation of claim after final judgment has been rendered, when subsequent action involves same claim between same parties. In order to prove relitigation is barred by res judicata, four elements must be satisfied: (1) former judgment must have been rendered by Ct. of competent jurisdiction; (2) former judgment must have been rendered on merits; (3) matter now in issue was or could have been determined in prior action; & (4) controversy adjudicated in former action must have been between same parties to present suit or their privies. Here, appellate Ct. decision reversing probation revocation due to insufficient evidence was judgment on merits for purposes of res judicata. Thus, any further proceedings relating to revocation of D's probation, based on same violation of probation at issue in first revocation proceeding, were barred by res judicata. Held, judgment reversed.

**RELATED CASES:** Dexter, 991 N.E.2d 171 (Ind. Ct. App 2013) (even if four-pronged test from Shumate applies, Indiana Supreme Court's decision reversing D's habitual-offender enhancement was not a final judgment on the merits, thus State was not barred from retrying him under doctrine of res judicata).

**TITLE:** State v. Canon
**INDEX NO.:** L.7.a.
**CITE:** 602 N.W.2d 316 (Wis.Ct. App. 1999)
**SUBJECT:** Collateral Estoppel -- Issue Resolved by Acquittal Cannot Be Relitigated in Perjury Trial
**HOLDING:** Where jury acquitted D on DUI charge, state is collaterally estopped from prosecuting him for perjury based on testimony at his DUI trial that, while intoxicated, he was not the driver of the vehicle. Because he did not contest his intoxication, the only issue in DUI trial was whether he was the driver. By its acquittal, the jury necessarily found that he was not. A new jury could not convict him of perjury without making a new determination that he was the driver. The Court rejected the state's argument that the acquittal's collateral estoppel effect is countered because it was obtained through the D's fraud.

**TITLE:** United States v. Castillo-Basa

**INDEX NO.:** L.7.a.

**CITE:** 478 F.3d 1025; 05-50768 (9th Cir. 2007)

**SUBJECT:** Collateral estoppel bars perjury charge against D who testified falsely and gained acquittal

**HOLDING:** The Ninth Circuit Court of Appeals held that D who, in an earlier prosecution, took the stand to challenge a single element of the charged offense cannot, following his acquittal, be prosecuted for perjury after the government located evidence that demonstrated that D's testimony at the earlier trial was false. Court's ruling was based on collateral estoppel principles embodied in the Fifth Amendment's double jeopardy clause.

D initially was charged with illegally reentering the country after having been deported, in violation of federal statutory law. The government, however, could not locate an audio record of D's deportation hearing. D -- in both a sworn declaration and testimony at trial -- stated that, on the day his deportation hearing was scheduled, no one came to bring him from his cell. Although district court refused to give requested instruction that the jury specifically required a finding that D was present at the deportation hearing to meet an element of the charge, D was acquitted anyway. Soon after, the government found the tape of D's deportation hearing and charged him with perjury. Relying on Ashe v. Swenson, 397 U.S. 436 (1970), Court determined second prosecution was barred by common-law principles of collateral estoppel. Although an accused's presence at a deportation hearing is not technically one of the facts that a jury must determine in a re-entry prosecution, Court decided "given the evidence and the arguments before it, the jury could not have acquitted Castillo-Basa without deciding that he had not been afforded a deportation hearing, and thus that he had not been physically present at any such hearing." "[A] jury need not directly decide the veracity of a D's testimony in the first trial for collateral estoppel to bar a subsequent perjury prosecution -- it is enough that the jury decide an issue that is 'sufficiently similar' to an issue in the prospective second prosecution and that the similar issues are 'sufficiently material' in both instances." Court stressed that D's testimony at his re-entry trial was the principle evidence presented to contest the government's evidence. A dissent was entered.

**TITLE:** Wilcox v. State
**INDEX NO.:** L.7.a.
**CITE:** (1st Dist., 4-24-96), Ind. App., 664 N.E.2d 379
**SUBJECT:** Collateral estoppel - criminal nonsupport after favorable civil adjudication
**HOLDING:** Doctrine of collateral estoppel, which operates to bar subsequent relitigation of same fact or issue adjudicated in former proceeding, did not apply to preclude relitigation of D's ability to pay child support. In civil contempt proceeding, Tr. Ct. found that D was not in contempt of Ct. for failure to pay support from 11/93 through 1/94, because he did not have financial ability to meet his support obligations. In criminal case, State alleged that D willfully & intentionally withheld child support from 11/93 through 6/94. Although issue in both proceedings was whether D was financially able to provide support, Ct. rejected claim that there was identity of issues between two proceedings. Additional 5-month period of nonpayment supported State's allegation in criminal case & could have been pivotal to jury's conclusion that D intentionally refused to provide support for his child. Record showed that during 5-month period, D failed to obtain employment & failed to seek relief from preliminary injunction which froze his assets. Thus, issues between two adjudications were not coextensive & issue presented in second action was not subsumed within issue determined in first adjudication. Held, affirmed in part, remanded for resentencing; Chezem, J., concurring.

**RELATED CASES:** Olson and Mahoney, 135 N.E.3d 988 (Ind. Ct. App. 2019) (juvenile court's finding of no probable cause does not bar proceedings for co-defendants charged in adult court); Bailey, App., 716 N.E.2d 67(Tr. Ct. erred by dismissing criminal recklessness charge against D based on doctrine of collateral estoppel).

**TITLE:** Wood v. State

**INDEX NO:** L.7.a.

**CITE:** (5/20/2013), 988 N.E.2d 374 (Ind. Ct. App 2013)

**SUBJECT:** Collateral estoppel precluded guilty plea for possession by SVF after acquittal in first phase of bifurcated trial

**HOLDING:** After first phase of D's trial for possession of a firearm by a SVF, jury returned a verdict acquitting D of knowing or intentional possession. Prohibition against double jeopardy and doctrine of collateral estoppel prohibited Tr. Ct. from allowing State to be given a second chance, in second phase of bifurcated trial, to prove he possessed the same handguns. Because D could not face a seond jury trial for possession of those firearms, neither could he plead guilty to that crime, thus Court reversed his conviction. See Menna v. N.Y., 423 U.S. 61 (1975). Held, judgment reversed and remanded.

# L. DEFENSES

## L.7. Legal bars to prosecution (see, also B.10)

### L.7.b. Statute of limitations (Ind. Code 35-41-4-2)

**TITLE:** Cowan v. Sup. Ct., Kern County
**INDEX NO.:** L.7.b.
**CITE:** 14 Cal. 4th 367; 926 P.2d 438 (Cal. 1996)
**SUBJECT:** D May Waive Statute of Limitations To Take Advantage of Plea Bargain
**HOLDING:** California Supreme Court holds that D may waive statute of limitations to take advantage of plea agreement requiring him to plead guilty to time-barred lesser offense. Tr. Ct. had jurisdiction over time-barred offense by virtue of valid greater charge.

