CHAPTER 1
RIGHTS OF ACCUSED
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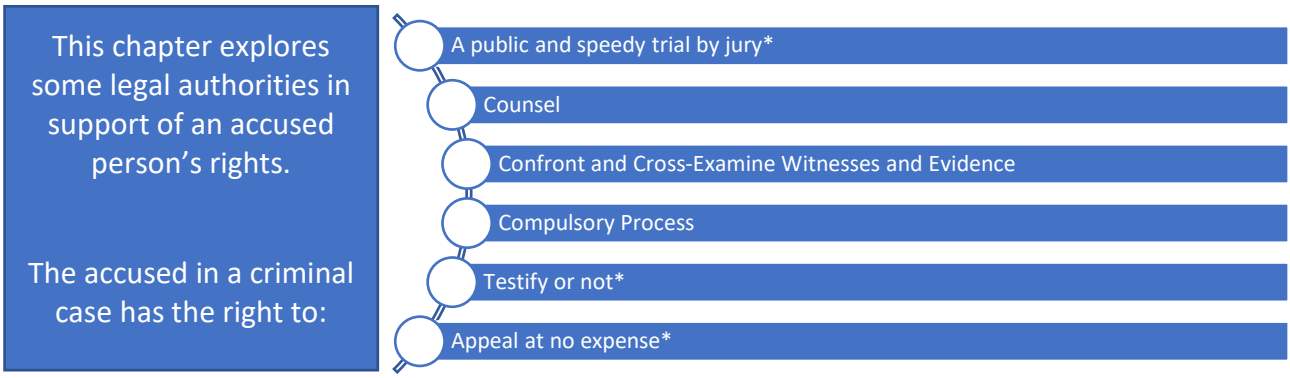
I. CONSTITUTIONAL RIGHTS

A. OVERVIEW



**Generally, must be personally waived by the accused.*

B. PUBLIC TRIAL

1. Defendant's right to a public trial & limitations on right

Accused has the right to a public trial. See Article I, §13, Constitution of Indiana, 6th Amendment, U.S. Constitution.

> Williams v. State, 690 N.E.2d 162 (Ind. 1997) (right to public trial under Indiana Constitution has always been subject to same analysis as under the U.S. Constitution).

Criminal proceedings are presumptively open to attendance by the general public. Ind. Code § 5-14-2-2. No court may order the exclusion of the general public from any criminal proceeding, or part of a criminal proceeding, unless it first affords the parties and the general public a meaningful opportunity to be heard on the issue of any proposed exclusion. Ind. Code § 5-14-2-3. Further, before closing a courtroom, the trial court must consider reasonable alternatives *sua sponte*, even if none are suggested by the defendant.

> Presley v. Georgia, 130 S.Ct. 721 (2010) (trial court cannot close the courtroom to the public because of a general concern that prospective jurors sitting in the courtroom with members of the public might be polluted by exposure to comments from members of the public).

Right to public trial is limited by interests of administration of justice, such as defendant's right to fair trial or government's interest in inhibiting disclosure of sensitive information. Waller v. Georgia, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, 81 L.Ed.2d 31 (1984); Kendrick v. State, 661 N.E.2d 1242 (Ind. Ct. App. 1996).

2. Closing a Proceeding

Before a court chooses to close a proceeding to the public, the court should engage in the following analysis: (1) party seeking to close hearing must advance overriding interest likely

to be prejudicial; (2) closure must be no broader than necessary to protect that interest; (3) court must consider reasonable alternatives to closing proceeding; and (4) court must make adequate findings to support closure. Kendrick v. State, 661 N.E.2d 1232 (Ind. Ct. App. 1996).

(a) Hearing required before closure

No court may order the exclusion of the general public from any criminal proceedings, or part of a criminal proceeding, unless it first affords the parties and the general public a meaningful opportunity to be heard on the issue of any proposed exclusion. Ind. Code § 5-14-2-3.

Objection to closure of public trial strongly supports necessity of precedent hearing before ordering closure, but where holding hearing will vitiate critical interests of public, courts, prosecuting party and constitutional rights of accused, closure without hearing at which public and press are heard to argue against closure may be consistent with right to access. State ex rel. Post-Tribune Pub. Co. v. Porter Superior Court, 412 N.E.2d 748 (Ind. 1980). See also Ind. Code § 5-14-2-4 to 6.

(b) Limited Closure

The court must, upon granting a motion to close the courtroom, ensure that any exclusion must: (1) extend no further than the circumstances reasonably require; and (2) be temporary. Ind. Code § 5-14-2-6(e).

(c) Must make specific showings to close courtroom

Court must make specific findings of fact and conclusions of law to support its ruling on any such motion or proposed order on the record. Ind. Code § 5-14-2-6(g).

(1) No showing if witness safety at issue

No showing need be made where safety of witnesses is at stake. Kendrick v. State, 661 N.E.2d 1242 (Ind. Ct. App. 1996).

(2) Specific findings are required for additional security measures

In Williams v. State, 690 N.E.2d 162, 169-70 (Ind. 1997), the Indiana Supreme Court recognized that the adoption of security measures, such as the requirement of some form of identification, might affect the openness of a trial. As a result, the court adopted a prospective rule under the supervisory powers of the court which requires a trial court to make specific findings to justify any security measures taken that are "beyond what is customarily permitted that are likely to affect unfettered access by the press and public to the courtroom." In particular, the court stated that the "finding need not be extensive, but must provide the reasons for the action taken, and show that both the burdens and benefits of the action have been considered."

(3) Court's inherent power to exclude

Right to a public trial "does not affect the inherent power of a court to make limited exclusions of witnesses, to relieve overcrowding, to protect the order and decorum of the courtroom, or to exclude those individuals whose presence constitutes a direct threat to the safety of the spectators, parties, or witnesses." Ind. Code § 5-14-2-7.

Hackett v. State, 266 Ind. 103, 360 N.E.2d 1000 (1977) (no violation in excluding public from hearing testimony of single witness during trial where restriction was (1) related to the legitimate purpose of furthering integrity of judicial process; and (2) supported by sufficient record).

Williams v. State, 690 N.E.2d 162 (Ind. 1997) (exclusion of the public from a particular witness's testimony is valid when it seeks to protect a witness fearful of retaliation by those attending the trial).

Long v. State, 121 N.E.2d 1085 (Ind. Ct. App. 2019) (trial court did not err in posting a sign asking that spectators enter or exit during breaks because, as the trial court had explained, "the 'comings and goings' of spectators proved to be 'very distracting' and was 'happening a lot' during testimony on the first day of trial").

(d) Defendant on appeal need not show prejudice

Defendant need not show specific prejudice to obtain a reversal for a violation of the right to a public trial. Kendrick v. State, 661 N.E.2d 1244 (Ind. Ct. App. 1996) (quoting Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984)). Because the loss to both defendant and society from improperly closing courtrooms is intangible, the prejudice of the non-public proceedings is implied. Id.

(e) Defendant needs to show prejudice for IAC claim

Even though violating a defendant's right to public trial is a "structural error," a defendant who raises this within a claim that counsel was ineffective must demonstrate prejudice, either that but for counsel's errors the result of the trial would have been different or that the trial was fundamentally unfair.

Weaver v. Massachusetts, 137 S.Ct. 1899 (2017) (although potential jurors might have behaved differently if defendant's family or the public had been present during jury selection, defendant offered no evidence to suggest a reasonable probability of a different outcome but for counsel's failure to object and failed to show fundamental unfairness).

3. Public and media – no right

The public, press, and other news media do not enjoy defendant's right to a public trial under the 6th Amendment and the Indiana Constitution Art. I, §13.

State ex rel. Post-Tribune Pub. Co. v. Porter Superior Court, 412 N.E.2d 748 (Ind. 1980) (right of public trial is personal to accused and may be waived and does not carry with it further right to trial from which public and press are barred).

Compton v. State, 58 N.E.3d 1006 (Ind. Ct. App. 2015) (defendant was not denied due process when the media was allowed to Tweet live updates of his felony murder trial from the courtroom).

4. Use original action to contest ruling

Any party or member of general public has standing to bring original action. See Ind. Code § 5-14-2-8.

C. SPEEDY TRIAL

Note: For a complete review of the right to a speedy trial, Indiana Criminal Rule § 4, and the Interstate Agreement on Detainers, see IPDC's Pretrial Manual, Chapter 11, and also IPDC, Criminal Rule 4 and the Right to Speedy Trial (2021).

1. Constitutional right

Defendant has a right to a speedy trial under the Sixth Amendment and Article 1, § 12, although neither prescribes a specific time limit for trial. Klopfer v. North Carolina, 386 U.S. 213 (1967); Burress v. State, 363 N.E.2d 1036, 1038 (Ind. Ct. App. 1977).

Balancing test is to be used to determine whether delay violates speedy trial right, considering factors such as: (1) length of the delay; (2) reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972). See also Rivers v. State, 777 N.E.2d 51, 55-57 (Ind. Ct. App. 2002) (applying four-part Barker analysis to Sixth Amendment claim).

Logan v. State, 16 N.E.3d 953 (Ind. 2014) (despite trial court's technical compliance with Indiana Criminal Rule 4(C), defendant's 1,291-day delay that elapsed between State's filing of class C felony child molestation charge against him and beginning of his trial violated his constitutional right to speedy trial).

2. Criminal Rule 4

(a) Defendant in jail

No defendant shall be detained in jail on a charge without trial for a period in aggregate of more than six months from the date the criminal charge is filed or the date of arrest, whichever is later. Indiana Criminal Rule 4(A).

(1) Exceptions

Defendant may be held for longer period where it is caused by defendant's act, defendant moves for continuance, or court congestion or emergency makes timely trial impossible. Indiana Criminal Rule 4(A).

(2) Remedy

Any defendant detained beyond the permissible time shall be released on his own recognizance and may still be held to answer to charges filed against him within the limitations provided for in Indiana Criminal Rule 4(C). Indiana Criminal Rule 4(A).

State ex rel. Bramley v. Tipton Circuit Ct., 835 N.E.2d 479 (Ind. 2005) (pretrial detainee does not waive his right to release pending trial under Indiana Criminal Rule 4(A) by failing to object to a trial date setting outside the 180-day time limit).

(b) On motion for early trial by incarcerated defendant

Defendant in jail may move for an early trial and shall be discharged if not brought to trial within 70 calendar days from the date of such motion (except for above exceptions). Indiana Criminal Rule 4(B).

Crosby v. State, 597 N.E.2d 984, 989 (Ind. Ct. App. 1992) (violation of 70-day time limit is per se violation of Indiana constitution and sole remedy is discharge and dismissal). See also State v. Laslie, 381 N.E.2d 529 (Ind. Ct. App. 1978).

(c) Defendant discharged

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate of more than one year from the date the charge is filed, or the defendant is arrested, whichever is later. Indiana Criminal Rule 4(C).

Lee v. State, 569 N.E.2d 717 (Ind. Ct. App. 1991) (trial only must be commenced before 12-month period is exhausted; where jury was sworn in on last possible day

and trial occurred after 12-month time limit, Indiana Criminal Rule 4 was not violated).

(1) Exceptions

Defendant may be held for a longer period where it is caused by defendant's act, defendant moves for continuance, or court congestion or emergency makes timely trial impossible. Indiana Criminal Rule 4(C).

