CHAPTER TWO
Initial Hearing, Omnibus Date, Pretrial Conference
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INITIAL HEARING, OMNIBUS DATE, PRETRIAL CONFERENCE

I. INITIAL HEARING

A. CONSTITUTIONAL REQUIREMENTS

1. Purpose

The Fourth Amendment to the U.S. Constitution requires a determination of probable cause by a neutral, detached magistrate before an arrestee is subjected to an extended restraint of liberty, but the determination need not be made in an adversary proceeding. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975).

The purpose of the initial hearing to prevent defendants from being "unduly detained or held in custody without showing of probable cause." May v. State, 502 N.E.2d 96 (Ind. 1986).

> Buie v. State, 633 N.E.2d 250, 258 (Ind. 1994) (purpose of statute is to avoid unnecessary delay during which investigating officers might solicit confessions or attempt to procure other evidence), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999).

2. Venue for Hearing

Initial hearing may properly be made either in the county of arrest, or in any county believed to have venue over the offense. Ind. Code § 35-33-7-1 (a).

3. Procedure

In Indiana, an initial hearing may include the following:

(a) determination of probable cause, if not determined prior to hearing;
(b) filing of a formal charge, if not filed prior to the hearing;
(c) warning of rights (e.g., speedy trial, privilege against self-incrimination) and explanation of charges;
(d) determination of indigency and appointment of counsel, if appropriate;
(e) determination of bail;
(f) entering of preliminary not guilty plea for defendant; and
(g) setting of omnibus date.

See Ind. Code § 35-33-7-5.

4. Waiver of Hearing; Failure to Object

A conviction will not be reversed for lack of an arraignment or plea in the record unless the

record shows the defendant objected to the lack of an arraignment or plea before trial. Blanton v. State, 233 Ind. 51, 54, 115 N.E.2d 122, 123 (1953); Gee v. State, 508 N.E.2d 787 (Ind. 1987).

Costello v. State, 643 N.E.2d 421 (Ind. Ct. App. 1994) (trial court's failure to arraign defendant theft charges before trial was not fundamental error. Defendant was originally charged and arraigned for practicing medicine without license, but later charged with three counts of theft. Defendant did not object to lack of arraignment on theft charges; court's failure to rearraign defendant as required by IC 35-33-7-5 did not so prejudice her as to warrant reversal).

5. Delay in Initial Hearing

a. Showing prejudice

The burden is on the defendant to show that the delay was unreasonable and prejudicial. Anthony v. State, 540 N.E.2d 602, 605 (Ind. 1989). Examples of unreasonable delays are delays for purpose of gathering evidence to justify arrest, delay motivated by ill will against arrestee, or delay for delay's sake. In evaluating whether delay in particular case is unreasonable, courts must allow substantial degree of flexibility. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991).

However, a delay of more than 48 hours between arrest and initial hearing is presumptively unreasonable. Powell v. Nevada, 511 U.S. 79, 83-84, 114 S. Ct. 1280 (1994); County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991). The burden is then on the State to demonstrate existence of bona fide emergency or extraordinary circumstance. Where jurisdiction consolidates pretrial proceedings (such as arraignment and probable cause hearings) and it takes longer to do so, this fact does not qualify as extraordinary circumstance. Nor do intervening weekends qualify as extraordinary circumstance to justify delay exceeding 48 hours. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991).

b. Remedy: suppression

The denial of a defendant's right to a prompt determination of probable cause does not require dismissal of the charges or deprive a court of jurisdiction to try the defendant, but merely affects the admissibility of evidence that might be tainted by the defendant's illegal arrest and detention. Denson v. State, 263 Ind. 315, 330 N.E.2d 734 (1975). See also Kerr, 16A *Indiana Practice - Criminal Procedure, Trial* §10.3b (West 1998).

The U.S. Supreme Court has not decided whether the Federal Constitution requires suppression of evidence tainted by an unreasonable delay between arrest and initial hearing. Powell v. Nevada, 511 U.S. 79, 85 (1994).

A violation of Ind. Code § 35-33-7-1 is not automatically grounds to suppress a statement obtained in the time between the defendant's arrest and initial hearing. See Covelli v. State, 579 N.E.2d 466 (Ind. Ct. App. 1991) (confession given during delay between arrest and initial hearing is factor to be considered regarding voluntariness of statement).