**TITLE:** Greichunos v. State
**INDEX NO.:** L.7.b.
**CITE:** (4th Dist. 12/27/83), Ind. App., 457 N.E.2d 615
**SUBJECT:** Statute of limitations - applicable statute
**HOLDING:** Tr. Ct. erred in denying D's motion to dismiss information (filed 2/18/82) charging him with second degree arson committed 4/16/75. Applicable statute of limitations (S/L) is one in effect at time prosecution is instituted. Streepy (1931) 202 Ind. 685. Here, at time offense was committed, prosecutions for treason, murder, arson & kidnapping could be commenced "at any time after the commission of the offense (Ind. Code 35-1-3-1)." Effective 10/1/77, the S/L for Class B felonies was 5 years (Ind. Code 35-41-4-2). Ct. rejects state's contention that Streepy creates ex post facto problems. Under Streepy, a newly enacted S/L cannot revive a previously barred prosecution. Savings clause contained in Acts 1977, P.L. 340, Section 150 indicates no legislative intent to maintain former S/L. There is no vested right in S/L, which is merely a remedy/mode of procedure. State has burden of proving crime charged was committed within S/L. Fisher 291 N.E.2d 76; Atkins, App., 437 N.E.2d 114. An information which fails to allege facts sufficient to constitute an exception to S/L is subject to dismissal. Obie 106 N.E.2d 452; Terrell (1905), 165 Ind. 443. Held, reversed & remanded with instructions to dismiss.

**RELATED CASES:** Parmley, App., 699 N.E.2d 288 (D's conviction for child molesting for act which allegedly occurred on 12/7/89 & for which he was charged more than 5 years later was not barred by applicable statute of limitations).

**TITLE:** Harris v. State

**INDEX NO.:** L.7.b.

**CITE:** (8/13/2013), 992 N.E.2d 887 reh'g granted on other grounds 9 N.E.3d 679 (Ind. Ct. App 2013)

**SUBJECT:** Statute of limitations precluded untimely amendment to charging information

**HOLDING:** After jury acquitted D of rape and hung on class C felony sexual misconduct with a minor charge, statute of limitations barred State from amending the sexual misconduct charge by adding deviate sexual conduct as alternative basis for charge. Alleged crime occurred on December 25, 2005, and class C felony has a period of limitations of five years. See Ind. Code 35-41-4-2(a)(1). After first trial, the State moved to amend its remaining count against D by adding "or deviate sexual conduct" on September 20, 2011, nearly a year after the period of limitations for the alleged deviate sexual conduct expired.

Proposed amendment constitutes a matter of substance and includes a new and additional offense. Just as the State would be barred from bringing a new or refiled charge of deviate sexual conduct, it is barred from bringing the charge through an amendment. The statute of limitations cannot be circumvented because of the procedural availability of amending informations or the happenstance of a mistrial. Held, denial of State's motion to amend information affirmed.

**TITLE:** Heitman v. State
**INDEX NO.:** L.7.b.
**CITE:** (1/18/94), Ind. App., 627 N.E.2d 1307
**SUBJECT:** Statute of limitations -- D leaves Indiana but cooperated with authorities
**HOLDING:** Ind. Const. Art. 1 Section 23 states that General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon same terms, shall not equally belong to all citizens. General Assembly may not enact statute which classifies and is unreasonable, arbitrary or rests upon some ground of difference not having fair and substantial relation to object of legislation Johnson, 404 N.E.2d 585. Here, D was accused of molesting his daughter. Before and during investigation while he was in Pennsylvania, D remained in constant contact with ex-wife and Indiana authorities. He was charged in September 1990 for child molesting occurring between January 1984 and June 1985. D claimed equal protection clause was violated because statute provides five-year statute of limitation and more that five years passed before he was charged. Ct. held that if suspect leaves Indiana and is evading extradition or is otherwise avoiding authorities, statute of limitation tolls. If suspect has left Indiana but cooperates fully with Indiana authorities, and returns voluntarily to Indiana to face charges against him, statute of limitations does not toll. Therefore, since D was not avoiding service of process and fully cooperated with authorities while living in Pennsylvania, statute of limitations did not toll. Held, conviction reversed and D released from custody.

**TITLE:** Heitman v. State
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist., 1-18-94), Ind. App., 627 N.E.2d 1307
**SUBJECT:** Statute of Limitations (SL) not tolled by D's absence
**HOLDING:** If suspect has left State but does not avoid authorities & cooperates & returns voluntarily to face charges, SL is not tolled during his absence. D & wife divorced, & D & two children moved to Pennsylvania. One daughter eventually returned to Ind. in 1987. She alleged D had molested her, but later recanted charge. In 1988, she renewed allegations D had molested her in 1984 & 1985. Before & during investigation of charges, D remained in contact with ex- wife & Ind. authorities, even paying police detective's expenses to investigate. After detective went to Pennsylvania, no further action was taken for two years, but in 1990, D was charged with child molesting & incest for incidents allegedly occurring in 1984 & 1985. He was convicted on both counts.

D argued that Ind. Code 35-41-4-2(g)(1), providing that SL is tolled for any period when accused is not usually & publicly resident in State or conceals himself to avoid process, unconstitutionally violates equal protection guarantee of Ind. Const. art I, § 23. Ct. noted purpose of SL is to ensure against inevitable prejudice & injustice to D that delay in prosecution creates, & it strikes balance between D's interest in repose & State's need to adequately investigate & prepare case, Scott, App., 461 N.E.2d 141. Art. I, § 23 prevents legislature from enacting statutes that classify & are unreasonable, arbitrary, or rest on some ground or difference not having fair & substantial relation to their purpose.

Ct. found that if statute were applied to toll SL in D's case, it would be unconstitutional, because mere fact person lives outside State does not by itself have substantial relation to State's ability to bring person to justice. Ct. also found, however, that statute was capable of interpretation that would make it constitutional. Language in statute "that process cannot be served upon him" could modify "is not usually resident in Ind." as well as "so conceals himself," because two clauses are separated by "or." Ct. concluded this interpretation comported with purpose of legislation balanced competing interests, & classified suspects based on amenability to process. Ct. held proper interpretation to be: "If a suspect leaves Indiana and is evading extradition or is otherwise avoiding authorities, the statute of limitations tolls. If a suspect has left Indiana but cooperates fully with Indiana authorities, and returns voluntarily to Indiana to face charges against him, the statute of limitations does not toll."

Applying interpretation to D's case, Ct. found SL was not tolled because he fully cooperated with authorities & State would have had no difficulty filing information against him earlier. Because SL was not tolled, & last instance of alleged misconduct occurred more than five years prior to charge, charges against D were barred. Held, convictions vacated & release ordered.

**RELATED CASES:** Roberts, App., 712 N.E.2d 23 (SL tolled when D did not keep in contact with authorities when he left state).

**TITLE:** Hobson v. State
**INDEX NO.:** L.7.b.
**CITE:** (3d Dist. 7/23/86), Ind. App., 495 N.E.2d 741
**SUBJECT:** Statute of limitations - when tolled
**HOLDING:** Period of limitations was tolled by filing of information. Here, D argues period was not tolled until his arrest, 11 days after filing of information. Under Ind. Code 35-41-4-2(e), prosecution is considered commenced on earliest of (1) date of filing indictment/information; (2) date of issuance of valid arrest warrant; (3) date of arrest. Ct. rejects D's reliance on Scott, App., 461 N.E.2d 141, finding 7-year delay between filing of information & D's arrest triggered Ct.'s speedy trial analysis. Nonetheless, Ct. finds it does not matter which date is used, as evidence is sufficient to establish prosecution was commenced within period of limitations. Held, conviction affirmed.

**RELATED CASES:** DeHart, App., 471 N.E.2d 312 (where there is continuing duty to do some act, statute of limitations does not apply where some portion of offense is within period of limitations).