(2) On motion for early trial by incarcerated defendant

Any defendant held beyond the time limit shall be discharged and charges shall be dismissed. Huffman v. State, 502 N.E.2d 906 (Ind. 1987).

State ex rel. Bishop v. Madison Circuit Court, 690 N.E.2d 1173 (Ind. 1998) (if motion for dismissal is denied, defendant may obtain dismissal by filing petition for a writ of mandamus).

(d) Indiana Criminal Rule 4 is not constitutional guarantee

Practice Pointer: The time limits of Indiana Criminal Rule 4 are not constitutional guarantees and are not coextensive with constitutional provision. Easton v. State, 258 Ind. 204, 206, 280 N.E.2d 307, 308 (1972); Sharpe v. State, 174 Ind. App. 652, 654 n.2, 369 N.E.2d 683, 686 n.2 (1977). Therefore, there may be situations in which a defendant can argue for the protection under the constitutional right to speedy trial even when Indiana Criminal Rule 4 has not been violated. See, e.g., Logan v. State, 16 N.E.3d 953 (Ind. 2014).

In addition, a defendant who waives her rights under Indiana Criminal Rule 4 does not necessarily waive the constitutional right to a speedy trial. Lockert v. State, 711 N.E.2d 88, 90-91 (Ind. Ct. App. 1999).

On the other hand, a violation of the Indiana Criminal Rule 4-time limits is a per se violation of the constitutional right to a speedy trial. Fossey v. State, 258 N.E.2d 616, 619 (Ind. 1970).

(e) Computing time when charge is dismissed and refiled

When the charge is dismissed and later refiled, time limits begin to run when original charge is filed, are tolled when charge is dismissed, and resume running when defendant is arrested on refiled charge. Bentley v. State, 462 N.E.2d 58 (Ind. 1984).

Fink v. State, 469 N.E.2d 466 (Ind. Ct. App. 1984) (prosecutor cannot avoid tolling of time limit by dismissing original charge and refiling related but different charge).

(f) Extension due to unavailable evidence

The time limits of Indiana Criminal Rule 4 may be extended for up to 90 days if the prosecution can show that there is evidence for prosecution that is unavailable, prosecution has made reasonable effort to obtain it, and there are just grounds to believe evidence can be obtained within 90 days. Indiana Criminal Rule 4(D). The 90-day Indiana Criminal Rule 4(D) extension begins to run from the end of the Indiana Criminal Rule 4(B) 70-day period, not the day the trial court grants the State's extension request. Littrell v. State, 15 N.E.3d 646 (Ind. Ct. App. 2014).

Evidence includes expected testimony of unavailable witness, Indiana Criminal Rule 4(D), and evidence need not be unique or essential to prosecution's case. Smith v. State, 502 N.E.2d 485, 488 (Ind. 1985).

Griffin v. State, 695 N.E.2d 1010 (Ind. Ct. App. 1998) (when unavailable evidence is particular witness, reasonable effort requirement of rule is satisfied where State is not at fault for absence of witness).

Chambers v. State, 848 N.E.2d 298 (Ind. Ct. App. 2006) (trial court abused its discretion when it granted State a continuance pursuant to Indiana Criminal Rule 4(D), because State failed to show there was evidence that it needed that it could not then be had and that it made a reasonable effort to procure).

Wilhelmus v. State, 824 N.E.2d 405 (Ind. Ct. App. 2005) (given absence of key witnesses, trial court did not abuse discretion in granting State's request for 14-day continuance).

(g) Extension due to court congestion

If motion for extension is based on court congestion, prosecutor must make statement in a motion for continuance not less than 10 days prior to trial date. Indiana Criminal Rule 4(A). Trial court must give preference to criminal cases over pending civil cases before making determination that the court calendar is congested. Gill v. State, 267 Ind. 160, 165, 368 N.E.2d 1159, 1161-62 (1977).

Loyd v. State, 272 Ind. 404, 409-410398 N.E.2d 1260, 1265-66 (1980) (congestion may be caused by unavailability of essential personnel, including judge and prosecutor).

Upon appellate review, trial court's finding of court congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. Clark v. State, 659 N.E.2d 548 (Ind. 1995). However, Defendant may challenge finding, either at time of his Motion for Discharge or upon Motion to Correct Error, by demonstrating that, at time trial court made decision to postpone trial, finding of "congestion" was factually or legally inaccurate. Id. Upon incarcerated defendant's request for speedy trial, Indiana Criminal Rule 4(B) requires particularized priority treatment. Id.

Logan v. State, 16 N.E.3d 953 (Ind. 2014) (the "particularized priority treatment" requirement set forth in Clark does not mean that the trial court must always prioritize an Indiana Criminal Rule 4(B) deadline over a Indiana Criminal Rule 4(C) deadline should the two conflict; nor does it imply that the trial court must only prioritize a Indiana Criminal Rule 4(B) case when a Indiana Criminal Rule 4(C) deadline is not imminent. It merely requires the trial court, when setting his or her calendar, to make certain that a defendant who has filed an Indiana Criminal Rule 4(B) motion is tried within 70 calendar days).

(h) Extension due to defendant

If defendant requests continuance, time limits are extended by length of time requested by defendant. If delay is caused by defendant's act, time limit is extended by amount of resulting delay. Indiana Criminal Rule 4(F).

If a defendant's attorney requests a continuance, defendant is chargeable with delay even if defendant is not personally aware of the request. Easton v. State, 258 Ind. 204, 206, 280 N.E.2d 307, 308 (1972).

However, if a defendant moves for continuance because of prosecutor's fault, such as failure of prosecution witness to appear for deposition, the ensuing delay is not chargeable to defendant. Biggs v. State, 546 N.E.2d 1271 (Ind. Ct. App. 1989). See also Marshall v. State, 759 N.E.2d 655 (Ind. Ct. App. 2001).

Burdine v. State, 515 N.E.2d 1085, 1091 (Ind. 1987), *superseded on other grounds* Ind. Evidence Rule 401 (1994) (defendant is chargeable with delay if he enters guilty plea in accordance with plea agreement and then withdraws plea).

Delay due to defendant's interlocutory appeal is chargeable to defendant. Vance v. State, 620 N.E.2d 687, 689 (Ind. 1993).

But see Haston v. State, 695 N.E.2d 1042 (Ind. Ct. App. 1998) (only time attributable to defendant for speedy trial purposes was time from when trial court certified suppression issue for interlocutory appeal until date defendant's opportunity to seek appellate review expired by operation of law; here, because defendant failed to petition appellate court to entertain jurisdiction within thirty days, only delay attributable to defendant was thirty days and not remaining three years it took State to bring defendant to trial).

Where a defendant moves for a continuance, a co-defendant may also be charged with the resulting delay unless the co-defendant objects to the continuance and moves for severance. Nicholson v. State, 768 N.E.2d 1043, 1047 (Ind. Ct. App. 2002).

If defendant causes any delay during last 30 days of any period of time, State may petition trial court for an additional 30-day extension. Indiana Criminal Rule 4(F).

(i) Waiver

The right to speedy trial is not self-executing, and defendant may waive right by failing to invoke right with motion for discharge when appropriate. Roseborough v. State, 625 N.E.2d 1223, 1224-5 (Ind. 1993).

D. RIGHT TO COUNSEL

Defendant has a right to counsel at every critical stage of a criminal proceeding. United States v. Wade, 388 U.S. 218 (1967); Manley v. State, 410 N.E.2d 1338 (Ind. Ct. App. 1980). Proceeding is critical if incrimination may occur or an opportunity for effective defense may be seized or foregone. Id. at 1342.

1. Indigent litigant's right to counsel

An indigent litigant has a 14th Amendment due process right to appointed counsel only when he may be deprived of his physical liberty. There is a presumption against the appointment of counsel when the litigant's physical liberty is not at stake. Lassiter v. Dept. of Social Services, 452 U.S. 18, 101 S. Ct. 2153 (1981).

See generally *IPDC Pretrial Manual,* Chapter 16, Right to Counsel.

2. Only relinquished by knowing, voluntary, and intelligent waiver

Right to counsel can only be relinquished by knowing, voluntary, and intelligent waivers. Dowell v. State, 557 N.E.2d 1063, 1065-66 (Ind. Ct. App. 1990).

Trial courts need not necessarily appoint counsel for every defendant who fails to implement an intention to employ counsel, nor need they unreasonably indulge a defendant who repeatedly fails to cooperate with appointed counsel, but trial courts should at a minimum reasonably inform such defendants of the dangers and disadvantages of proceeding without counsel. Without a clear record of such warnings, it cannot be said that defendant voluntarily waived his right to counsel. Poynter v. State, 749 N.E.2d 1122 (Ind. 2001).

(a) Failure to appear does not waive right to counsel

Defendant does not waive his right to counsel by failing to appear at trial. Hawkins v. State, 982 N.E.2d 997 (Ind. 2013); Carr v. State, 591 N.E.2d 640, 642 (Ind. Ct. App. 1992). However, a defendant's intentional and inexcusable absence from trial can serve as a knowing, voluntary, and intelligent waiver of the right to counsel. Jackson v. State,

868 N.E.2d 494 (Ind. 2007).

(b) Inability to understand proceedings

Inability to understand English may result in denial of 6th Amendment right to counsel.

Martinez v. State, 451 N.E.2d 39 (Ind. 1983) (Defendant not harmed by failure of the court to provide an interpreter for the defendant where defendant did not request the use of an interpreter before trial).

Drake v. State, 895 N.E.2d 389 (Ind. Ct. App. 2008) (sparse record, coupled with defendant's questionable mental capacity, leads to conclusion that trial court should have inquired further as to defendant's background, education and abilities).

3. Defendant should be warned of dangers of self-representation

Defendant who asserts his right to self-representation should be warned of the dangers and pitfalls of self-representation. Atkinson v. State, 810 N.E.2d 1190, 1191 (Ind. Ct. App. 2004); Poynter v. State, 749 N.E.2d 1122, 1127 (Ind. 2001). Failure to do so weighs heavily against a finding of a knowing and intelligent waiver of counsel. Kowalskey v. State, 42 N.E.3d97 (Ind. Ct. App. 2015). Thus, a waiver of counsel is invalid where trial court did not advise defendant of dangers and disadvantages of self-representation. Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013).

Wilson v. State, 94 N.E.3d 312 (Ind. Ct. App. 2018) (appellate counsel was ineffective for failing to argue that defendant, who proceeded pro se, was not proerply advised of the dangers and disadvantages of self-representation as required).

When reviewing a trial court's decision to allow self-representation, factors to be considered are: (1) the court's inquiry into defendant's decision; (2) other evidence establishing whether defendant understood the dangers and pitfalls of self-representation; (3) defendant's background and experience; and (4) the context in which the defendant proceeded pro se. Henson v. State, 798 N.E.2d 540 (Ind. Ct. App. 2003).

Hopper v. State, 957 N.E.2d 613 (Ind. 2011), *on rehearing* (when defendant pleads guilty *pro se*, there is no mandatory advisement regarding pitfalls of self-representation; rather, this will only be considered as one factor in considering voluntariness of waiver).

E. RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES

1. Confrontation

See *IPDC Evidence Manual*.

2. Cross-examination

See *IPDC Evidence Manual*.

F. RIGHT TO TESTIFY ON OWN BEHALF

1. U.S. Constitutional right to testify

Criminal defendants have constitutional right to testify on their own behalf - rooted in the Fifth Amendment privilege - and right to present evidence on their behalf. Rock v. Arkansas, 483 U.S. 44 (1987).