Cf. Corley v. U.S., 129 S.Ct. 1558 (2009) (18 U.S.C. § 3501, read together with Fed. Crim. Proc. R. 5(a), McNabb v. U.S., 318 U.S. 332 (1943) and Mallory v. U.S., 354

U.S. 449 (1957), require that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing Defendant before the magistrate judge to be told formally of the charges against him).

Although the Indiana Court of Appeals has stated that the "normal remedy" for denial of a prompt initial hearing is suppression of evidence obtained during the delay. Saunders v. State, 562 N.E.2d 729 (Ind. Ct. App. 1990), *vacated in part on other grounds,*584 N.E.2d 1087 (Ind.). See also Kerr, 16A *Indiana Practice - Criminal Procedure, Trial* §10.3b, n.40 (West 1998), Indiana courts have been reluctant to actually suppress evidence tainted in this manner. See, e.g., Buie v. State, 633 N.E.2d 250 (Ind. 1994) *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999); Ford v. State, 521 N.E.2d 1309 (Ind. 1988); Frith v. State, 263 Ind. 100, 325 N.E.2d 186 (1975); Stafford v. State, 890 N.E.2d 744 (Ind. Ct. App. 2008).

6. No Automatic Right to Counsel at Initial Hearing

a. Federal Constitution

An initial hearing in Indiana is not a critical stage in proceeding, for purposes of requiring counsel. See Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854 (1975). However, if evidence is taken, or any factual determination other than the mere review of probable cause for arrest takes place, the right to counsel attaches. Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999 (1970).

Remsen v. State, 495 N.E.2d 184 (Ind. 1986) (even assuming absence of counsel at arraignment constituted denial of right to counsel, error harmless beyond reasonable doubt; prosecution did not benefit from absence, defendant was advised of rights/charge and court entered plea of not guilty before appointing pauper counsel).

Fender v. Lash, 304 N.E.2d 209 (Ind. 1973) (defendant had no absolute right to have counsel present at preliminary hearing).

However, the initial hearing does mark the initiation of the adversarial process that triggers attachment of the Sixth Amendment right to counsel, thus requiring the appointment of counsel within a reasonable time once the request for appointment has been made. Rothgery v. Gillespie County, Texas, 554 U.S. 191, 128 S. Ct. 2578 (2008).

Rothgery v. Gillespie County, Texas, 554 U.S. 191, 128 S. Ct. 2578 (2008) (in civil rights action, majority held that criminal defendant's initial appearance before magistrate judge, where he learns charge against him and liberty is subject to restriction, marks initiation of adversary judicial proceedings that trigger attachment of Sixth Amendment right to counsel; petitioner had bonded out after his initial hearing and was then rearrested; he contended if he had received counsel initially counsel would have been able to show he had been arrested on erroneous information before he was rearrested).

b. Indiana Constitution

No case or statute interprets the Indiana Constitution to require representation by counsel at the initial hearing. However, that right arguably does exist because the Indiana Supreme Court has held that the right to counsel attaches at the time of **arrest**, compared

to the federal right, which does not attach until "formal proceedings have been initiated." See State v. Taylor, 49 N.E.3d 1019, 1021 (Ind. 2016); Batchelor v. State, 189 Ind. 69 (1920); and Suter v. State, 227 Ind. 648, 88 N.E.2d 386 (1949).

In Taylor, the chief deputy prosecutor and several police officers surreptitiously listened into what was supposed to be a private conversation between Taylor and his lawyer at the police station. Taylor and his lawyer discussed "all aspects" of the case, including location of evidence and defense trial strategy. The Court held that the eavesdropping violated state and federal rights to counsel.

To date, the Indiana Supreme Court has not addressed whether Taylor requires counsel at an initial hearing.

Taylor leaves open several questions, including whether a defendant should be entitled to counsel at the initial hearing, and a hearing at the trial court's determination under Criminal Rule 26(B) about whether a defendant presents a substantial risk of fight or danger to himself or others.

> See Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018), *op. on reh'g.*, *overruled on other grounds by* Daves v. Dallas Cnty. Texas, 22 F.4th 522 (5th Cir. 2022)).

In *Odonnell*, the Fifth Circuit upheld the District Court's preliminary injunction of the Harris County predetermined bail schedule for alleged misdemeanants. The Circuit Court held that "the County's mechanical application of the secured bail schedule **without regard for the individual arrestee's personal circumstances**" violates both the Due Process and Equal Protection Clauses of the U.S. Constitution. Id. at 546 (emphasis added).