**TITLE:** Lamb v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 9-2-98), Ind. App., 699 N.E.2d 708
**SUBJECT:** Statute of limitations - elevating charge by virtue of prior conviction
**HOLDING:** Because D was charged with class D felony dealing in marijuana, regardless of whether charge was elevated by virtue of prior conviction, five-year period of limitation provided by Ind. Code 35-41-4-2(a) applied. Thus, State's prosecution for class D felony was timely brought because it filed original & amended charging information well within five years. Statute provides that prosecution for offense is barred unless it is commenced within five years after commission of class B, C, or D felony, or within two years after commission of misdemeanor. Information charged D on one page with dealing in marijuana as class A misdemeanor, & on separate page with dealing in marijuana with prior conviction, as class D felony.

D argued that because information was filed after two-year misdemeanor limitations period but before expiration of five-year felony limitations period, State was barred from prosecuting him for misdemeanor dealing, & question of "prior conviction" never arose, making conviction of felony dealing unattainable. Ct. noted that although State was barred from convicting D of misdemeanor dealing, prosecution for class D felony dealing was not necessarily barred. Because D was put on notice within limitations period that State was charging him with felony dealing, period of limitation's goals of justice & fairness were met. In separating felony dealing count into two parts, State was not charging D with two offenses or even two counts, but was merely trying to follow law designed to protect D's right to have jury not hear of prior convictions before making decision regarding his guilt or innocence of dealing. In concluding that State may prosecute D for felony dealing, Ct. noted that if State proves all elements of felony dealing except prior conviction, D shall not be convicted of felony dealing or misdemeanor dealing. Held, denial of motion to dismiss affirmed.

**TITLE:** Lebo v. State
**INDEX NO.:** L.7.b.
**CITE:** (11/16/2012), 977 N.E. 2d 1031 (Ind. Ct. App 2012)
**SUBJECT:** Statute of limitations - concealment; continuing crime
**HOLDING:** Tr. Ct. did not abuse its discretion by denying D's Motion to Dismiss alleging that the State's charges are barred by the statute of limitations. The State must commence prosecution of a misdemeanor offense within two years after its commission. This statute of limitations is tolled if the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not ahve been discovered by that authority by exercise of due diligence. The circumstances of concealment must be charged and proven at trial. Here, on September 6, 2011, the State charged the D with two counts of failure to report child abuse or neglect, Class B misdemeanors. The State alleged that between August 1, 2007 and October 28, 2008, D had reason to believe that K.T., a minor child, was a victim of abuse or neglect and failed to report such and concealed her failure by instructing her players not to discuss team matters or rumors with anyone, and that the State did not have evidence to file charges until afer an investigative report in October 2010 and could not ahve discovered the evidence with due diligence. Because the charges make the proper specific allegation which are supported by the probable cause, the State can proceed with the charges, letting the jury to determine whether the statute of limitations was tolled. Moreover, even if the statute of limitations were not tolled, the crime of failing to report child abuse is a continuaing crime. An individual is not relieved of his or her duty to report unless a report has already been made to the best of the individual's belief. Thus, the filing of this charges is not barred by the statute of limitations. Held, judgment affirmed; Baker, J., concurring on the basis that the statute of limitation may be tolled but failure to report is not a continuing crime.

**RELATED CASES:** Gilliland, 979 N.E. 2d 1049 (Ind. Ct. App 2012) (By failing to make a report regarding child abuse during the time the Jr. Varsity volleyball coach worked at his school, D, the athletic director, concealed the fact that he had a duty to report the alleged misconduct between the coach and a player; thus, the statute of limitations was sufficiently tolled to bring the charges within the proper time period; Bailey, J., dissenting, in part, on the basis that concealment cannot arise from remaining silent about one's own crime and the concealment, here, did not occur until D's affirmative statement on November 21, 2008 to police that he had no knowledge of misconduct).

**TITLE:** Marshall v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 08-15-05), Ind. App., 832 N.E.2d 615
**SUBJECT:** Burglary conviction time barred; "discovery" not "establishment" of identity key
**HOLDING:** Tr. Ct. misapplied the statute of limitations when it allowed the State to convict D of Class B felony burglary. Ind. Code 35-41-4-2 states that a prosecution for a class B felony is barred unless brought within five years of the offense. Section (b) of the statute allows an exception if prosecution is commenced within a year after either the initial discovery of the offender with DNA evidence or when the offender's identity could have been discovered by the exercise of due diligence. Here, State had fingerprint evidence connecting D to the offense outside the statute of limitations' exception period but argued they were not able to "establish" D's identity until it obtained the final DNA test results due to technology advances. Ct. noted Ind. Code 35-41-4-2(b) does not use the word "establish" but rather "discovers" or "could have discovered." A separate exception under Ind. Code 35-41-4-2(h)(2) emphasizes this distinction & provides a mechanism for the State to toll time to establish a D committed an offense. The statute allows tolling if an accused person conceals evidence of an offense & evidence sufficient to charge him is unknown to the prosecution & undiscovered by due diligence. For Ind. Code 35-41-4-2(b) to be applicable in light of State's pre-DNA discovery of D's identity, the statute would need to omit the "discovery" trigger as in Ind. Code 35-41-4-2(h). Held, judgment reversed on this ground while affirmed on other grounds relating to other charges.

**TITLE:** Minton v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 1-29-04), Ind. App., 802 N.E.2d 929
**SUBJECT:** Statute of limitations - child molesting/sexual misconduct with minor
**HOLDING:** D challenged his convictions for multiple counts of child molesting & sexual misconduct with a minor as being in violation of ex post facto, the Privileges & Immunities Clause of the Indiana Constitution & double jeopardy. Child molesting statute, Ind. Code 35-41-4-2, was amended in 1993 to extend the statute of limitations for child molesting from five years to until the alleged victim turned 31 years old. The public law creating the amendment contained a non-code provision restricting its application to crimes committed after June 30, 1988. Some of D's convictions related to behavior in 1992 prior to the amendment. Case *cited* by D, Stogner v. California, 123 S.Ct. 2446, 2449 (2003), supported with approval decisions where Cts. upheld extensions of unexpired statute of limitations. Ct. also relied on Indiana precedent establishing that a period of limitation is granted in the grace of the sovereign & may be modified as long as the accused is not entitled to acquittal before the subsequent law is enacted. Streepy v. State, 202 Ind. 685, 177 N.E. 897 (1931).

Ct. rejected D's claim that Privileges & Immunities Clause in Art. I, § 23 of Indiana Constitution was violated, & its principle that all criminal Ds be treated fairly & equally. Using two-part test in Collins v. Day, 644 N.E.2d 72 (Ind. 1994), Ct. found that the legislation was reasonably related to inherent characteristics distinguishing the unequally treated classes & the statute uniformly applies to all similarly situated persons. D did not show the reason given by the State for the discrepancy -- the longer limitation allows a child to recover repressed memories -- to be an arbitrary or manifestly unreasonable legislative classification. Held, judgment affirmed.

**TITLE:** Pavan v. State

**INDEX NO.:** L.7.b.

**CITE:** (11/17/2016), 64 N.E.3d 231 (Ind. Ct. App 2016)

**SUBJECT:** Statute of limitations' tolling provision not intended to decriminalize consensual incestuous sex for family members over age 31

**HOLDING:** Trial counsel was not ineffective for failing to pursue a statute-of-limitations defense to an incest charge involving D's 34-year-old biological aunt. Charges were filed within the general five-year statute of limitations applicable to class C felonies, but Ind. Code § 35-41-4-2(e) provides that prosecution for incest is barred "unless commenced before the date the alleged victim reaches thirty-one years of age."