Correll v. State, 639 N.E.2d 677, 680 (Ind. Ct. App. 1994), quoting United States v. Dunnigan, 504 U.S. 940, 113 S.Ct. 1111, 1117, 122 L.Ed.2d 445 (1993) (defendant's

right to testify on his own behalf in criminal case is "a right implicit in the Constitution.").

(a) States may not per se exclude testimony

State rules may not arbitrarily exclude all or part of defendant's testimony on a per se basis. Restrictions on use of testimony must be related to, and proportionate to, ends to be served by such restrictions.

Rock v. Arkansas, *supra*, 107 S.Ct. at 2711 (blanket exclusion of all hypnotically-enhanced testimony violates defendant's right to testify).

Book v. State, 880 N.E.2d 1240 (Ind. Ct. App. 2008) (while judge has power to set order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand; under certain circumstances, such a practice could result in violation of defendant's Fifth Amendment right to remain silent and right to due process).

Wilson v. State, 865 N.E.2d 1024 (Ind. Ct. App. 2007) (trial court violated defendant's due process rights by denying him the right to present evidence at his sentencing hearing because of his refusal to cooperate with probation officer assigned to prepare his PSI report).

2. Indiana Constitution – right to be heard

Article I, § 13 of the Indiana Constitution provides in part: "In all criminal prosecutions, the accused shall have the right…to be heard by himself and counsel…"

This language places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charge. Campbell v. State, 622 N.E.2d 495, 498 (Ind. 1993).

(a) Denial of right is fundamental error

Denial of right to be heard is fundamental error, which if not rectified constitutes denial of due process. Winkelman v. State, 498 N.E.2d 99, 101 (Ind. Ct. App. 1986).

Winkelman v. State, *supra* (pro se defendants did not knowingly and intelligently waive right to be heard - at point where they were to present their defense judge said they would have opportunity to make statement to jury during final argument, but judge failed to explain that they could testify as witnesses in their own behalf);

The trial court has an affirmative duty to ensure that a pro se defendant knowingly and intelligently waived his right to testify at trial. Phillips v. State, 673 N.E.2d 1200 (Ind. 2006). Such duty does not exist where defendant is represented by counsel. Id.

Fonner v. State, 955 N.E.2d 24 (Ind. Ct. App. 2011) (error in failing to explain to defendant that he had right to offer his own testimony at trial was harmless because defendant did not indicate what testimony he would have offered at trial had he received the proper advisement or what evidence was not rendered admissible because he did not know he could testify).

Correll v. State, 639 N.E.2d 677 (Ind. Ct. App. 1994) (quoting U.S. v. Curry, 977 F.2d 1042, 1058 (7th Cir. 1992), *cert. denied* (court not required under Due Process Clause to specifically determine whether defendant knowingly and intelligently waived right to testify at trial).

Underwood v. Clark, 939 F.2d 473 (7th Cir. 1991) (mere allegation that counsel would not let defendant testify was insufficient to require hearing or action on claim

of denial of right to testify in own defense; some additional substantiation necessary, such as affidavit from counsel who allegedly forbade defendant to testify).

3. Practice Tips – should your client testify?

One of the biggest decisions facing any defendant or defense attorney is whether the client will testify at trial. The following checklists may help in making the decision. See Chapter 12, "False Statements and Perjurious Testimony," for ways to handle a client who insists upon testifying falsely.

(a) Checklist in determining whether defendant should testify

(1) Will defendant's testimony support defense theory?

(2) Credibility of defendant's testimony?

(3) Will he support or contradict stronger witnesses?

(4) Will defendant's testimony reveal information not covered by other witnesses? (Can defendant's testimony be restricted to statement, "Hey, I'm honest.")

(5) Is prior record of defendant usable for impeachment? Ind. R. Evid. 609 offenses.

(6) Strength of prosecution's case? (If case weak, may be harmful to expose him to cross-examination).

(7) Will incriminating evidence become admissible in rebuttal because of defendant's testimony?

(8) To what extent are there alternative methods and witnesses who can present necessary impression and evidence?

(b) Factors that defendant should testify

(1) Most jurors will expect to hear from defendant.

(2) Jury may be sophisticated and may assume defendant has record.

(3) Defendant may be only person who can refute State's allegations.

(c) Factors that defendant should not testify unless absolutely necessary

(1) He will weaken his defense.

(2) Jury will judge his testimony differently and will probably convict him if they do not believe him regardless of strength of State's case.

(3) He will not hold up under cross-examination.

(4) He may commit perjury; lawyer is then in a bind.

G. RIGHT TO BE PRESENT AT TRIAL PROCEEDINGS

1. Presence required at every stage where jury present

Right to be present at trial is among the most basic and fundamental of all constitutional rights. Defendant has right to be present at every stage of a proceeding where the jury's presence is required. Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136 (1892); Ridley v. State, 690 N.E.2d 177, 180 (Ind.1997); and Indiana Constitution, Art. 1 §13.

2. Standard for right to be present

Standard to apply is whether defendant's presence has a reasonably substantial relationship to the opportunity to defend herself. Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

In order for there to be a violation of defendant's right to be present under Sixth and Fourteenth Amendments of U.S. Constitution and Art. I, §13 of the Indiana Constitution, absences must be related to the presentation of witnesses or evidence - in other words, substantive proceedings. Godby v. State, 736 N.E.2d 252, 257 (Ind. 2000). See also United States v. Gagnon, 470 U.S. 522, 527 (1985) (no violation where no indication that defendant could have done anything at the hearing or gained anything by attending).

(a) Presumption of defendant's presence

In Indiana, the defendant is presumed to have been present at all times when his presence in court is required unless there is evidence to the contrary shown by record. Brown v. State, 445 N.E. 2d 82, 83 (Ind. 1983).

(b) Defendant's burden to show absence during critical stage

Defendant has initial burden of showing he was absent during "critical stage." Marsillett v. State, 495 N.E.2d 699, 709 (Ind. 1986).

3. Specific proceedings where presence required

Indiana and federal case law holds that a defendant has right to be present at following proceedings:

(1) voir dire
(2) opening statement
(3) preliminary instructions
(4) while testimony being taken
(5) preliminary questions as to competency
(6) final argument
(7) final instructions
(8) ex parte communications during jury deliberations
(9) replay of trial testimony
(10) return of verdict
(11) habitual offender phase
(12) polling jury and discharge of jury
(13) pronouncement of sentence

(a) Voir dire

Defendants have the right to be present when the jury is selected. Right may be waived. Green v. State, 470 N.E.2d 333 (Ind. 1984).

(b) Opening statement

Defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). See also Ridley v. State, 690 N.E.2d 177 (Ind. 1997).

(c) Preliminary instructions

After the jury has been sworn the court shall instruct in writing as to issues for trial, burden of proof, credibility of witnesses, and manner of weighing testimony to be received. See Criminal Rule 8(F).

If the jury must be present, then the defendant has the right to be present during a procedure or proceeding. Brown v. State, 445 N.E.2d 82, 83 (Ind. 1983); Simmons v. State, 717 N.E.2d 635 (Ind. Ct. App. 1999).

(d) While testimony being taken

The importance of a defendant's presence at time evidence is taken is at the core of the due process right. Bedgood v. State, 477 N.E.2d 869 (Ind. 1985).

(1) Unexcused late arrival waives right to be present

Unexcused late arrival will waive right to be present while testimony is being taken. Bedgood v. State, 477 N.E.2d 869 (Ind. 1985).

Must be shown that "defendant was aware of his trial date and time, and it may also be necessary to instruct the jury that the defendant's absence was not evidence of guilt and that he had the right to give up the rights to confront and aid in cross-examination of witnesses." Seniours v. State, 634 N.E.2d 803 (Ind. Ct. App. 1994).

(e) Competency

Preliminary questions of competency before the trial court may be done in defendant's absence. Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

Practice Pointer: The Supreme Court noted that defendant's rights were not violated in Stincer because he had the opportunity at trial for full and effective cross-examination of the two witnesses who testified at competency hearing in his absence. Kentucky v. Stincer, 482 U.S. 730, 746 (1987). If witnesses had not testified at trial (and therefore been unavailable for cross-examination), absence of defendant at competency hearing may violate his constitutional rights. The Court also noted that a competency hearing where a witness is asked to discuss upcoming substantive testimony might require the defendant's presence. Id.

(f) State's continuance motion

Defendant must be present when the court grants the State's motion for continuance. Chupp v. State, 509 N.E.2d 835 (Ind. 1987).

(g) Final argument

Defendant's presence is required because it bears a substantial relationship to her ability to defend. Ridley v. State, 690 N.E.2d 177 (Ind. 1997).

(h) Final instructions

Defendant must be present when jury instructed, or when instructions are repeated, or additional instructions given.

Miles v. State, 222 Ind. 312, 53 N.E.2d 779 (1944) (where jury instructions are re-read in the absence of the defendant, harm is presumed even where defendant's counsel is present).

(i) Ex parte communications during jury deliberations

Rebuttable presumption of prejudice against the defendant exists where the defendant is not present during a court or court's staff member's response to questions from the jury. Driver v. State, 594 N.E.2d 488 (Ind. Ct. App. 1992).

Note: Defendant carries the burden to present substance of communications on appeal.

Marsillett v. State, 495 N.E.2d 699, 709 (Ind. 1986) (normally, judges are required to inform the parties that questions have been proffered by the jury; however, where the questions are refused an answer, the error is harmless).

(1) Showing of prejudice required

State may avoid a reversal if it shows that no harm or prejudice resulted from an ex parte communication between the trial court and the jury. Sylvester v. State, 549 N.E.2d 37, 41 (Ind. 1990).

(2) Exception – response to juror questions & questioning juror re: non-disclosure during voir dire

A defendant does not have the right to be present during a hearing in which the judge and counsel consider the response that should be made to questions received from the jury during deliberations, and when judge and counsel question a juror about a failure to disclose knowing members of the victim's family. Godby v. State, 736 N.E.2d 252, 257-58 (Ind. 2000).

(j) Replay of trial testimony

Ind. Code § 34-36-1-6 provides defendant the right to be present when the jury reviews evidence, and review is only permitted in open court. Replaying any portion of the trial outside of the presence of the defendant creates a rebuttable presumption of prejudice against the defendant. State v. Harden, 496 N.E.2d 35 (Ind. 1986). Defendant, not his counsel, must waive the defendant's right to be present. Morrison v. State, 609 N.E.2d 1155 (Ind. Ct. App. 1993).

Powell v. State, 644 N.E.2d 855 (Ind. 1994) (reversible error to allow jury to review tapes of conversation between an informant and defendant alone in the jury room after the deliberations had begun).

Williams v. State, 830 N.E.2d 107 (Ind. Ct. App. 2005) (no violation of right to be present where judge denies jury's request for information).

(k) Return of verdict

For reversal, the record must affirmatively indicate that the defendant was not present at the time the jury delivered the verdict. Welsh v. State, 25 N.E. 883 (Ind. 1890).

(l) Polling and discharge of jury

(1) Right to poll jury

Ind. Code § 35-37-2-7 gives defendant right to poll jury.

Defendants are not entitled to poll the jury where they voluntarily are not present at the delivering of the verdict. Dudley v. State, 30 N.E.2d 718 (Ind. 1941).