7. Misdemeanor Cases

The initial hearing of a person issued a: (1) summons; or (2) summons and promise to appear; must take place according to the terms of the summons.

A determination of probable cause is not required at an initial hearing after a misdemeanor summons unless the prosecutor requests on the record that the person be held in custody before trial. Ind. Code § 35-33-7-3.5.

8. No Federal Right to Preliminary Hearing in State Court

A defendant in state court has no federal constitutional right to a preliminary hearing. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989 (1987).

B. INDIANA STATUTORY TIME LIMITS

A person is entitled to an initial hearing promptly after being arrested with or without a warrant. Ind. Code § 35-33-7-4 (with warrant), Ind. Code § 35-33-7-1 (without warrant).

1. Within 20 Days if Defendant Makes Bail

If defendant makes bail, the initial hearing may be held at any time within 20 days of arrest.

See Ind. Code § 35-33-7-1(b) (arrest without warrant) and Ind. Code § 35-33-7-4 (arrest under warrant).

2. OWI Cases - 10 Days after Arrest if Defendant Makes Bail

Ind. Code § 35-33-7-1(c) provides:

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

3. Delaying Initial Hearing to File Charge

Ind. Code § 35-33-7-3(b) provides:

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

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

Under Ind. Code § 35-33-7-5(1)-(5), a trial court should inform the person about:

(1) the right to retain counsel and if he intends to retain counsel he must do so within:

(A) Twenty (20) days if the person is charged with a felony; or
(B) Ten (10) days if the person is charged only with one (1) or more misdemeanors;

after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;

(2) the right to assigned counsel at no expense if he is indigent;
(3) the right to speedy trial;
(4) the amount and conditions of bail;
(5) the privilege against self-incrimination . . .

C. CONSTITUTIONAL ISSUES WITH INDIANA'S INITIAL HEARING STATUTE

In Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018),*op. on reh'g*, the Fifth Circuit upheld the District Court's preliminary injunction of the Harris County predetermined bail schedule for alleged misdemeanants. The Court held that "the County's mechanical application of the secured bail schedule **without regard for the individual arrestee's personal circumstances**" violates both the Due Process and Equal Protection Clauses of the U.S. Constitution (emphasis added).

The Indiana initial hearing statute, Ind. Code § 35-33-7-3, does not require a review of ability of indigent person to pay the prescheduled amount, which under the reasoning of *Odonnell* violates due process and equal protection.

Note: These constitutional concerns are also at issue with bail and procedure (Ind. Code § 35-33-8 and Criminal Rule 26). See Chapter 3 of this manual.

PRACTICE POINTER: Once appointed, counsel should consider filing a motion for bond reduction, which should ask the trial court to make an individualized assessment of defendant's circumstances to determine if requiring the defendant to post the amount established by the pre-determined bail schedule is appropriate.

Note: Judicial determinations of probable cause for warrantless arrests must be held within 48 hours of arrest to comply with the promptness requirement of the Fourth Amendment. County of Riverside v. McLaughlin, 500 U.S. 44 (1991). See IPDC Pretrial Manual, Chapter 2 § I.D.2, *below*.

D. DETERMINATION OF PROBABLE CAUSE - WARRANTLESS ARREST

1. Judicial Determination Before or After Arrest

The Fifth and Fourteenth Amendments to the U.S. Constitution require a judicial determination of probable cause to justify extended restraint of liberty following arrest, but the determination may be made before or promptly after arrest. Determination of probable cause does not require an adversary proceeding but must be made by an impartial magistrate or by a grand jury. Gerstein v. Pugh, 420 U.S. 103 95 S. Ct. 854 (1975).

Kaley v. United States, 134 S.Ct. 1090 (2013) (defendant was not entitled to an adversarial proceeding to challenge grand jury's probable cause finding, even though probable cause finding allowed government to seize her assets, which prevented defendant from hiring counsel of choice).

Cott v. State, 404 N.E.2d 1190 (Ind. Ct. App. 1980) (State must provide for determination of probable cause as condition for any significant pretrial restraint of liberty).

Rhoton v. State, 575 N.E.2d 1006, 1008 (Ind. Ct. App. 1991) (even where determination of probable cause required as condition for pretrial restraint of defendant's liberty, determination need not be made by adversarial hearing).