The purpose of Ind. Code § 35-41-4-2(e) is to extend the statute of limitations to allow victims of certain sex crimes to report their abuse upon reaching adulthood, not to shorten the applicable statute for any crime or wholly decriminalize an otherwise illegal sex act based on the age of the other party. The statute criminalizing incest, Ind. Code § 35-46-1-3, does not support D's assertion that it is not illegal to engage in consensual incestuous sex when the other person involved is over age thirty-one. Court rejected D's "absurd and illogical" interpretation of the statutes, concluding trial counsel cannot be deemed ineffective for failing to pursue a meritless defense. Held, denial of petition for post-conviction relief affirmed.

**TITLE:** Quinn v. State
**INDEX NO.:** L.7.b.
**CITE:** (10/8/2015), 45 N.E.3d 39 (Ind. Ct. App. 2015)
**SUBJECT:** No statute of limitations violation
**HOLDING:** In an issue of first impression, D was not entitled to dismissal on statute-of-limitations grounds, even though he was charged 25 years after he committed his offenses, because the State acted with due diligence in discovering DNA evidence that tied him to the crimes. See Ind. Code § 35-41-4-2(b).

In 1988, E.F., who was ten, was raped while confined in a car. Because her face was covered during the attack, she could not identify her assailant. Lab technicians found sperm on some of her clothes, but then-available testing could not link it to a specific person. The case was closed. At the time, the lab had no formal retention policy, but an analyst could retain and store items if he or she desired. In 2000, the prosecutor destroyed the evidence he possessed while the original lab analyst stored the items in her possession, E.F.'s clothes. In September of 2011, E.F. contacted a former investigator about the case. He reached out to lab personnel, who found the clothes. In June of 2012, the lab tested the clothes and matched D's DNA profile on CODIS. A subsequent buccal swab confirmed D was the source of the sperm. In March of 2013, the State charged D with child molesting and criminal confinement, both B felonies, which he moved to dismiss.

At the time D was charged, Ind. Code § 35-41-4-2(b)(2) (2009) provided, in relevant part that a "prosecution for a Class B . . . 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 . . . could have discovered evidence sufficient to charge the offender with the offense through DNA . . . analysis by the exercise of due diligence." (Emphasis added).

The State met the due diligence requirement. The lab lacks the resources to test every stored item to create a DNA profile. Thus, it is reasonable for the lab to test, as here, only upon a request from law enforcement. Likewise, the sheriff lacks resources to leave every case open for periodic investigation. Thus, it is reasonable for the sheriff to close cases once all avenues have been exhausted and to reopen them, as here, only upon receiving new information. Further, D agrees that once the lab determined that the clothes still existed, it acted diligently to test the clothes and connect them to D. Held, judgment affirmed.

**TITLE:** Sloan v. State
**INDEX NO.:** L.7.b.
**CITE:** (06-01-11), 947 N.E.2d 917 (Ind. 2011)
**SUBJECT:** Statute of limitations - end of tolling after D's acts of concealment
**HOLDING:** Period in which prosecution must be commenced does not include any period in which D conceals evidence of offense, and evidence sufficient to charge him with that offense is unknown to prosecuting authority and could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2(h)(2). Here, D regularly molested his step-niece between the ages of six to thirteen. D told complaining witness (CW) after every occurrence that if she told anyone she would go to jail. CW revealed the molestations at the age of thirty and D moved to dismiss the Class C felony charge on grounds it was filed well after the applicable five-year statute of limitations. Court disagreed with Court of Appeals' conclusion that concealment by means of threats not to tell ended when the molestations ceased. The relevant inquiry is when the prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the D. See Crider v. State, 531 N.E.2d 1151 (Ind. 1988). This is when tolling ends and the limitations period begins to run. Until the Legislature speaks on the issue, public policy and a strict reading of the statute favor the prosecution of alleged crimes over the protection of Ds who have intimidated victims or otherwise concealed evidence. Held, transfer granted, Court of Appeals' opinion at 926 N.E.2d 1095 vacated, denial of motion to dismiss affirmed. Sullivan and Rucker, JJ., dissenting, do not agree that statute begins to run when D ceases threats, but thinks tolling period should cease when victim no longer reasonably fears material retaliation for reporting crimes.

**TITLE:** Smith v. State
**INDEX NO.:** L.7.b.
**CITE:** (2nd Dist., 4-22-97), Ind. App., 678 N.E.2d 1152
**SUBJECT:** Conviction for offense time barred - fundamental error
**HOLDING:** Where charging information charges offense within limitation period but proof clearly establishes that offense was not committed within proper period of limitations, D is entitled to be discharged on that count & failure to do so constitutes fundamental error. It is part of State's burden to establish that offense was committed within period of limitations. Fisher v. State, 259 Ind. 633, 291 N.E.2d 76 (1973); Atkins v. State, 437 N.E.2d 114 (Ind. Ct. App 1982). Here, conviction for sexual battery could not stand because State failed to bring charge within five-year period of limitations provided in Ind. Code 35-41-4-2(a)(1). Held, convictions affirmed in part, reversed in part, & remanded.

**RELATED CASES:** Jewell, App., 877 N.E.2d 864 (Even though D did not raise a statute of limitations defense at trial, State was barred from prosecuting him for sexual misconduct with a minor as a Class D felony, because State filed information for this count after expiration of the five-year limitations period).

**TITLE:** State v. Chrzan
**INDEX NO.:** L.7.b.
**CITE:** (4th Dist., 4-14-98), Ind. App., 693 N.E.2d 566
**SUBJECT:** Statute of limitations - concealment
**HOLDING:** Period in which prosecution must be commenced does not include any period in which accused conceals evidence of offense, & evidence sufficient to charge him with that offense is unknown to prosecuting authority & could not have been discovered by that authority by exercise of due diligence. Ind. Code 35-41-4-2. Accused must positively act to conceal fact that crime has been committed & not just accused's own guilt. Here, during last two years as grain elevator manager & until D resigned on January 13, 1994, he allegedly misappropriated funds. On January 18, 1994, D wrote two checks to replacement manager claiming they were payment for beans that he bought. Prosecutor did not file charges until January 16, 1996, which was two years & three days after alleged misappropriation. Although statute of limitations for misappropriation is two years, D's manipulation of financial records during two years prior to his resignation as manager & writing of two checks on January 18, 1994, were positive acts on part of D to conceal fact that crime had been committed. Thus, Tr. Ct. erroneously granted D's motion to dismiss. Held, judgment reversed & remanded for further proceedings.

**RELATED CASES:** Sipe, App., 797 N.E.2d 336 (D's statute of limitations challenge to his child molesting convictions failed, because D successfully concealed his crimes by intimidating the victim & time did not begin to run until victim notified authorities of abuse); Kifer, App., 740 N.E.2d 586 ( D's alteration & disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt); Crider, 531 N.E.2d 1151 (statute did not run until victim made disclosure to authorities; D had successfully concealed fact of his crimes by positive acts of intimidation of victims).

**TITLE**: State v. Lindsay
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist., 03-09-07), Ind. App., 862 N.E.2d 314
**SUBJECT:** Corrupt business influence charge barred by statute of limitations
**HOLDING:** Tr. Ct. properly dismissed charge of corrupt business influence (RICO) against D. State argued that given the ongoing nature of a RICO offense, the class C felony RICO charge was filed within the applicable five-year statute of limitation. "Racketeering activity" means to commit any of the crimes listed in Ind. Code 35-45-6-1, including official misconduct, perjury, obstruction of justice, or intimidation. State recharacterized D's 2003 & 2004 false informing offenses as "official misconduct" in order to bring the offenses within the purview of the predicate offenses required to establish a continuation of the pattern of racketeering activity. However, conduct giving rise to false informing charges, i.e., D's alleged false statements in 2003-2004 concerning 1988 murders, were not related to D's performance of his official duties as a federal police officer working in Florida, which is required to constitute offense of official misconduct. There was no other conduct which would support a charge of official misconduct or any of the other offenses which could be deemed to be a continuation of a pattern of racketeering activity.