(2) Presence required at discharge

Defendant's presence is required at discharge. Jenkins v. State, 492 N.E.2d 666, 670 (Ind. 1986).

a. Harmless error if not present at ministerial discharge

When the trial has already effectively been concluded, and the discharge of the jury is merely a ministerial act, the defendant's absence is harmless error.

Jenkins v. State, 492 N.E.2d 666 (Ind. 1986) (judge ended the trial by disqualifying himself, declaring a mistrial, and then dismissing the jury in the defendant's absence, and any error was harmless).

(m) Sentencing

Defendant must be personally present at the time sentence is pronounced. Ind. Code § 35-38-1-4(a). In Gary v. State, 113 N.E.3d 237 (Ind. Ct. App. 2018), in a 2-1 decision, the Court of Appeals found no fundamental error in the defendant being sentenced via video conference without first obtaining a waiver of the right to be present. Justice David, joined by Chief Justice Rush, dissented from the denial of transfer at 116 N.E.3d 455 (Ind. 2019), arguing that defendants have a constitutional right to be physically present when a judge imposes a sentence for a crime.

(1) Waiver

Where defendant knowingly and voluntarily waives right to be present at trial, continuing absence may be considered knowing and voluntary waiver of right to be present at sentencing. Gillespie v. State, 634 N.E.2d 862, 863 (Ind. Ct. App. 1994).

Hawkins v. State, 982 N.E.2d 997 (Ind. 2013) (nothing in record reflected a waiver of defendant's right to be present in person, thus it was improper for trial court to sentence him via video conference).

(2) Juvenile Disposition

The commitment of a delinquent child is not considered a sentence. Jordan v. State, 512 N.E.2d 407, 408 (Ind. 1987). Ind. Admin. Rule 14(B) permits remote participation in juvenile disposition-modification hearings where the parties have agreed or where the court issues a good cause order based on the factors listed in the rule, including the child's best interest. C.S. v. State, 131 N.E.3d 592 (Ind. 2019).

(n) Habitual offender phase

Kindred v. State, 521 N.E.2d 320, 329 (Ind. 1988) (defendant estopped from claiming he was prejudiced because court did not permit him to appear and defend at habitual offender phase, where (1) *pro se* defendant withdrew on first day of trial; (2) court obtained his waiver of right to be present; and (3) defendant never requested to return once he withdrew).

4. Absence of defendant creates presumption of harm

State v. Harden, 496 N.E.2d 35 (Ind. 1986) (defendant's absence during playing of co-conspirator's statement to jury is presumptively harmful).

(a) Absence during short periods at trial

Defendant's absence during short periods at trial may be harmless beyond reasonable doubt. Ware v. United States, 376 F.2d 717 (7th Cir. 1967).

(b) Rebutting presumption

State may rebut presumption of prejudice by showing propriety of court's response to jury in defendant's absence.

Marsillet v. State, 495 N.E.2d 699, 709 (Ind. 1986) (presumption of harm rebutted where judge responded to jury request by refusing to reply to their questions).

5. Failure to appear does not waive right to jury trial

Defendant does not waive right to jury trial by failing to appear at trial. Carr v. State, 591 N.E.2d 640, 641 (Ind. Ct. App. 1992); Slayton v. State, 755 N.E.2d 232, 235-36 (Ind. Ct. App. 2001).

6. Waiver of right to be present

In a non-capital case, defendant by his conduct may waive constitutional right to be present at his own trial. Waiver occurs when defendant knows of scheduled trial date and does not appear. Adams v. State, 509 N.E.2d 812 (Ind. 1987).

(a) Adequate inquiry

Inquiry into reasons for defendant's absence must be more than perfunctory to afford basis for deciding issue of waiver. Harrison v. State, 707 N.E.2d 767, 786 (Ind. 1999).

Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975) (inquiry was inadequate and reversible error where self-inflicted wound may not have been administered to avoid trial, but rather because of mental illness, and court failed to inquire as to whether mental illness accounted for defendant's actions).

(b) Should be express waiver by defendant

"A defendant can waive this right, but the waiver must be express and given by the defendant personally." Hagenmeyer v. State, 683 N.E.2d 629 (Ind. Ct. App. 1997).

State v. Harden, 496 N.E.2d 35 (Ind. 1986) (express personal waiver by defendant is required in order to play co-conspirator's taped confession in defendant's absence).

(c) Attorney may waive with client's express authorization

Attorney may state defendant's waiver of right to be present. Green v. State, 470 N.E.2d 333 (Ind. 1984).

However, defendant must expressly authorize counsel to waive appearance. Harris v. State, 249 Ind. 681, 688, 231 N.E.2d 800, 804 (1967). See also Morrison v. State, 609 N.E.2d 1155 (Ind. Ct. App. 1993).

(d) Examples of waiver

(1) Continued absence and failure to notify court

Defendant's continued absence coupled with failure to notify court and provide it with adequate explanation constitutes waiver. The decision to proceed with the trial is within the trial court's discretion, with review limited to abuse of discretion. Brown v. State, 390 N.E.2d 1058, 1061 (Ind.Ct.App. 1979).

Shepler v. State, 412 N.E.2d 62, 67 (Ind. 1980) (waiver of right to be present where trial resumed following hour delay because: (1) defendant failed to appear after lunch; (2) defendant knew of obligation to return to trial; and (3) on appeal offered no explanation for absence).

McHenry v. State, 401 N.E.2d 745, 747 (Ind. Ct. App. 1980) (No abuse of discretion in conducting trial in defendant's absence where: (1) court admonished defendant several times at conclusion of voir dire that trial would be

conducted in his absence if he was not present; (2) attorney had not heard from client; and (3) defendant made no effort to contact attorney).

Brown v. State, 839 N.E.2d 225 (Ind. Ct. App. 2005) (defendant voluntarily waived his right to be present for trial and was properly tried *in absentia* despite being incarcerated in another county at time of trial; defendant failed to notify trial court or his counsel of his incarceration and presented no evidence that he was prevented from communicating his predicament).

(2) Illness

Indiana courts tend to be unsympathetic to pleas for delaying proceedings because of defendants' illness.

Harrison v. State, 707 N.E.2d 767 (Ind. 1999) (where record reflected that illness did not appear to be so debilitating as to physically prevent defendant from appearing in court, defendant voluntarily waived right to appear; holding penalty phase without defendant present was not error).

Adams v. State, 509 N.E.2d 812 (Ind. 1987) (defendant waived presence by refusing to leave jail cell; unsubstantiated, uncorroborated complaints by defendant of physical ailment not basis for deferring trial).

Dodson v. State, 502 N.E.2d 1333 (Ind. 1987) (defendant waived right to be present when, after epileptic seizure, he voluntarily excused himself from courtroom).

(3) Disruptive conduct during proceedings

Defendant can waive right to be present at trial by:

(1) contumacious conduct; and

(2) express statement that he does not wish to remain during proceedings.

Kindred v. State, 521 N.E.2d 320, 325 (Ind. 1988) (trial court obtained knowing, intelligent and voluntary waiver of defendant's constitutional rights prior to granting defendant's motion to withdraw from trial proceedings where, although defendant became obstreperous and refused to answer questions regarding his understanding of his constitutional rights, court went to great lengths to ascertain that defendant's judgment was not affected by medication and that he understood his rights).

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (right to be present may be forfeited by misconduct disruptive to proceedings).

Johnston v. State, 126 N.E.3d 878 (Ind. Ct. App. 2019) (under Allen, judges confronted with disruptive, contumacious and stubbornly defiant defendants have discretion to meet the circumstances in each case; here, unruly defendant properly removed from courtroom during trial and tried in absentia).

Jenkins v. State, 596 N.E.2d 283 (Ind. Ct. App. 1993) (defendant may waive right to be present at trial by becoming intoxicated).

Wilson v. State, 30 N.E.3d 1264 (Ind. Ct. App. 2015) (trial court properly removed defendant from courtroom after his outburst with members of gallery, use of profanity, and physical altercation with bailiffs).

(e) Voluntary absence

Trial may proceed in absence of defendant if circumstances are consistent with voluntary failure to appear. However, when at his earliest opportunity defendant appears, he must be permitted to demonstrate his absence was not voluntary. Opportunity to be given defendant to present evidence that his absence at trial was not voluntary does not require a *sua sponte* inquiry; rather, defendant cannot be prevented from explaining his absence. Hudson v. State, 462 N.E.2d 1077 (Ind. Ct. App. 1984); Holtz v. State, 858 N.E.2d 1059 (Ind. Ct. App. 2006).

(1) Refusal of representation

Defendant - who creates situation in which he can opt to go to trial (1) *pro se*; or (2) with an attorney he does not want - voluntarily absents himself if he refuses both options, especially where defendant is disruptive. Perry v. State, 471 N.E.2d 270 (Ind. 1984).

(2) Refusal to wear jail clothes

Green v. State, 470 N.E.2d 333 (Ind. 1984) (defendant given choice of appearing in jail clothes or not at all voluntarily absents himself if he chooses not to appear, when ample notice of trial date was given and defendant waived right without protest).

See also 33 A.L.R.4th 429, §§12a (1984) (validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case).

(f) Defendant's request to be absent from proceedings

Although defendant in a criminal proceeding has the right to be present at all stages of his or her trial, defendant does not have a corollary right to be absent where he is otherwise available, and his presence is required for a legitimate purpose, such as identification.

Ziebell v. State, 788 N.E.2d 902 (Ind. Ct. App. 2003) (no error in compelling defendant to be present during habitual phase of his trial, because his presence was necessary for identification purposes).

(g) Trial *in absentia*

Before trial *in absentia*, trial court must find accused had adequate notice of charges and proceedings. Broecker v. State, 342 N.E.2d 886 (Ind. 1976).

Defendant bears the responsibility of maintaining correspondence with attorney as to actual trial date.

Netherly v. State, 536 N.E.2d 296 (Ind. Ct. App. 1989) (conducting trial in defendant's absence was not error, as defendant was present at final pretrial conference when probable trial date set, and defendant failed to maintain correspondence with attorney or appear in court).

(1) When permitted

Court may conclude defendant's absence was knowing and voluntary and proceed with trial when: (1) evidence defendant knew of his scheduled trial date; (2) defendant fails to appear for trial; and (3) defendant fails to notify trial court or provide it with explanation of absence. Freeman v. State, 541 N.E.2d 533, 535 (Ind. 1989); Welch v. State, 564 N.E.2d 525, 529 (Ind. Ct. App. 1990).

Caveat: Attorney's assertion client knew of trial date may be sufficient to support finding of waiver. Ramos v. State, 467 N.E.2d 717 (Ind. 1984).

(2) Defendant allowed to demonstrate absence involuntary

Indiana cases permitting trial *in absentia* assume voluntary absence of defendant.

Bullock v. State, 451 N.E.2d 646 (Ind. 1983) (waiver occurred where defendant's knowledge of trial date was coupled with his voluntary choice not to appear).

(3) Where defendant exits proceeding without permission

Court may proceed with trial that had begun with defendant in attendance when defendant leaves without permission or excuse. Howard v. State, 377 N.E.2d 628 (Ind. 1978).

Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194 (1973) (right to be present waived, without need for explicit advisement of right or waiver, where defendant failed to return to court after first morning of trial, without excuse).