PRACTICE POINTER: Seek transcripts of the initial hearing if proof of probable cause is by testimony. Such transcripts offer another discovery route and may reveal important facts about a case.

a. At Initial Hearing if Not Obtained Before

Judicial determination of probable cause must occur at initial hearing if prosecutor has not obtained a determination of probable cause by court or grand jury prior to beginning of hearing.

At or before initial hearing, the facts upon which the arrest was made shall be submitted to judicial officer *ex parte*, in affidavit or under oath. If submitted orally, proceeding

shall be recorded, and upon request transcribed. Ind. Code § 35-33-7-2(a).

b. Release or Detention

Judicial officer shall order arrested person be held to answer charges if facts submitted establish probable cause. Ind. Code § 35-33-7-2 (b).

Court shall order immediate release if facts submitted do not establish probable cause, or prosecuting attorney informs judicial officer on record no charge will be filed against arrested person. Ind. Code § 35-33-7-2 (b).

Release due to a lack of probable cause does not bar subsequent information or indictment. Ind. Code § 35-33-7-7.2

c. Failure to Have Hearing

Failure to hold a probable cause hearing does not deprive a court of jurisdiction to hear the defendant's case and does not require reversal of a conviction. Gerstein v. Pugh, 420 U.S. 103 (1975). "The Fourth Amendment probable cause determination is addressed only to pretrial custody." Id. at 123.

2. 48-Hour Rule

A system that does not provide for initial appearance for judicial determination of probable cause within 48 hours of a warrantless arrest, including weekends, is presumptively unreasonable under the Fourth Amendment. The State bears the burden of showing that the delay was due to a bona fide emergency or other extraordinary circumstance.

County of Riverside Calif. v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991) (probable cause determination within 48 hours of arrest may still violate the 4th Amendment, if defendant can show that probable cause determination was unreasonably delayed. Courts must allow flexibility in determining reasonableness of delay. Examples of unreasonable delay between arrest and initial hearing include: delays for gathering evidence to justify arrest; delay motivated by ill will against arrestee; or delay for delay's sake.)

Broering v. State, 169 N.E.3d 412 (Ind. Ct. App. 2021) (six-day delay in bringing defendant before judge for initial hearing was held to be unreasonable delay but no reversal when defendant could not show prejudice from delay).

E. INITIAL HEARING FOR ARREST PURSUANT TO WARRANT

Ind. Code § 35-33-7-4 provides, in part:

A person arrested in accordance with the provisions of a warrant shall be taken promptly for an initial hearing before the court issuing the warrant or before a judicial officer having jurisdiction over the defendant.

1. Timing

Hearing shall be held within 20 days after arrest if defendant makes bond or is released in accordance with provisions for release stated on warrant. Ind. Code § 35-33-7-4.

2. Prerequisites for Arrest Warrant

In Indiana, a warrant for arrest may be issued only after a formal charge has been filed in the appropriate court and probable cause has been found to exist, by court or by a grand jury. Ind. Code § 35-33-2-1(c).

Adamovich v. State, 529 N.E.2d 346 (Ind. Ct. App. 1988) (a probable cause finding need not be set forth explicitly in the court's order book; facts stated in valid affidavit and charging information clearly support court's finding of probable cause).

3. Warrant Governs Proceeding

Initial hearing is held in accordance with provisions of warrant. The defendant is advised of the charge against him at initial hearing, and an automatic not guilty plea is entered on his behalf. Ind. Code § 35-33-7-5 (7). The preliminary not guilty plea becomes a formal plea of not guilty twenty (20) days after completion of initial hearing if the charge is a felony. Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994).