Simple fact that D moved to Florida in 1996 is not indicative of an intent to avoid service of process & did not constitute an act of concealment so as to toll the statute of limitations. Heitman v. State, 627 N.E.2d 1307 (Ind. Ct. App 2007). Even assuming allegations of D's repeated threats & acts of intimidation directed toward witnesses are true, the statute of limitation would have ceased to be tolled, at the latest, after he moved to Florida in 1996 & no longer had contact with those witnesses. Thus, five-year statute of limitation was not tolled by acts of concealment. Held, judgment affirmed.

**TITLE:** State v. Sturman
**INDEX NO.:** L.7.b.
**CITE:** (7/14/2016), 56 N.E.3d 1187 (Ind. Ct. App 2015)
**SUBJECT:** Reckless homicide SOL runs on date of death, not date of act
**HOLDING:** In an issue of first impression, the Tr. Ct. abused its discretion in dismissing D's reckless homicide charge on statute-of-limitation grounds because it erroneously determined the statute began to run on the date D committed the act that led to the person's death, not the date the person died.

D prescribed massive amounts of pain killers to D.E.H., who died from "pharmacologic intoxication." D wrote the final prescription on July 29, 2010; D.E.H. died on August 6, 2010. The State charged D with reckless homicide on August 5, 2015. Finding that the five-year statute of limitations began to run the date D wrote the final prescription – July 29, 2010 – the Tr. Ct. found that the August 5, 2015 charge did not fall within the limitations period and thus dismissed the charge.

A statute of limitation begins to run only when the crime is complete, and in the case of reckless homicide, the crime is not complete until the victim dies. See Illinois v. Mudd, 507 N.E.2d 869, 871 (Ill.Ct. App. 1987) (reckless homicide case). Thus, the State could not charge D with reckless homicide until the date D.E.H died, August 6, 2010. Cf. Alderson v. State, 145 N.E. 572, 573 (1924) ("A homicide consists of not only striking the fatal blow . . . but is not complete until the victim has [actually] died"). Therefore, the August 5, 2015, filing of the reckless homicide charge fell within the five-year limitations period. Held, dismissal of count reversed.

**TITLE:** Study v. State
**INDEX NO.:** L.7.b.
**CITE:** (2/4/2015), 24 N.E.3d 947 (Ind. 2015)
**SUBJECT:** Statute of Limitations – tolling requires positive act of concealment
**HOLDING:** Tr. Ct. erred by denying D's motion to dismiss the March 2006 robbery count because the charge was filed outside of the five-year statute of limitations. A prosecution for a Class B felony is barred unless it is commenced within five years after the commission of the offense. However, the period within which a prosecution must be commenced does not include any period in which the accused person conceals evidence of the offense and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence. Ind. Code 35-41-4-2(h)(2). Despite an amendment to the concealment-tolling provision, Court will continue to follow the long line of cases limiting the concealment-tolling provision to only positive acts that conceal that an offense has been committed and not just concealment of any evidence of guilt.

Here, D was charged with multiple bank robberies, including one that occurred outside of the five-year statute of limitations. The State alleged that he concealed his crime by wearing a mask, hiding the getaway car, clothes worn during the crime, items taken from a victim, the weapon used, and evidence linking the robbery to other robberies. But none of these actions served to prevent law enforcement from discovering that a bank had been robbed, and in fact, law enforcement immediately knew of the robbery and began investigating. As such, D's actions did not toll the statute of limitations and his robbery charge should have been dismissed. Held, transfer granted, judgment reversed, in part, and remanded for Tr. Ct. to vacate the conviction and sentence for Count XI and dismiss the charge, and Court of Appeals' memorandum opinion summarily affirmed on all issues except for the issue regarding the interpretation and application of the concealment-tolling provision.

**RELATED CASES:** Amos, 83 N.E.3d 1221 (Ind. Ct. App 2017) (distinguishing Dvorak (above), Court held that D's regular communications with his investors constituted an attempt to delay or prevent discovery of his commission of the alleged crimes of securities fraud and offer or sale of unregistered security, and thus constituted positive acts of concealment for purposes of tolling the statute of limitations), Dvorak, 78 N.E.3d 25 (Ind. Ct. App 2017) (Tr. Ct. erred by denying D's motion to dismiss counts of offer or sale of an unregistered security and acting as an unregistered agent because the charges were filed outside the 5-year statute of limitations; D did not engage in any positive act calculated to conceal the fact that he was not registered and the security was not registered with the Secretary of State).

**TITLE:** Umfleet v. State
**INDEX NO.:** L.7.b.
**CITE:** (1st Dist. 7/11/90), Ind. App., 556 N.E.2d 339
**SUBJECT:** Statute of limitations - concealment
**HOLDING:** Tr. Ct. erred in denying D's motion to dismiss where prosecution was not commenced within 5-year statute of limitations. Statute of limitations provides that limitations period does not include any period in which accused person conceals evidence of offense & evidence sufficient to convict him/her is not known to prosecutor & could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2. Exception must be construed narrowly & in favor of accused. Holmes, App., 393 N.E.2d 242. Concealment must result from D's positive acts. Id. In denying D's motion to dismiss, Tr. Ct. referred to fact that victim did not recognize that acts were wrong, & that when she did, she was afraid that D would get in trouble & lose his job. However, there was no indication that D had told her that his conduct was not wrong or that she should not tell anyone about it. Tr. Ct. also mentioned D's continual denial that any molestation took place, but D's denial of involvement in any abuse was not positive act to conceal fact that offense had been committed. Record does not reveal any conduct on D's part that could be considered positive act to conceal fact that crime was committed. Held, denial of motion to dismiss reversed. **Note:** In 1 count, D was charged with act of fondling within 18-month period that fell only partly inside limitations period. Ct. App. found that, because state failed to prove that alleged act took place within limitations period, charge should have been dismissed.

**RELATED CASES:** Sloan, 947 N.E.2d 917 (Ind. 2011) (to extent Umfleet may be interpreted as contrary to Ct's holding, it is expressly disapproved); Kifer, App., 740 N.E.2d 586 ( D's alteration & disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt); Crider, 531 N.E.2d 1151 (statute did not run until victim made disclosure to authorities; D had successfully concealed fact of his crimes by positive acts of intimidation of victims).

**TITLE:** Wallace v. State
**INDEX NO.:** L.7.b.
**CITE:** (8-16-01), Ind., 753 N.E.2d 568
**SUBJECT:** Statute of limitations - child molesting
**HOLDING:** Child molesting convictions first charged in 1998 for alleged acts done in 1988-89 were barred by five-year statute of limitations that was in effect in 1998. Ind. Code 35-41-4-2(a)(1) (1998). Here, between date of alleged offenses & time D was charged, the statute of limitations was amended to allow prosecution for certain classes of child molesting to be commenced at any time before alleged victim reaches 31 years of age. Ind. Code 35-41-4-2-(c)(1). The applicable statute of limitations is that which was in effect at the time the prosecution was initiated. Patterson v. State, 532 N.E.2d 604 (Ind. 1988). Further, D was convicted of child molesting under Ind. Code 35-42-4-3(c) (sexual conduct with child between ages of twelve & fifteen) which was subject to the then- existing five-year statute of limitations, which was obviously not met in this case. Held, transfer granted, convictions reversed; Boehm, & Dickson, JJ., dissenting, argued that while the five-year statute of limitations was applicable, D waived issue by not raising it with Tr. Ct.).