(4) Where defendant fails to appear at trial

Where defendant never appears, court may conclude absence knowing and voluntary and proceed with trial if evidence defendant knew of scheduled trial date. Bullock v. State, 451 N.E.2d 646 (Ind. 1983). Best evidence of knowledge of trial date is defendant's presence in court on day matter set for trial. Brown v. State, 181 Ind. App. 102, 390 N.E.2d 1058 (1979).

Diaz v. State, 775 N.E.2d 1212 (Ind. Ct. App. 2002) (where the record clearly indicated that defendant did not understand English and was silent as to whether he was assisted by an interpreter at pretrial conference or was otherwise able to understand proceedings, absence may not have been knowing and voluntary, despite defendant's appearance at pretrial conference at which trial date was set; fact that defendant was told scheduled trial date is far from dispositive as to whether he actually knew the date).

Fennell v. State, 492 N.E.2d 297 (Ind. 1986) (waiver existed where defendant moved to Texas and told landlord and neighbor, he was doing so to avoid trial - even though no direct evidence he knew of trial date, circumstantial evidence suggests he did).

Soliz v. State, 832 N.E.2d 1022 (Ind. Ct. App. 2005) (when a defendant appears on the first day of trial but fails to appear on the second day, trial court has the discretion to proceed with a trial in defendant's absence).

(5) Military service

The State of Indiana cannot compel a defendant's presence for a judicial proceeding while, at the same time, the United States compels his absence for active duty in military service overseas.

Calvert v. State, 14 N.E.3d 818 (Ind. Ct. App. 2014) (trial court erred when it denied defendant's motion for continuance and tried him in *absentia* while he was on active duty with the U.S. Army in Afghanistan).

(6) Right to counsel not waived

Court may not find defendant waived his right to counsel by not appearing at trial. Such a finding constitutes denial of basic right to counsel. Carr v. State, 591 N.E.2d

640, 642 (Ind. Ct. App. 1992). A defendant's failure to appear at trial does not constitute a waiver of his right to counsel in every case. Jackson v. State, 868 N.E.2d 494 (Ind. 2007).

Hawkins v. State, 982 N.E.2d 997 (Ind. 2013) (record did not support a finding that defendant's failure to appear at trial constituted a knowing, voluntary or intelligent waiver of his right to counsel; thus, it was inappropriate to try him *in absentia* without representation).

(7) Advising jurors regarding defendant's absence

In Smith v. State, 160 N.E.3d 1152 (Ind. Ct. App. 2021), it was not fundamental error for the trial court to advise potential jurors that the court had personally advised the defendant of the trial date a few weeks before trial. This was not a prohibited comment on the defendant's refusal to testify but rather recognition of the defendant's absence. Also, jurors were appropriately instructed regarding the presumption of innocence and the State's burden of proof.

7. Failure to appear – Class A misdemeanor, Level 6 felony

Ind. Code § 35-44.1-2-9 provides:

(a) A person who, having been released from lawful detention on condition that he appear at a specified time and place in connection with a charge of a crime, intentionally fails to appear at that time and place commits failure to appear, a Class A misdemeanor. However, the offense is a Level 6 felony if the charge was a felony charge.

(b) It is no defense that the accused person was not convicted of the crime with which he was originally charged.

(c) This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole.

Korff v. State, 567 N.E.2d 1146 (Ind. 1991) (failure to appear applies to defendants who are released on their own recognizance).

Cf.

Pennington v. State, 426 N.E.2d 408 (Ind. 1981) (insufficient to support conviction for failure to appear, where *ex parte* order entered 31 days after defendant's release on own recognizance, on a case which State had stipulated by written plea agreement would be dismissed).

H. COMPULSORY PROCESS FOR OBTAINING WITNESSES

The right to offer testimony of witnesses, and to compel their attendance is in plain terms is the right to present the defendant's version of facts as well as prosecutions to the jury so it may decide where the truth lies. Washington v. Texas, 87 S.Ct. 1920 (1967).

1. Right to subpoena

Sixth Amendment Compulsory Process Clause includes right to subpoena witnesses and to present them in defense. Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

Rowe v. State, 444 N.E.2d 303, 305-06 (Ind. 1983) (where defendant had due notice of trial and hearing dates and opportunity to obtain subpoenas and to seek court enforcement of them, denial of defendant's motion for continuance on basis of failure of witness to appear did not deprive defendant of her right to compulsory process for obtaining

witnesses).

(a) Not absolute

Defendants do not enjoy an absolute right to subpoena anyone or anything. Appellate courts will consider whether:

(1) court arbitrarily denied defendant's 6th Amendment rights;

(2) witness was competent; and

(3) testimony was relevant and material.

To be material, testimony must be sufficient to create reasonable doubt about a verdict which, based on the entire record, is already of questionable validity. Hunt v. State, 546 N.E.2d 1249 (Ind. Ct. App. 1989).

(b) Example where subpoena should have been honored

Ferguson v. State, 670 N.E.2d 371 (Ind. Ct. App. 1996) (trial court abused its discretion in quashing murder defendant's subpoena of deputy prosecutor with respect to any understanding he had with an uncharged coconspirator, who testified she had not entered into any agreement with State in exchange for her testimony; the prosecutor's testimony was essential to get at the truth).

(c) Examples where subpoena quashed

(1) Where evidence sought is immaterial

Klagiss v. State, 585 N.E.2d 674 (Ind. Ct. App. 1992) (granting motion to quash subpoena did not constitute an arbitrary denial of defendant's right to compulsory process where: (1) counsel for T.V. station said no one with knowledge about the making of a tape or accuracy of its contents would be available to authenticate it or to be cross-examined by State; (2) any error was harmless; and (3) defendant intended to use the tape for an improper purpose, i.e., as a learned treatise during cross-examination of the State's medical expert).

(2) Denial of continuance to subpoena additional witnesses or experts

Trotter v. State, 733 N.E.2d 527, 533 (Ind. Ct. App. 2000) ("[t]he trial court was within its discretion to deny a continuance," where defense counsel had ample opportunity to serve various subpoenas and seek the court's assistance in enforcing them before the trial).

Hyppolite v. State, 774 N.E.2d 584, 595-96 (Ind. Ct. App. 2002) (even though defendant claimed he had not known State intended to claim voice on audiotape was his, trial court did not abuse discretion in denying continuance on morning of trial to obtain voice expert, as defendant had ample time before trial to listen to and examine tape).

(3) Where accomplice will invoke 5th Amendment

Davis v. State, 529 N.E.2d 112 (Ind. Ct. App. 1988) (right to compulsory process was not violated where trial judge quashed subpoena ordering purported accomplice to testify; accomplice maintained he would claim privilege against self-incrimination if called as witness, testimony would not have been material and relevant, and defendant had no right to have accomplice invoke privilege in front of jury).

(4) Alibi witness unwilling to testify on defendant's behalf

Dearman v. State, 161 Ind. App. 263, 315 N.E.2d 405, 412 (1974) (no error in refusing to issue process to secure testimony of unwilling alibi witness where evidence showed alleged alibi witness was unwilling to testify on defendant's behalf; relevant facts in record gave inference that subpoena would not have produced any favorable testimony for the defendant).

2. Right to present witnesses in defense

The Sixth Amendment Compulsory Process Clause includes not only the right to subpoena witnesses but also the right to present them in defense. Taylor v. Illinois, 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). A defendant's right to a meaningful opportunity to present a complete defense cannot be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (citing to Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); Crane v. Kentucky, 476 U.S. 683 (1986); and Rock v. Arkansas, 483 U.S. 44 (1987), as examples of arbitrary evidence rules, i.e., rules that excluded important defense evidence but that did not serve any legitimate interests).

Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004) (trial court erroneously excluded prior testimony that a third party made statements to the witness implicating himself in the murders; witness's testimony was exculpatory, unique, and critical to defense as there was no other source for the defendant to rely upon to present this part of his defense that another individual had committed crimes).

Saintignon v. State, 118 N.E.3d 778 (Ind. Ct. App. 2019) (Trial court's exclusion of alleged alibi witness did not violate defendant's right to present a defense; the witness was disclosed days before trial, defendant's claim that he did not know about witness until then was not supported by the record, notice of alibi was vague about time he was allegedly at witness's house, and evidence in the record that defendant was still in the area of victim's home after time alleged in notice of alibi).

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (reversible error to prohibit the defendant's evidence supporting his theory that another person committed the murder; defendant sought to present evidence that: a third party, who worked at same place as the victim and the defendant, was having affair with victim; the third party had sex with victim on night before murder; and the third party had lied to his wife about where he was that evening and later told his wife that he had an argument with victim on the last day she was seen alive; and the third party came in late to work on the morning after the murder and lied about his tardiness on his time card).

Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (jailhouse confession to crime by original suspect of crime was admissible as statement against penal interest and under Sixth Amendment).

Griffin v. State, 763 N.E.2d 450, 455 (Ind. 2002) (third party's admission of guilt to attorney did not sufficiently meet the Chambers requirements for admissibility; Boehm, J., dissenting).

Townsend v. State, 26 N.E.3d 619 (Ind. Ct. App. 2015) (trial court violated defendant's right to compulsory process by barring defense witness from testifying, where he was not at fault for calling witness late, his testimony would have challenged credibility of State's witness and letting him testify would not have prejudiced State; harmless error).

I. IMPARTIAL ATMOSPHERE, JURY, AND JUDGE

1. Impartial atmosphere

Judges are required to remain impartial to preserve the defendant's due process rights. Harrington v. State, 584 N.E.2d 558, 561 (Ind. 1992) and Cook v. State, 734 N.E.2d 563 (Ind. 2000).

Everling v. State, 929 N.E.2d 1281 (Ind. 2010) (child molesting convictions reversed because trial court denied defendant's right to an impartial judge; evidentiary rulings, uneven tolerance for late filings, and court's comments to defense counsel showed actual bias and prejudice).

Meadows v. State, 785 N.E.2d 1112 (Ind. Ct. App. 2003) (defendant failed to demonstrate that there was unacceptable risk that jury may have been prejudiced by presence of several uniformed police officers at his trial).

2. Impartial judge and jury

The right to a fair trial before an impartial judge is an essential element of due process. Caperton v. A.T. Massey Coal Co., Inc., 129 S.Ct. 2252, 2257-64 (2009); Hackney v. State, 649 N.E.2d 690 (Ind. Ct. App. 1995). A trial judge must refrain from any actions that would indicate to a jury that the judge has any position other than strict impartiality. Everling v. State, 929 N.E.2d 1281, 1287-91 (Ind. 2010).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (courts have an obligation to refrain from making unnecessary comments that could destroy their apparent or actual impartiality, but *sua sponte* injection of comments or objections by a judge is not grounds for reversal unless it harmed defendant or denied him a fair trial).

Stellwag v. State, 854 N.E.2d 64, 65-69 (Ind. Ct. App. 2006) (judge intervened in the trial by questioning a witness and admonishing the defendant to such an extent as to question the judge's impartiality).

The Sixth Amendment and Ind. Const. Article I, §13 guarantee the right to an impartial jury. Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 2005); Perkins v. State, 541 N.E.2d 927 (Ind. 1989).

Threats v. State, 582 N.E.2d 396, 398 (Ind. Ct. App. 1991) (juror bias may be actual or implied, which may be presumed from the juror's relationship with one of the parties, and a biased juror must be removed).

Haak v. State, 417 N.E.2d 321 (Ind. 1981) (bias on the part of relatives of persons employed by the prosecutor's office may be inferred).