F. ADVISEMENTS OF RIGHTS AT INITIAL HEARING

Ind. Code § 35-33-7-5 Hearing -- Informing accused of rights -- Copy of formal charges

At the initial hearing of a person, the judicial officer shall inform the person orally or in writing:

(1) That the person has a right to retain counsel and if the person intends to retain counsel the person must do so within:

(A) Twenty (20) days if the person is charged with a felony; or
(B) Ten (10) days if the person is charged only with one (1) or more misdemeanors;

after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;

(2) That the person has a right to assigned counsel at no expense to the person if the person is indigent;
(3) That the person has a right to a speedy trial;
(4) Of the amount and conditions of bail;
(5) Of his privilege against self-incrimination;
(6) Of the nature of the charge against the person; and
(7) That a preliminary plea of not guilty is being entered for the person and the preliminary plea of not guilty will become a formal plea of not guilty:

(A) Twenty (20) days after the completion of the initial hearing; or
(B) Ten (10) days after the completion of the initial hearing if the person is charged only with one (1) or more misdemeanors; unless the defendant enters a different plea; and

(8) that the person may request to petition for a specialized driving privileges hearing if the person is charged with:

(A) any offense in which the operation of a motor vehicle is an element of the offense;

(B) any offense under IC 9-30-5, IC 35-46-9, or IC 14-15-8 (before its repeal); or

(C) any offense under IC 35-42-1, IC 35-42-2, or IC 35-44.1-3-1 that involves the use of a vehicle.

In addition, the judge shall direct the prosecuting attorney to give the defendant or the defendant's attorney a copy of any formal felony charges filed or ready to be filed. The judge shall, upon request of the defendant, direct the prosecuting attorney to give the defendant or the defendant's attorney a copy of any formal misdemeanor charges filed or ready to be filed.

1. Waiver of Rights

a. Where Court Advises Unrepresented Defendant of Rights

McElroy v. State, 553 N.E.2d 835 (Ind. 1990) (unrepresented defendant's statements at initial hearing were admissible at trial; the trial court followed Ind. Code § 35-33-7-5, advising defendant of right to remain silent and to have attorney with him when being questioned, and did not interrogate defendant concerning facts of case).

b. Where Court Fails to Advise of Rights, but Defendant Has Counsel

Fox v. State, 506 N.E.2d 1090 (Ind. 1987) (trial court's failure to advise defendant of his rights to counsel and speedy trial, of amount and condition of bail, of privilege against self-incrimination, and of nature of charges against him did not warrant reversal, where counsel waived formal reading of charges at initial hearing and did not bring omissions to the court's attention before trial).

c. Lack of Objection to Failure to Read Charges

Arraignment or reading of charges may be waived. Heartfield v. State, 459 N.E.2d 33, 36 (Ind. 1984); Rogers v. State, 415 N.E.2d 57 (Ind. 1981); and Andrews v. State, 196 Ind. 12, 146 N.E. 817 (1925).

Hudson v. State, 462 N.E.2d 1077, 1080 (Ind. Ct. App. 1984) (mere failure to *read* those rights prior to trial [as opposed to at a guilty plea hearing] is waivable error when defendant does not bring problem to court's attention before proceeding to trial).

2. Indigency Determination and Assigned Counsel

When a defendant requests assigned counsel, the judicial officer shall make an indigency determination before the completion of the initial hearing. Ind. Code § 35-33-7-6(a). If defendant is found to be indigent, magistrate shall assign counsel. Indigency determinations are reviewable at any time during proceedings. In making this determination, the court shall consider the defendant's assets, income, and necessary expenses. See Ind. Code § 35-33-7-6.5(a) (2020). The court may consider that a person's eligibility for federal need-based public assistance programs constitutes sufficient evidence to establish that a person is indigent. Ind. Code § 35-33-7-6.5(b) (2020). See "Right to Counsel," IPDC Pretrial Manual, Chapter 15.

G. LAWYER'S ENTRANCE INTO THE CASE

1. Usual Practice in Indiana

In Indiana, indigent persons arrested for criminal offense are not appointed counsel until first appearance in court. Even where the accused is taken promptly to court and appointed an attorney, she will rarely see her attorney on that same day.

The U.S. Supreme Court has noted that an accused person "requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). The Sixth Amendment right to counsel requires the appointment of counsel within a reasonable time once the request for appointment has been made. Rothgery v. Gillespie County, Texas, 554 U.S. 191, 128 S. Ct. 2578 (2008).

a. Harm to Defendant by Late Entry

Without counsel, the defendant's rights are compromised. Incomplete investigation compromises discovery efforts. Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986) (*overruled* on other grounds by the AEDPA). Bail decisions go unreviewed. Rothgery v. Gillespie County, Texas, 554 U.S. 191 (2008).