**TITLE:** Willner v. State
**INDEX NO.:** L.7.b.
**CITE:** (11-10-92), Ind., 602 N.E.2d 507
**SUBJECT:** Statute limitations pleading in Information - Bribery
**HOLDING:** Information adequately advised D that State intended to rely on his status as office holder to extend statute of limitations, reversing Ct. App. decision at 588 N.E.2d 581. Act relied on for charged bribery occurred in May 1982. Amended Information was not filed until 1990 & did not mention anything about statute of limitations. Ind. Code 35-41-4-2 provided that statute of limitations was five years, but subsection (d)(3) provided for tolling of limitations period, for any period that D was elected or appointed to office. Generally, State is required to allege facts sufficient to bring charges within statute of limitations, & although Information did allege D was officeholder when crime was committed, it did not allege how long thereafter he remained in office. Although Ct. App. held that omission was fatal to State's charge, Ind. S.Ct. disagreed, noting that record was clear that D remained in office until sentenced on instant offense. Ct. found that this was matter of public record of which Tr. Ct. could take judicial notice, & that D was certainly aware of it. D was not misled about facts State intended to prove at trial & was not prejudiced by failure to allege that he remained in office. Held, transfer granted, Ct. App. opinion vacated, & remanded for consideration of other issues raised on appeal, Debruler, J., dissenting.

**RELATED CASES:** Reeves, 938 N.E. 2d 10 (Ind. Ct. App. 2010) (where State failed to allege in the charging information facts that supported the concealment of evidence exception to the statute, the Tr. Ct. abused its discretion by denying D's motion to dismiss).

# L. DEFENSES

## L.7. Legal Bars to Prosecution (*see*, *also* B.10.)

### L.7.e. Prosecution for Different Offenses (IC 35-41-4-4)

**TITLE:** Brittingham v. State
**INDEX NO.:** L.7.e.
**CITE:** (4/25/2023), Ind. Ct. App., 208 N.E.3d 669
**SUBJECT:** Dismissal not required under successive prosecution statute
**HOLDING:** In this interlocutory appeal, the State alleged that Defendant kidnapped his girlfriend as she was leaving work because he suspected she was romantically involved with another man. Defendant's girlfriend and the suspected boyfriend worked at the same location. Defendant slammed the girlfriend against the car and threw her inside. The suspected boyfriend fled during the confrontation between Defendant and his girlfriend, but Defendant tracked him down in the parking lot of a Meijer store and punched him several times. Defendant drove away with his girlfriend to Nebraska, where he was eventually caught. During the drive, Defendant made several calls to friends and family, threatening to kill himself and his girlfriend. In January 2022, the State charged Defendant with kidnapping, criminal confinement, intimidation, and battery against the suspected boyfriend and Defendant's girlfriend (Case 1). In February 2022, under a different cause number, the State charged Defendant with Class A misdemeanor battery against the suspected boyfriend (Case 2). Case 2 was resolved by a guilty plea in April 2022. In May 2022, Defendant moved to dismiss all charges in Case 1, arguing that the charges stem from the same incident and involve the same parties, so those charges should have been joined under the same cause number as Case 2. The State then moved to dismiss the charges in Case 1 that involved the suspected boyfriend and argued the confrontation and kidnapping of the girlfriend were separate and distinct from the charges stemming from the incident at Meijer. The trial court found the charges related to the alleged kidnapping and criminal confinement of the girlfriend were "sufficiently unrelated and could be described independently, without referring to the specific details" of the events underlying the charges where the suspected boyfriend was the alleged victim and denied Defendant's motion to dismiss. The Court of Appeals concluded that the Successive Prosecution Statute did not prohibit the State from continuing to prosecute Case 1. The Court read the phrase "should have been charged" in subsection (a)(3) of Indiana Code section 35-41-4-4 in conjunction with Indiana's joinder statute, Indiana Code section 35-34-1-9, and Indiana Code section 35-34-1-10. The Court determined that neither the Successive Prosecution Statute nor Indiana Code Section 35-34-1-10 has been interpreted to automatically bar successive prosecutions for separate offenses that occurred at the same time or during the same general criminal episode." The Court reasoned that the criminal acts underlying the two cases involved different victims, occurred at different times and places, and were fueled by distinct intentions. Held: judgment affirmed.

# L. DEFENSES

## L.7. Legal Bars to Prosecution (*see*, *also* B.10.)

### L.7.e. Prosecution in Another Jurisdiction (IC 35-41-4-5)

# L. DEFENSES

## L.7. Legal Bars to Prosecution (*see*, *also* B.10.)

### L.7.g. Judicial Estoppel

# L. DEFENSES

## L.9. Miscellaneous Defenses

### L.9.a. Necessity (as applied to certain traffic offenses – IC 9-30-10-18)

**TITLE:** Dozier v. State
**INDEX NO.:** L.9.a.
**CITE:** (4/21/2099), Ind. App. 1999, 709 N.E.2d 27
**SUBJECT:** Necessity defense - existence of viable & adequate alternatives to criminal conduct
**HOLDING:** In prosecution for carrying handgun on school property without license, evidence was sufficient to rebut D's defense of necessity. In order to prevail on claim of necessity, among elements D must show is that there was no adequate alternative to commission of act. Toops, App., 643 N.E.2d 387. Pointing out that his life was in danger because he was attempting to quit violent street gang & that adults with whom he spoke gave no realistic guidance on how he might leave gang without resultant harm, D argued that he had no adequate alternative to protect himself other than carrying handgun. Ct. disagreed & found that there was sufficient evidence before Tr. Ct. to conclude that D had viable & adequate alternatives. Although advised to do so, D never told his parents that he was attempting to quit gang or that he had been threatened. Second, D did not contact police to report gang member's threat. Finally, most obvious alternative available to D was simply not to attend school on day after threat & to contact school authorities explaining his absence. Ct. summarily rejected D's arguments explaining why none of foregoing options was viable, concluding that any one of alternatives would have been more adequate than taking loaded gun to school. Held, conviction affirmed

**RELATED CASES:** Clemons, 996 N.E.2d 1282 (Ind. Ct. App. 2013) (State sufficiently rebutted D's claim that he possessed cocaine so his girlfriend would not use it; however, there was evidence that D stabbed his girlfriend and threatened to kill her in the same fight over the cocaine; thus, there was evidence that harm was disproportionate, D helped create the emergency, and his actions were unreasonable).

**TITLE:** Hernandez v. State
**INDEX NO.:** L.9.a.
**CITE:** (11/10/2015), Ind. 2015, 45 N.E.3d 373
**SUBJECT:** Evidence warranted giving defense of necessity instruction
**HOLDING:** Tr. Ct. abused its discretion in refusing to give D's tendered jury instruction on the affirmative defense of necessity. A criminal D is entitled to have a jury instruction on "any theory or defense which has some foundation in the evidence," even if the evidence is weak and inconsistent, so long as there is some probative value to support it. Here, trial testimony supported each of the six necessity factors set forth in Toops v. State, 643 N.E.2d 387 (Ind. Ct. App. 1994). Even if there is only a "scintilla" of evidence in support of a criminal D's proposed defense instruction, it should be left to the province of the jury to determine whether that evidence is believable or unbelievable.