Overstreet v. State, 877 N.E.2d 144, 157-59 (Ind. Ct. App. 2007) (impossible to determine whether the risk of any improper considerations rose to an unacceptable level where record showed that during trial, jurors saw some spectators in courtroom wearing buttons with photos of victim).

United States v. Farmer, 583 F.3d 131, 149-50 (2d Cir. 2009) (T-shirts displaying victim's photograph were not so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial).

II. SPECIAL PROCEDURES DURING TRIAL

A. SEATING OF DEFENDANT

Defendant should be situated so as to consult effectively with counsel and see and hear witnesses and other participants.

1. In courtroom audience to test eyewitness identification

For purposes of "in-court lineup," defendant may sit in audience with permission of court. Murphy v. State, 475 N.E.2d 42 (Ind. Ct. App. 1985).

Practice Pointer: For an in-court identification to be admissible despite an improper pretrial identification, the State must establish an independent source for in-court identification by demonstrating through clear and convincing evidence that witness had, at some time independent of any suggestive procedures, sufficient occasion to formulate an insular recognition of defendant. Murphy v. State, 475 N.E.2d 42 (Ind. Ct. App. 1985).

B. DEFENDANT TESTIFYING FROM COUNSEL TABLE

No fundamental error where: (1) court established new policy forcing defendant to testify from counsel table; (2) defendant failed to show this action negated presumption of innocence; or (3) that he was prejudiced by the policy. Stowers v. State, 657 N.E.2d 194 (Ind. Ct. App. 1995).

C. APPEAR IN CIVILIAN CLOTHES

1. Qualified right not to appear in prison attire

Defendant cannot be compelled to stand trial before jury "while dressed in identifiable prison clothes." However, failure to make objection to being tried in jail clothes negates the presence of compulsion necessary to establish a constitutional violation. Estelle v. Williams, 425 U.S. 501 (1976).

(a) Object and request permission to wear civilian clothes

Defendant must either object to appearing in jail clothes or request permission to wear civilian clothes. The central issue for constitutional purposes is whether the accused was compelled to appear before the jury in the prison clothes. Howard v. State, 459 N.E.2d 29 (Ind. 1984). This rule applies to habitual offender proceedings as well. French v. State, 778 N.E.2d 816 (Ind. 2002)).

Brown v. State, 848 N.E.2d 699 (Ind. Ct. App. 2006), *vacated on other grounds*, 868 N.E.2d 464 (Ind. 2007) (defendant did not object to wearing jail bracelet until witness identified it at trial, and thus waived issue).

Bronaugh v. State, 942 N.E.2d 826 (Ind. Ct. App. 2011) (defendant was not denied due process when he appeared for first day of his jury trial wearing identifiable jail clothes, where counsel failed to object, and defendant had ample time to arrange for civilian clothing but failed to do so).

(b) Showing

Pursuant to Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the defendant must demonstrate that: (1) he was compelled to wear jail clothes; and (2) the clothes are easily identifiable as such.

Shackelford v. State, 498 N.E.2d 382 (Ind. 1986) (no violation of defendant's right to fair trial by failure to grant continuance so defendant could obtain civilian clothing to wear to trial where: (1) defendant did not show he was compelled to go to trial before jury in jail attire; and (2) failed to allege or show that such clothing was readily identifiable as jail clothing).

Sherwood v. State, 784 N.E.2d 946 (Ind. Ct. App. 2002) (no error in denying defendant's motion for mistrial after five jurors observed him in jail garb as he was being escorted to court because defendant failed to show any actual harm as a result of what jurors had briefly seen or that it had probable persuasive effect on the jury).

Southern v. State, 878 N.E.2d 315 (Ind. Ct. App. 2005) (showing polygraph video in which defendant was wearing jail uniform was not error).

Vazquez v. State, 944 N.E.2d 10 (Ind. Ct. App. 2011) (defendant's appearance in jail clothes without objection during bench trial did not impede his presumption of innocence).

2. Waive

(a) Refusal to wear civilian clothes

Wearing of jail clothes not error if accused refuses to wear civilian clothes.

Jeffers v. State, 485 N.E.2d 81 (Ind. 1985) (defendant's strained relationship with trial court which arose from his refusal to don civilian clothes did not establish prejudice which could have deprived defendant of fair trial by virtue of denial of motion for change of venue).

(b) Failure to secure civilian clothes

Failure to secure civilian clothes after notice may waive trial right.

Green v. State, 470 N.E.2d 333 (Ind. 1984) (no error in finding waiver of right to be present where: (1) defendant knew about trial date for months; (2) failed to procure prompt delivery of civilian clothes; and (3) failed to move for a continuance).

3. Request to wear military uniform

Forgey v. State, 886 N.E.2d 16 (Ind. Ct. App. 2008) (trial court did not abuse its discretion by precluding defendant from wearing his United States Marine Corps uniform at trial, where he was not on active duty but had been honorably discharged nearly fourteen years before trial; further, had trial court allowed defendant to wear his uniform, it would have been a violation of federal law, specifically 10 U.S.C.A. § 771).

D. APPEAR FREE FROM PHYSICAL RESTRAINTS IN FRONT OF JURY

1. Right not to appear before jury in restraints

Defendant is not to appear before jury in bonds, shackles, leg irons or other restraint. However, shackles may be necessary where there is evidence of a prior escape attempt or other danger. Evans v. State, 571 N.E.2d 1231, 1238 (Ind. 1991). See also Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (use of shackles in extreme remedy which should be permitted only where justified by essential state interest specific to each trial).

Roche v. Anderson, 132 F.Supp.2d 688 (N.D. Ind. 2001) (shackles should never be permitted except to prevent escape of accused, to protect everyone in courtroom, and to maintain order during trial; here, defense counsel's failure to object on record to use of shackles during trial constituted deficient performance and prejudiced defendant).

Deck v. Missouri, 125 S.Ct. 207 (2005) (use of visible shackles during a capital penalty trial violates the 5th and 14th Amendments unless there is a state interest specific to the particular defendant on trial).

Wilber v. Hepp, 16 F.4th 1232 (7th Cir. 2021) (State court's determination that petitioner was not deprived of right to due process when visibly shackled before jury during closing arguments was unreasonable application of clearly established federal law in Deck v. Missouri and warranted federal habeas relief, even though petitioner's behavior posed potential threats to security and orderliness of courtroom that warranted imposition of restraints; trial court gave no explanation why restraints had to be visible).

(a) Restraints for convenience impermissible

Walker v. State, 410 N.E.2d 1190, 1194 (Ind. 1980) (impermissible basis for jury to see defendants restrained where: (1) defendants were brought back into court while judge admonished jury before weekend recess; and (2) court stated bringing defendants back in restraints "was mere convenience due to the late hour of the day").

(b) Stun belts forbidden

Wrinkles v. State, 749 N.E.2d 1179 (Ind. 2002) (when activated, the stun belt's electrical emission causes most persons to shake uncontrollably and remain incapacitated for up to forty-five minutes, and even if not activated, stun belt has potential of compromising defense and has chilling effect).

Stephenson v. State, 864 N.E.2d 1022 (Ind. 2007) (in absence of explanation, failure to object to stun belt that is readily visible is substandard performance).

Dickens v. State, 997 N.E.2d 56 (Ind. Ct. App. 2013) (in trial occurring before stun belt restraint was prohibited, trial counsel was not ineffective for failing to object to restraint because restraint was under defendant's clothes and not visible, preventing jurors from drawing adverse inferences about defendant because of the restraint).

(c) Inadvertent exposure to jury cured by admonition

Court's admonition is presumed to cure any error when jury briefly sees defendant in shackles.

Flowers v. State, 481 N.E.2d 100 (Ind. 1985) (fact that one juror saw defendant in irons during course of trial for attempted murder, robbery, and rape did not entitle defendant to mistrial, where that juror was duly admonished).

Badelle v. State, 754 N.E.2d 510, 541-42 (Ind. Ct. App. 2001) (fact that some jurors may have seen defendant being escorted with other prisoners and in handcuffs during course of the trial is not reversible error absent a showing of actual harm).

(d) Handcuffed defendant during transport

A jury that is aware that a defendant is in custody can easily infer that a sheriff might take precautions such as handcuffing defendant during transportation, thus being seen by jurors while being transported in handcuffs is not grounds for reversal. Gibbs v. State, 460 N.E.2d 1217 (Ind. 1984).

Perryman v. State, 80 N.E.3d 234 (Ind. Ct. App. 2017) (denial of motion for mistrial affirmed where defendant was put in the presence of one to three jurors while standing handcuffed in the breezeway of the court).

2. Exceptions

Restraints and other security measures permitted to: (1) prevent escape; (2) protect everyone in courtroom, or (3) maintain order. Jessup v. State, 256 Ind. 409, 269 N.E.2d 374 (1971).

Practice Pointer: Nature of offense for which defendant is being tried and defendant's conduct during other proceedings are relevant factors in determining whether restraint is appropriate. For example, if defendant has been charged with assaulting a guard, restraint is appropriate. See Jessup v. State, *supra* and Evans v. State, 571 N.E.2d 1231, 1238 (Ind. 1991).

(a) Prevent escape

Lucas v. State, 499 N.E.2d 1090, 1095 (Ind. 1986) (restraint during trial permissible where: (1) defendants linked to two escape attempts during pretrial incarceration, although not formally charged with those crimes; (2) security measures of shackles and handcuffs implemented in manner designed to prevent jury awareness; and (3) no evidence jury actually saw defendant in shackles). See also Forte v. State, 759 N.E.2d 206, 207-08 (Ind. 2001).

(b) Disruptive, contumacious, stubbornly defiant defendant

Restraint is permissible to control an obstreperous defendant. Three options in cases of "stubbornly defiant" defendant include: (1) bind and gag; (2) cite for contempt; and (3) remove from courtroom. Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353, 359 (1970) and Randall v. State, 455 N.E.2d 916, 924 (Ind. 1983).

(1) Bind and gag

Binding and gagging defendant are extreme measures that should only be used as last resort after examining all of the alternatives following unruly behavior.

Avant v. State, 528 N.E.2d 74, 77 (Ind. 1988) (no prejudice to defendant to have mouth taped shut and hands tied behind back following several unruly outbursts; defendant had repeatedly disrupted proceedings).

Vaughn v. State, 971 N.E.2d 63 (Ind. 2012) (mistrial not required where bailiff placed hand over defendant's mouth; better practice would have been to warn defendant that if he did not stop talking then he would be prevented from talking).

(2) Dangerous defendant

Dangerous defendant may be shackled, but only upon a showing of extreme need. Smith v. State, 475 N.E.2d 27 (Ind. 1985).

Broadus v. State, 487 N.E.2d 1298, 1305 (Ind. 1986) (no error where court ordered defendant shackled after threatening life of security guard).

French v. State, 778 N.E.2d 816, 820 (Ind. 2002) (trial court acted properly in placing defendant in restraints during his trial, including a restraint on his right arm which was visible to the jury, because defendant had been involved in a physical altercation with police officers shortly before the trial).

Corbin v. State, 840 N.E.2d 424 (Ind. Ct. App. 2006) (no error in restraining defendant with leg and waist shackles during trial where defendant had stated that he did not have anything to lose, which caused concern for safety of proceedings and people in courtroom; moreover, the defense table had skirting around it hiding defendant's lower body from the jury).