The prosecution may obtain evidence in violation of accused's rights. Evidence is lost, witnesses' memories dim, so their testimony often becomes impeachable. Dispositive defenses (double jeopardy, speedy trial, statute of limitations, lack of jurisdiction, statutory immunities from prosecution, and vindictive prosecution) may languish. Flanagan v. U.S., 465 U.S. 259, 104 S. Ct. 1051 (1984).

Other defenses, which benefit all concerned by their early development (e.g., lack of competency and insanity), are neglected. Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999 (1970).

The accused may also suffer the psychological trauma of isolation.

Guaranteeing counsel at first appearance affects a client's waiting time in jail, largely because of counsel's ability to argue for release or lower bail amounts. Shorter pretrial incarceration periods may give the client a better chance of acquittal and reduce unnecessary costs the person is required to pay. Importantly, shorter pretrial incarceration helps to guarantee the client can maintain employment, income, housing, and childcare. Meaningful representation and advocacy at first appearance have been shown to increase the level of client satisfaction and the perception that the proceedings are fair. In sum, shorter pretrial incarceration helps a client maintain their position in the community.

2. First Steps

a. Initial Contact with Defendant

Defendant should: Know counsel will meet with defendant as soon as possible.

- Avoid admissions and confessions.
- Say nothing to police officers or others (cellmates, reporters, etc.) and refuse to

answer questions until he talks with lawyer.

- Avoid consenting to searches.
- Avoid reenactments of alleged crime or defendant's own actions.
- Object to lineups.
- Refuse to appear in lineups or to be shown for identification in lawyer's absence. However, defendant should never resist physically. See "Right to Counsel," Chapter 15.
- Object to physical examinations. Defendant should object to physical examinations, inspection of his body, or taking of blood or hair.
- Object to lie detector tests.
- Avoid reporters.
- Tell counsel of whereabouts and plans to be moved.
- Report to counsel mistreatment by the police.
- Inform counsel of possible sources of bail money.
- Be given relevant information about counsel.

b. Counsel's Initial Contact with Police

Speak to investigating officer by telephone, and

- Identify your status and your client.
- Track defendant's location.
- Determine charges presently filed and others being considered.
- Admonish regarding interrogation, lineups, etc. See "Right to Counsel," Chapter 15. Tell officer not to interrogate defendant or ask questions until counsel arrives.
- Secure medical treatment for defendant through police officer.
- Advise officer that defendant will not confess.
- Obtain officer's identity.

PRACTICE POINTER: The Indiana Supreme Court has held that police have a duty under the Indiana Constitution, Article 1 Section 13, to inform a custodial suspect when his attorney is present at the jail and is seeking access to him. Malinski v. State, 794 N.E.2d 1071 (Ind. 2003). If the client is in custody and counsel has difficulty in contacting the client, it may be a warning sign that the police are interrogating the client or seeking to obtain a waiver of rights or other evidence. Document your efforts to see and speak to the client, along with exact times. See also Ajabu v. State, 693 N.E.2d 921 (Ind. 1998) and Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986).

a. Jail Visit and Bail

Contact bondsman, any relative or friend whom defendant has indicated will pay bail money to meet counsel and defendant at police station. Interview defendant and arrange for release, if possible.

3. Preparing for Initial Interview

The initial meeting with an attorney shapes the client's judgment of the lawyer.

> ABA Criminal Justice Section, Defense Function Standard 4-3.1 (4th ed. 2014): Establishment of Relationship

(a) Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances and explain what the client can do to help preserve confidentiality.

(b) At an early stage, counsel should discuss with the client the objectives of the representation and through what stages of a criminal matter the defense counsel will continue to represent the accused. An engagement letter as described in Standard 4-3.5 should also be provided.

(c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible. In such an instance, defense counsel should also consider whether a mental examination or other protective measures are in the client's best interest.

(d) In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

(e) Defense counsel should ensure that space is available and adequate for confidential client consultations.

(f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

a. Establishing Rapport

(1) Client-Centered Interview

Proceed tactfully. Consider defendant's emotional and psychological strain, anxiety, and fear about detention, trial and sentencing.

(2) Explaining Attorney-Client Privilege to Gain Confidence

One of best methods of convincing client to trust you is to explain the attorney-client privilege. To avoid later misunderstandings, it is imperative during initial interview to settle respective roles of lawyer and client. See the discussions of confidentiality of information and attorney-client decision making in Chapter 14, "Professional Responsibility."