Court concluded the failure to give an instruction on the defense of necessity may have impacted the jury's decision on D's guilt or innocence. Based on the instructions that were given, the jury could have returned a guilty verdict even if it believed D's testimony that supported his lawful defense. Therefore, the error could not have been harmless. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment reversed and remanded for a new trial.

**RELATED CASES:** Rochefort, 177 N.E.3d 113 (Ind. Ct. App. 2021) (Tr. Ct. did not abuse its discretion in failing to instruct jury on the defense of necessity because D did not show that the emergency situation which necessitated his escape presented any immediate and present danger required to justify the defense; after being left at the mental health appointment, there was no evidence presented that D, a work release participant, was menaced or in immediate danger).

**TITLE:** Toops v. State
**INDEX NO.:** L.9.a.
**CITE:** (11/30/1994), Ind. App. 1994, 643 N.E.3d 387
**SUBJECT:** Defense of necessity
**HOLDING:** Tr. Ct. erred in refusing to instruct jury regarding defense of necessity. When driver of vehicle in which D was passenger saw police car, he panicked & jumped into back seat. When car began to careen out of control, D grabbed steering wheel & drove for some distance even though he was intoxicated. At close of evidence D tendered jury instruction on necessity, which was refused by the Tr. Ct.

After lengthy review of evolution of common law necessity defense, Ct. rejected State's argument that this defense is not recognized in Ind., noting that jury may be instructed on any theory or defense which has some foundation in evidence, even if evidence is weak or inconsistent, Clemens, 610 N.E.2d 236; Harrington, App., 423 N.E.2d 622. Here, evidence raised jury question as to whether D's control of car while intoxicated was necessary to prevent greater harm of automobile collision, personal injury, or property damage. Although tendered instruction was incomplete, it correctly covered general confines of necessity defense. Ct. adopted following requirements to be incorporated into tendered instruction as prerequisites in establishing necessity defense: (1) act charged as criminal must have been done to prevent significant evil; (2) there must have been no adequate alternative to commission of act; (3) harm caused by act must not be disproportionate to harm avoided; (4) accused must entertain good-faith belief that act was necessary to prevent greater harm; (5) such belief must be objectively reasonable under all circumstances; & (6) accused must not have substantially contributed to creation of emergency. Held, conviction reversed & remanded.

**RELATED CASES:** Belton, 6 N.E.3d 1043 (Ind. Ct. App. 2014) (in trial for driving while suspended, State failed to disprove beyond reasonable doubt defense of necessity because its claim that D should have pulled off road into gas station or parking lot because emergency had abated was based on speculation; State presented no evidence that in 7 blocks D drove, there was a place for her to pull off road); Patton, App., 760 N.E.2d 672 (In carrying handgun without license prosecution, D was entitled to jury instruction regarding necessity); Judge et al., App., 659 N.E.2d 608 (necessity defense unavailable to excuse crimes of criminal trespass & obstructing traffic committed by abortion protestors who interfered with constitutional right of regulated abortion).; Gilbert, App., 369 N.E.2d 650 (statutory provision concerning habitual offender's operation of motor vehicle in extreme emergency to save, life, limb or property is addressed to Tr. Ct.'s sentencing function).

# L. DEFENSES

## L.9. Miscellaneous Defenses

### L.9.b. Impossibility (IC 35-41-5-1(b))

**TITLE:** King v. State
**INDEX NO.:** L.9.b.
**CITE:** (10/31/1984), Ind. App. 1984, 469 N.E.2d 1201
**SUBJECT:** Impossibility - buying stolen goods not stolen; reverse sting
**HOLDING:** Evidence was sufficient to support D's conviction for attempting to receive stolen property (RSP) where undercover officer told D items were "a little hot," despite fact that items were not stolen. See State v. Gillespie, App., 428 N.E.2d 1338. Here, D contends verdict was contrary to law because items received as "stolen property" were not stolen. Ct. notes Ind. Code 35-43-4-2(b) (attempt statute) rejects defense of impossibility. Fact that items were not actually stolen is unimportant as long as jury found D believed them to be stolen. D's purchase of items constituted substantial step toward commission of crime RSP. Ct. rejects dissent's argument that decision constitutes "a long step-down road to thought control." Attempt statute requires proof of both intent & conduct which constitutes substantial step toward commission of crime. Person's intent & conduct are more reliable indication of culpability than hazy distinction between factual & legal impossibility, as legislature recognized by rejecting impossibility defense in Ind. Code 35-41-5-1(b). Held, conviction affirmed. Conover DISSENTS. It was legally impossible for D to commit crime. Legislature intended to exclude only factual impossibility

# L. DEFENSES

## L.9. Miscellaneous Defenses

### L.9.c. Intervening Causation

**TITLE:** Cannon v. State
**INDEX NO.:** L.9.c.
**CITE:** (03/09/2020), Ind. Ct. App. 2020, 142 N.E.3d 1039
**SUBJECT:** Failure to wear seatbelt was not an intervening cause in criminal recklessness case
**HOLDING:** In car accident caused by Defendant's aggressive driving which resulted in death and serious bodily injury to passengers in another vehicle, the failure of those passengers to wear seat belts was not an intervening cause of their death; therefore, evidence was sufficient to support Defendant's criminal recklessness convictions. An accident reconstructionist stated that had passengers been wearing seat belts they would have survived the accident. Defendant argued the passengers' failure to wear seat belts was an intervening cause that broke the casual connection between his actions and the victim's injuries. The Court of Appeals found it is clearly foreseeable that an automobile passenger might fail to wear a seat belt and therefore failure to do so was not an intervening cause of a passenger/decedent's injuries breaking the chain of causation.

**TITLE:** Green v. State
**INDEX NO.:** L.9.c.
**CITE:** (05/22/1995), Ind. App. 1st Dist., 650 N.E.2d 307
**SUBJECT:** Reckless homicide - no intervening cause instruction for failure to wear seatbelt
**HOLDING:** Where there was no evidence to support D's tendered instruction on intervening, superseding causation, Tr. Ct. did not err in refusing it. In reckless homicide prosecution, D argued that victims' failure to wear their seatbelts was intervening, superseding cause relieving him of criminal liability. D tendered the following instruction: An intervening cause is an independent force that breaks the causal connection between the actions and/or omissions of the D & the injury. Ct. held that to support this theory of defense, intervening cause claimed must have been unforeseeable. It is clearly foreseeable that passenger in car might not wear seatbelt. Therefore, failure of victim to wear seatbelt cannot constitute intervening, superseding cause relieving D from criminal liability for reckless homicide. Warner v. State, Ind. App., 577 N.E.2d 267. Held, judgment affirmed.

**TITLE:** Smith v. State
**INDEX NO.:** L.9.c.
**CITE:** (04/02/2002), Ind. 2002, 765 N.E.2d 578
**SUBJECT:** Judicial estoppel doctrine not applicable where parties are not identical
**HOLDING:** Principle of judicial estoppel based on State's inconsistent position in earlier case does not apply against State in criminal case where parties to the two actions are not same. Purpose of judicial estoppel is to protect integrity of judicial process rather than to protect litigants from allegedly improper conduct by their adversaries. Wabash Grain, Inc. v. Smith, 700 N.E.2d 234 (Ind. Ct. App. 1998). Here, in murder prosecution, State had previously accepted its key witness's guilty plea under Ind. Code 35-44-3-2, which has been interpreted to apply to people who did not actively participate in crime itself, but who assisted criminal after he or she committed a crime. Ct. held that State was not judicially estopped from seeking accomplice liability instruction in D's trial even though it agreed to guilty plea from its key witness on a theory of facts that was allegedly inconsistent with D's being an accomplice to killing. Held, judgment affirmed.