(3) Prejudicial impact of shackled co-defendant

Defendant may be prejudiced when co-defendant shackled.

But see Broadus v. State, 487 N.E.2d 1298 (Ind. 1986) (admonition to disregard co-defendant's shackling presumed to cure prejudice).

(c) Maintain order

Must be a good reason to believe physical restraint necessary to maintain order. Jessup v. State, 269 N.E.2d 374, 375 (Ind. 1971).

Kocielko v. State, 938 N.E.2d 243, 251-52 (Ind. Ct. App. 2010), *on reh'g*, 943 N.E.2d 1282 (Ind. Ct. App. 2011) (trial court properly ordered police officer to sit inside the bar behind defendant as a security measure).

(d) Defendant refuses to come to trial

Defendant may be ordered to trial in chains and irons after he refuses to come to court. Randall v. State, 455 N.E.2d 916, 924 (Ind. 1983).

3. Judge presumed to retain impartiality

Judge is presumed to retain his impartiality whether defendant appears in court bound or unbound. Pier v. State, 446 N.E.2d 985, 988 (Ind. Ct. App. 1983).

Shanks v. State, 640 N.E.2d 734, 736 (Ind. Ct. App. 1994) (defendant did not establish any actual prejudice where defendant was tried to court in manacles and handcuffs).

III. MISCELLANEOUS RIGHTS AND PROBLEMS

A. COMPETENCY HEARING

1. Must hold hearing if reasonable doubt

Court must hold competency hearing where, any time before the final submission of a criminal case to the court or jury trying to case, there is evidence that creates reasonable, *bona fide* doubt as to defendant's competency to stand trial. Ind. Code § 35-36-3-1; Brown v. State, 516 N.E.2d 29, 30 (Ind. 1986).

Under due process, defendant must be able to understand the nature of charges against her and have the capacity to consult with lawyer in preparing his defense. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). See also Edmonds v. Peters, 93 F.3d 1307, 1314 (7th Cir. 1996).

2. When competency issue may be raised

Competency is determined by defendant's mental condition at time of trial. Notwithstanding statutory language (Ind. Code § 35-36-3-1(a)) that purportedly allows waiver of issue of competency of defendant to stand trial by noncompliance with statutory requirements, question of defendant's competency to stand trial may be raised at any time, including long after trial, conviction, and sentencing have occurred. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Smith v. State, 443 N.E.2d 1187 (Ind. 1983).

Donald v. State, 930 N.E.2d 76, 79-81 (Ind. Ct. App. 2010) (Indiana statute on mental competency does not apply to probation revocation proceedings, but the federal Due Process clause requires that a defendant must be competent when participating in a probation revocation proceeding).

Mast v. State, 914 N.E.2d 851 (Ind. Ct. App. 2009) (defendant received ineffective assistance where counsel advised him to plead guilty without waiting for results of two competency evaluations).

Barber v. State, 141 N.E.3d 35 (Ind. Ct. App. 2020) (evidence insufficient that defendant was incompetent when 24 years had passed between guilty plea and PCR petition alleging incompetence, and all the contemporaneous evidence from 1993 indicated defendant was competent to knowingly and voluntarily enter a guilty plea).

3. Court makes legal determination whether accused is competent

Court makes legal determination of defendant's fitness to stand trial. Court considers whether the accused has: (1) sufficient present ability to consult with lawyer with reasonable degree of rational understanding; and (2) rational and factual understanding of proceedings against her. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960) and Brewer v. State, 646 N.E.2d 1382, 1385 (Ind. 1995).

While Ind. Code § 35-36-3-1(b) gives the trial court authority to decide whether a defendant is competent to stand trial, Ind. Code § 35-36-3-3 vests sole authority in DMHA to decide if a defendant can be restored to competency. Thus, the trial court does not have discretion to deny the State's request to commit a defendant to DMHA where trial court had earlier declared him incompetent. See State v. Coats, 3 N.E.3d 528 (Ind. 2014).

4. Burden to determine competency

Burden rests on trial judge to satisfy herself whether or not the accused is competent to stand trial. Ind. Code § 35-36-3-1(b); Wallace v. State, 486 N.E.2d 445 (Ind. 1985).

Medina v. California, 505 U.S. 437, 440, 112 S.Ct. 2572, 2574, 120 L.Ed.2d 353 (1992) (State statute may (1) shift burden of proof to defendant to prove by a balance of probabilities she is incompetent to stand trial; and (2) establish a rebuttable presumption).

Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (State cannot require defendant to prove incompetence by clear and convincing evidence).

5. Juveniles

Matter of K.G., 808 N.E.2d 631 (Ind. 2004) (although juveniles alleged to be delinquent have the constitutional right to have their competency determined prior to delinquency proceedings, Indiana's adult competency statute is not applicable to this determination; Ind. Code § 31-32-12-1, which authorizes mental or physical examinations and treatment under certain circumstances when a physician determines them appropriate and consistent with the statute, is the proper vehicle to accomplish a competency finding in a juvenile proceeding).

B. RIGHT TO DECLINE ANTI-PSYCHOTIC DRUGS

The 6th & 14th Amendment due process right to refuse medication applies to those detained and awaiting trial. Sullivan v. Flanigan, 8 F.3d 591 (7th Cir. 1993), *cert. den'd*.

Riggins v. Nevada, 504 U.S. 127, 135, 112 S.Ct. 1810, 1815, 118 L.Ed.2d (1992) (violation of constitutional trial rights to permit State to administer anti-psychotic drug to defendant during trial over her objection without prosecution demonstrating and court finding treatment

medically appropriate, and considering less intrusive alternatives, essential to own or others' safety; medication possibly alters appearance, content of testimony and communication with counsel).

Sell v. United States, 539 U.S. 116, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) (forced medication is constitutionally permissible on a serious charge if: (1) medically appropriate; (2) substantially unlikely to have side effects which might undermine a trial's fairness; (3) is done only after considering less intrusive alternatives; and (4) is necessary to further important government trial-related issues. Forced medication solely for trial competence may be permitted only where important governmental concerns are at stake and the forced medication will significantly further governmental trial-related interests).

1. Compelling state interests may outweigh right to refuse medication

State may administer anti-psychotic drugs to inmates without judicial hearing where several conditions are present: (1) patient dangerous to self or others; (2) treatment in inmate's medical interest; and (3) administrative procedures adequate to give due process. Washington v. Harper, 494 U.S. 210, 110 S.Ct. 1028 (1990); Williams v. Anderson, 959 F.2d 1411, 1412 (7th Cir. 1992).

State v. Van Orden, 647 N.E.2d 641 (Ind. Ct. App. 1995) (mere fact that defendant is confined does not make the decision to accept drugs *per se* involuntary, absent other evidence to show that the administration of drugs involuntary, where: (1) defendant is not physically forced to take drug; and (2) confinement is inevitable because defendant is charged with murder; defendant's original objection to being medicated in order to achieve competency to stand trial does not render a later decision to accept anti-psychotic drugs involuntary).

2. Administering psychotropic drugs to defendant during trial

The administration (or abuse) of drugs can render an otherwise competent defendant incompetent, be insufficient to restore competency to stand trial, or undermine the fairness of the trial in other ways.

McManus v. Neal, 779 F.3d 634 (7th Cir. 2015) (Indiana state courts did not reasonably apply federal constitutional standard in affirming trial court's finding that defendant was competent to stand trial, where he suffered panic attacks during trial and was medicated with antidepressants that, according to expert testimony, would make a person drowsy and alter their decision making, perception and judgment; murder conviction reversed; proper question is whether defendant had present factual and rational understanding of proceedings and capacity to assist his lawyers; Indiana Supreme Court misapplied standard by suggesting Defendant was competent because "the consensus of the witnesses was that the medications assisted McManus in participating in his trial."). See *IPDC Pretrial Manual*, Chapter 4, Competency to Stand Trial; and *Representing Clients with Mental Illness*, Section 2.

C. RIGHT TO PRESENT ALIBI

See *IPDC Guide to Alibi Defense* (2021).

1. Not absolute

The right to present alibi defense or any other evidence is not absolute and may "bow to accommodate other legitimate interests in the criminal trial process." Baxter v. State, 522 N.E.2d 362 (Ind. 1988); Preston v. State, 644 N.E.2d 585 (Ind. Ct. App. 1994).

(a) Excluding third-party alibi testimony

Accused who improperly files notice of alibi may be prohibited from entering third party alibi testimony into evidence. Harvey v. State, 542 N.E.2d 198 (Ind. 1989).

Alibi testimony may be excluded as a consequence of:

(1) defendant's evasiveness with regards to alibi testimony,

(2) defendant's failure to make offer of proof,

(3) high risk defendant had fabricated story, and

(4) State is deprived of sufficient time to investigate and respond to the testimony.

However, the court will look to include defendant's own statements in his defense. Campbell v. State, 622 N.E.2d 495, 499 (Ind. 1993).

(b) Defendant's due process rights trump alibi statute

Deadlines imposed in alibi statute (Ind. Code § 35-36-4-3(b)) cannot be enforced so as to deny defendant due process rights if defendant proffers acceptable reason for violating the statutes time requirements. Harrison v. State, 644 N.E.2d 1243, 1255 (Ind. 1995).

Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (exclusion of defendant's own testimony for failure to comply with notice of alibi under Ind. Code § 35-36-4-1 is an impermissible infringement upon the rights of accused to testify).

Washington v. State, 840 N.E.2d 873, 880-85 (Ind. Ct. App. 2006) (a defendant's alibi witnesses may not be excluded because of a failure to file a pretrial notice of alibi under either the federal constitution or the Indiana constitution unless the failure to file the notice was the result of willful or purposeful misconduct or caused substantial prejudice to the State).

(1) Subject to harmless error analysis

Exclusion of evidence that does not affect substantial rights of defendant is harmless error. Exclusion of defendant's own alibi testimony subject to harmless error analysis**.**

Palmer v. State, 654 N.E.2d 844, 846 (Ind. Ct. App. 1995) (harmless error to exclude alibi testimony where the State offered overwhelming evidence that defendant was perpetrator; police officers identified defendant, and said they observed him approach the confidential informant).

Washington v. State, 840 N.E.2d 873 (Ind. Ct. App. 2006) (harmless error to exclude alibi evidence because witnesses did not provide a complete alibi and other significant evidence existed that defendant participated in crimes).

(2) Exclusion is error – if crucial issue

Exclusion is error where crucial issues are before the jury.

Preston v. State, 644 N.E.2d 585 (Ind. Ct. App. 1994) (trial court erred when they refused alibi testimony by defendant where defendant had mistakenly given incorrect address of whereabouts at time of the crime).

(3) Court may restrict defendant's ability to present alibi evidence

Harrison v. State, 644 N.E.2d 1243, 1255 (Ind. 1995) (court properly ordered defendant to seek court's permission outside presence of jury before introducing alibi

testimony where: (1) defendant did not file alibi notice until two days before trial; (2) defendant gave no reason for delay; and (3) the only information in the alibi notice was that defendant was at home on the date of the crime).

2. Evidence Defendant was not at crime scene is not alibi evidence

The purpose of the alibi notice statute is to ensure that the prosecution is not surprised by alibi testimony that the defendant was somewhere else, so the statute sets a deadline for notice of alibi, so prosecutor has ample time to investigate claim that the Defendant was at another specific location. Testimony that a defendant was not at crime scene requires no further investigation.

Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (trial court erred in excluding testimony of defense witnesses because they were purported "alibi" witness and the defendant did not file a Notice of Alibi; because the witnesses would have testified only that defendant was not at the scene [but not that he was at another specific location], the witnesses were "rebuttal witnesses," not alibi witness, and thus defendant was not required to file a Notice of Alibi).

D. SEVERANCE

See *IPDC Pretrial Manual*, Chapter 8, Joinder and Severance.

1. Severance of defendants

(a) May apply at any stage of joint trial

If either co-defendant is unfairly prejudiced at any stage of joint trial, defendant entitled to severance. Must show impossibility of fair trial, not merely that separate trial offers greater chance of acquittal. Blacknell v. State, 502 N.E.2d 899 (Ind. 1987).

(1) Mutually antagonistic defenses

Mutually antagonistic defenses require severance only if acceptance of one party's mutually antagonistic defense precludes acquittal of the other. Kimbrough v. State, 622 N.E.2d 230, 232 (Ind. Ct. App. 1993).

(2) Where co-defendant's confession incriminates defendant

Co-defendant may move for a separate trial because another defendant has made an out-of-court statement which makes reference to co-defendant but is not admissible evidence against him. Prosecutor must elect:

(1) separate trial for the moving defendant;

(2) joint trial at which statement not admitted into evidence;

(3) joint trial at which statement admitted into evidence after references to moving defendant have been effectively deleted.

See Ind. Code § 35-34-1-11(b).

(b) Bruton Rule

Admission of non-testifying co-defendant's statements implicating defendant violates Sixth Amendment right to confront witnesses. Curative instructions are inadequate to cure prejudice. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, (1968); Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) (admission of accomplice's out-of-court statement implicating defendant violated Confrontation Clause).

Fox v. State, 179 Ind. App. 267, 384 N.E.2d 1159, 1171 (1979) (reversible error, violation of right to confrontation to admit statement by one of five co-defendants that he was at scene of crime where State showed five defendants together before and after crimes; admonition to disregard evidence ineffective to cure prejudice).

(c) Exceptions to separate trial rule

Separate trials may not be required where one or more of the following circumstances exists:

(1) Redact incriminating portions of confession

Prosecutor may insist on joint trial if he agrees to delete all references to defendant in co-defendant's confession. Scott v. State, 425 N.E.2d 637, 639 (Ind. 1981).

Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998) (use, at joint trial, of non-testifying co-defendant's confession that has been redacted so as to replace defendant's name with a space or the word "deleted," violates the 6th Amendment right to confrontation; where confession refers directly to defendant, merely replacing his name with a blank, or the word "deleted," is not likely to fool anyone);

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) (a confession so edited as to omit any reference to the defendant is not prohibited by Bruton, even though it could be read, in light of other evidence, to incriminate defendant; unlike confession in Gray v. Maryland, here the confessions did not refer directly to the defendant, and required evidentiary linkage for their incriminating effect);

Townsend v. State, 533 N.E.2d 1215, 1224-25 (Ind. 1989) (in case predating Gray v. Maryland, Indiana Supreme Court approved redactions in which co-defendant's name was replaced with "blank" and "other person" and "another person.").

Practice pointer: In some cases redaction is ineffective because co-defendant will be implicated even though references have been deleted. Fox v. State, 179 Ind. App. 267, 280-84, 384 N.E.2d 1159, 1169-71 (1979); Gray v. Maryland, *supra*.

(2) Co-defendant takes stand after making confession and is subject to cross-examination

Where co-defendant takes stand and is available for cross-examination, Bruton rule does not apply. Nelson v. O'Neil, 402 U.S. 622, 91 S.Ct. 1723 (1971); Castro v. State, 580 N.E.2d 232 (Ind. 1991).

Rondon v. State, 534 N.E.2d 719, 726-27 (Ind. 1989) (any error in admitting confession was harmless, even when co-defendant testified and repudiated truthfulness of prior confession).

(3) Co-defendant's statement subject to harmless error

Alleged Bruton violations harmless where the great weight of the evidence introduced establish defendant's guilt. Fayson v. State, 726 N.E.2d 292, 294-95 (Ind. 2000); Richardson v. State, 268 Ind. 61, 64-65, 373 N.E.2d 874, 876 (1978).

Townsend v. State, 533 N.E.2d 1215 (Ind. 1989) (admission of confessions presents no reversible error where: (1) each defendant's own confession and other evidence presented at trial clearly established his guilt; (2) both confessions

were substantially similar; and (3) both were redacted and supported by an instruction to jury).

(4) *In Camera* inspection of confessions

Court may order prosecutor to disclose *in camera* any information concerning statements made by defendants which prosecutor intends to introduce in evidence at trial if this information would assist court in ruling on a motion for a separate trial. Ind. Code § 35-34-1-11(c).

(d) Error to admit "interlocking confessions"

Where a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987).

Cruz v. New York held that a court might use a defendant's interlocking confession on appeal, to assess whether a confrontation clause violation was harmless error. Cruz also held that a court might use a defendant's interlocking confession at trial, to assess whether co-defendant's confession had sufficient "indicia of reliability" to be directly admissible against defendant despite lack of opportunity for cross-examination, but the U.S. Supreme Court later held, in Crawford v. Washington, 124 S.Ct. 354 (2004), that the admission of a co-defendant's testimonial statement against a defendant who is denied the opportunity to cross-examine the co-defendant violates the Confrontation Clause regardless of the statement's "indicia of reliability."

Practice Pointer: Be sure the record reflects the nature of the prejudice your client faces as a result of the Confrontation Clause violation.

2. Severance of offenses

(a) Right to sever offenses

Whenever two or more offenses are joined for trial in the same indictment or information solely on the grounds that they are of the same or similar character, defendant has a right to severance of the offenses. Ind. Code § 35-34-1-11(a). See also Goodman v. State, 708 N.E.2d 901 (Ind. Ct. App. 1999).

Maymon v. State, 870 N.E.2d 523 (Ind. Ct. App. 2007), *aff'd on rehearing*, 875 N.E.2d 375 (trial counsel was ineffective for failing to request a severance of his four burglary charges, which involved four separate victims over a span of almost three months; defendant was entitled to severance of charges as a matter of right because they were joined for trial solely on ground that they were of same or similar character). See also Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000).

If the charges are based on the same conduct or on a series of acts connected together, or are parts of single scheme or plan, Ind. Code § 35-34-1-9(b)(2), severance is discretionary, not a matter of right.

Pierce v. State, 29 N.E.3d 1258 (Ind. 2015) (defendant was not entitled to severance of charges for separate incidents of sexual molestation with his three grandchildren; a common modus operandi and motive (i.e, to fulfill sexual desires) can sufficiently link crimes committed against different victims).

Robinson v. State, 56 N.E.3d 562 (Ind. Ct. App. 2016) (defendant was not entitled to

severance of two theft charges for trial as a matter of right because theft charges were connected together or constituted parts of single scheme or plan given that alleged thefts had a common victim, modus operandi, and motive, and proof regarding both was necessary in order for State to establish corrupt business influence charge).

Failure to move for severance prior to trial waives right to severance, and defendant cannot rely upon fundamental error on appeal. Muse v. State, 419 N.E.2d 1302, 1305 (Ind. 1981). And trial courts do not have a sua sponte duty to sever charges absent a motion from defendant. Norton v. State, 137 N.E.3d 974 (Ind. Ct. App. 2019).

(b) Severance at court's discretion

Pursuant to Ind. Code § 35-34-1-11(a), the court, upon motion of defendant or prosecutor, grant a severance whenever the court determines that severance is appropriate to promote a fair determination of defendant's guilt or innocence of each offense considering: (1) the number of offenses charged; (2) the complexity of the evidence to be offered; and (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. In making this determination, trial courts should consider the number of offenses charged, the complexity of evidence offered and whether the trier of fact will be able to distinguish evidence and apply the law intelligently as to each offense.

Bowser v. State, 984 N.E.2d 236 (Ind. Ct. App. 2013) (even with many charges, evidence was not complex, consisting of testimony from five witnesses and twenty-one exhibits, mostly photographs; scientific testimony about techniques for accident reconstruction was not so complex as to require severance; charged offenses differed only in levels of mental culpability, whether a deadly weapon was used, and level of harm inflicted upon the victims).

Robinson v. State, 56 N.E.3d 652, 656–57 (Ind. Ct. App. 2016) (neither number of offenses charged, nor complexity of evidence weighed in favor of severance when only three charges tried to the jury and evidence presented in support of charges was straightforward and inextricably intertwined).

Vasquez v. State, 174 N.E.3d 623 (Ind. Ct. App. 2021) (no abuse of discretion in denying discretionary severance of 10 child molest counts when evidence as to each victim was easily distinguishable, there were eight charges involving first victim and only two involving second victim, and evidence regarding second victim was straightforward as there was only one alleged incident.).

Wells v. State, 983 N.E.2d 132 (Ind. 2013) (Dickson and Rucker, JJ., dissenting from denial of transfer, note that there cannot be a "fair determination" if a joined offense would constitute 404(b) evidence if severed).

See also: Indiana Trial Rule 42(B) and Indiana Criminal Rule 21, which permit judges to order separate trials "in furtherance of convenience or to avoid prejudice."

E. BIFURCATED PROCEEDINGS

In certain cases, e.g., habitual offender and habitual substance offender proceedings, the defendant's right to a fair trial by an impartial jury may require bifurcated proceedings.

Hines v. State, 794 N.E.2d 469 (Ind. Ct. App. 2003), *adopted and incorporated by reference*, 801 N.E.2d 634 (Ind. 2004) (trial court abused its discretion in refusing to bifurcate defendant's trial for robbery and unlawful possession of firearm by serious violent felon; bifurcated proceeding is best way to ensure that defendant receives a fair trial and impartial

jury where he is tried both for independent felony and SVF); see also Russell v. State, 997 N.E.2d 351 (Ind. 2013).

McAnalley v. State, 134 N.E.3d 488 (Ind. Ct. App. 2019) (trial court should have accepted defendant's stipulation to his status as a person who could not lawfully possess a firearm; best practice for trial courts in trials for this offense is to bifurcate the proceedings).

Pickett v. State, 83 N.E.3d 717 (Ind. Ct. App. 2017) (trial court erred in denying defendant's motion to bifurcate so that SVF charge would be addressed in second phase).

Fletcher v. State, 505 N.E.2d 491 (Ind. Ct. App. 1987) (trial court erred in refusing to grant defendant a bifurcated trial on handgun count).

Sweet v. State, 439 N.E.2d 1144 (Ind. 1982) (bifurcated procedures mandated by habitual offender charge also apply to all criminal charges which allege prior marijuana conviction).

Landis v. State, 704 N.E.2d 113 (Ind. 1998) (when State seeks enhanced penalty based on prior conviction for stalking, defendant is entitled to bifurcated proceeding in which proof of prior conviction is submitted to jury only after it has rendered guilty verdict on present offense; State may present evidence of prior acts that are probative of crime of stalking, subject to Ind. Rules of Evidence, but evidence of any former convictions should be admitted only in "sentencing hearing" contemplated by Ind. Code § 35-38-1-2(c)).

Russell v. State, 997 N.E.2d 351, 354 (Ind. 2013) (if knowledge of prior offenses is kept from jury, then purpose of bifurcation has been met and defendant is not prejudiced).