**RELATED CASES:** T.S., 32 N.E.3d 780 (Ind. Ct. App. 2015) (rationale for not applying judicial estoppel against the State in criminal proceedings applies equally in the context of juvenile-delinquency proceedings); Slade, 942 N.E. 2d 115 (Ind. Ct. App. 2011) (judicial estoppel doctrine did not prevent State from arguing that D was required to execute a minimum of twenty years of his sentence even though that position is allegedly inconsistent with dropping firearm sentence enhancement allegation, which operates independently of Indiana's sentencing scheme).

**TITLE:** Spencer v. State
**INDEX NO.:** L.9.c.
**CITE:** (01/18/1996), Ind. App. 4th Dist., 600 N.E.2d 359
**SUBJECT:** Voluntary manslaughter - no intervening cause
**HOLDING:** Evidence was sufficient to support voluntary manslaughter conviction, where evidence showed that D's beating, not intervening cause, was responsible for victim's death. Following hospitalization, victim was placed on life support system, & remained alive for seven days following injuries which D inflicted upon him. Due to poor prognosis, victim's family & physicians elected to remove him from artificial means of life support. D argued that he could not be held responsible for victim's ultimate death because of this intervening cause. However, evidence showed that cause of death was blunt force injuries to head, face, & neck, not removal of life support. D put in motion series of events which ultimately ended in victim's death, thereby contributing mediately or immediately to death. Held, conviction affirmed.

**RELATERD CASES:** Ewing, 719 N.E.2d 1221 (where life support is removed because victim had suffered irreversible cessation of all functions of his entire brain, removal of life support is not intervening cause that relieves killer from inexorable consequences of his or her actions); Wooley, 716 N.E.2d 919 (no showing of overwhelming evidence of extraordinary intervening cause sufficient to break chain of criminal responsibility); Carrigg, App., 696 N.E.2d 392 (automobile accident caused victim's death, & there was no intervening cause).

# L. DEFENSES

## L.9. Miscellaneous Defenses

### L.9.d. Others

**TITLE:** Balttert v. State
**INDEX NO.:** L.9.d.
**CITE:** (06/15/2022), Ind. Ct. App., 190 N.E.3d 417
**SUBJECT:** Exclusion of defense under Religious Freedom Restoration Act affirmed - no substantial burden on exercise of religion
**HOLDING:** Defendant was charged with multiple felonies based on allegations of battery and strangulation against his children. Defendant claimed he must be permitted to present his defense to the jury under Indiana's Religious Freedom Restoration Act (RFRA) because his firmly held religious beliefs command that he discipline his children with corporal punishment as he sees fit, including punching, and choking them. The Court of Appeals agreed with the trial court granting the State's Motion in Limine to exclude the RFRA defense because the State had a compelling governmental interest in protecting the children from physical abuse and prosecution of Defendant was the least restrictive means of furthering that interest. Therefore, not permitting the RFRA defense to the jury will not substantially burden Defendant's exercise of religion.

**TITLE:** Terpstra v. State
**INDEX NO.:** L.9.d.
**CITE:** (4th Dist. 10/20/88), Ind. App., 529 N.E.2d 839
**SUBJECT:** Religious defense - not available for positive act, knowingly done
**HOLDING:** D's conviction for violating driver & motor vehicle licensing statutes did not abridge his free exercise of religion. D was charged with (1) failure to display vehicle registration (2) failure to display license plate; (3) display of false license plate; & (4) failure to have driver's license. At trial, D admitted these charges, but argued that, under his religious beliefs, complying with such licensing & registration constituted forbidden contracts with a foreign sovereign. D argued at trial & on appeal that forcing him to comply with these statutes abridged his free exercise of religion, in violation of U.S. & IN constitutions. D *cites* Thomas v. Review Bd. of Ind. Employment Sec. (1981), 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624, involving denial of unemployment benefits to individual who left job for religious reasons. However, D's case does not involve denial of license or registration. Case more nearly parallels Reynolds v. US (1878), 98 U.S. 145, 25 L.Ed. 2d 244 & progeny. Reynolds claimed religious beliefs requiring practice of polygamy constituted valid defense to bigamy charge. U.S. S.Ct. held that, when offense consists of positive act knowingly done, D cannot escape punishment because he/she religiously believed that law which he/she broke should not have been enacted. In Warren v. US (CA10 1948), 177 F.2d 596, Ct. distinguished between interference with religious beliefs, which state may not do, & interference with religious practices, which state may do in furtherance of compelling state interest. Statutes in question here promote compelling state interest of highway safety. See Ruge v. Kovach 467 N.E.2d 673. Held, conviction affirmed.

**TITLE:** Tyms-Bey v. State
**INDEX NO.:** L.9.d.
**CITE:** (1/13/2017), 69 N.E.3d 488 (Ind. Ct. App 2017)
**SUBJECT:** RFRA defense not available to tax protesters
**HOLDING:** The prohibition in the Indiana Religious Freedom Restoration Act ("RFRA") against substantially burdening a person's exercise of religion does not apply to religious grounds for refusing to pay taxes; the government has a compelling interest in the collection of taxes through a uniform and mandatory tax system.

The Indiana Department of Revenue determined that Defendant falsely reported his income and owed the State $1,042.82. After Defendant failed to amend his return or pay the balance due, the State charged him with three counts of Class D felony tax evasion. Defendant filed a notice of defense of religious freedom under RFRA. Ind. Code § 34-13-9-8. The State filed a motion to strike the defense, arguing that the religious freedom defense is not available as a defense to failure to pay taxes. The trial court granted the motion to strike, finding, as a matter of law, that the RFRA defense was not available under these circumstances.

RFRA provides that the government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government shows that application of the burden furthers a compelling government interest and is the least restrictive means of furthering that compelling interest. Ind. Code § 34-13-9-8. Here, the State has a compelling interest in the collection of taxes and in a uniform and mandatory tax system. See United States v. Lee, 455 U.S. 252, 258-61 (1982). "[T]he broad public interest in maintaining a sound tax system is of such high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." Id. at 260. Thus, Defendant has no right to use a RFRA defense to the charges of tax evasion, and, accordingly, the trial court did not err in granting the State's motion to strike the defense. Held, judgment affirmed.

Judge Najam, dissenting: In relying on United States v. Lee, 455 U.S. 252 (1982), the majority inappropriately relies on a case that interprets a person's religious rights within the context of the First Amendment instead of within the broader rights afforded by both the State and federal RFRA statutes. Cf. City of Boerne v. Flores, 521 U.S. 507, 535 (1997). As with its federal counterpart, Indiana's RFRA is "an obvious effort" by the General Assembly "to effect a complete separation from First Amendment case law." Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2761-62 (2014). And like Burwell, Indiana's RFRA requires a fact-sensitive, "particularized" assessment of the claimed religious exemption. Id. at 2779-80. Also, the legislature reserved to itself the right to exempt statutes from application of RFRA, and it did not exempt tax evasion. Further, the majority denies Defendant's right to a jury trial on an affirmative defense, guaranteed under Article I, Section 19 of the Indiana Constitution. Therefore, the trial court erred in finding that the RFRA defense was unavailable to Defendant as a matter of law. Defendant may not ultimately prevail on his RFRA defense, but he is entitled to his day in court on it.