Carter v. State, 512 N.E.2d 158 (Ind. 1987) (when accused elects to be represented by counsel, he surrenders to his attorney the right to make certain binding decisions concerning trial strategy and procedure).

b. Charges

Learn specific charge and any other charges being considered against defendant.

c. Elements of Offense(s) and Penalty/Time

Know elements of offense, penalty, and "good-time" diminution provisions of Ind. Code § 35-50-6-3, provisions regarding initial assignment to credit time classification under Ind. Code § 35-50-6-4, and whether the sentence for the offense is suspendible under Ind. Code § 35-50-2-2.2. Knowing the potential penalty is essential to adequately inform the defendant about the case.

4. Advising Client What to Expect

a. Explaining Court Proceedings

Explain judicial procedures including: individual components of proceedings, when they occur, approximate duration of case, and probabilities of pretrial release if defendant in custody. Avoid making predictions regarding adjudication or disposition.

b. Suggested Checklist for Initial Interview

At initial interview, advise defendant to:

- Avoid admissions to police,
- Say nothing to prosecutors,
- Not discuss the case with cell mates,
- Not discuss the case over the jail telephone,
- Not discuss the case with friends, family, or anyone but counsel,
- Refuse cooperation with police/prosecutor unless under arrest,
- Object to lineups, showups, reenactments, physical exams, etc.,
- Refuse search requests,
- Maintain poise in face of cameras,
- Immediately call counsel if anything comes up.

II. OMNIBUS DATE

A. SIGNIFICANCE

The "omnibus date" is the controlling date for filing of motions and other pleadings as specified in various statutes. Ind. Code § 35-36-8-1(b). Courts have strictly construed omnibus date deadlines. The **omnibus** date, and related deadlines, are not necessarily extended by a continuance of the omnibus **hearing** date or trial date.

B. ESTABLISHED AT INITIAL HEARING

1. Felonies (45-75 Days)

Judicial officer must set omnibus date at initial hearing. Ind. Code § 35-36-8-1(a)(1). Omnibus date must be no earlier than 45 days, and no later than 75 days after completion of initial hearing, unless otherwise agreed by prosecuting and defense attorneys. Ind. Code § 35-36-8-1(a)(2).

2. Misdemeanor Charges Only (30-65 Days)

Judicial officer sets omnibus date at completion of initial hearing. Ind. Code § 35-36-8-1(c)(1). Omnibus date must be no earlier than 30 days, and no later than 65 days after completion of initial hearing. Prosecuting and defense attorneys may agree to date earlier than 30 days from initial hearing. Ind. Code § 35-36-8-1(c)(2).

The omnibus date is also the trial date for misdemeanors. Ind. Code § 35-36-8-1(c)(3). **NOTE:** Some courts have construed the omnibus date as the "first scheduled trial date" for jury trial demands under Criminal Rule 22. See Lehman v. State, 55 N.E.3d 863, 868 (Ind. Ct. App. 2016).

> Fultz v. State, 473 N.E.2d 624 (Ind. Ct. App. 1985) (defendant waived any violation of Ind. Code § 35-36-8-1(c) by failing to object to trial court's failure to set trial date on date set for omnibus hearing).

PRACTICE POINTER: 65-day time limits for setting trial date under Ind. Code § 35-36-8-1(c)(3) may be useful to force speedy trial of misdemeanors. However, rights under that section of omnibus date statute are waived if not asserted at time omnibus date set.

C. MODIFYING OMNIBUS DATE

1. When Effective

Under Ind. Code § 35-36-8-1(d), a modification of omnibus date is not effective, unless:

(1) Defendant files motion for early trial (CR 4(B) motion);
(2) Subsequent counsel enters appearance after omnibus date, and previous counsel withdrew or was removed due to conflict of interest, or because manifest necessity required withdrawal;
(3) State failed to comply with order to compel discovery; or
(4) Prosecuting attorney and defendant agree to continue omnibus date.

2. WARNING: Modifications of Omnibus Date Are Not Implied

Make sure that modifications of the omnibus date are explicitly ordered or agreed to.

> Hooper v. State, 779 N.E.2d 596 (Ind. Ct. App. 2002) (continuance of omnibus *hearing* does not change omnibus *date* unless the requirements of Ind. Code § 35-36-8-1(d) are met). See also Sappenfield v. State, 462 N.E.2d 241 (Ind. Ct. App. 1984).

D. OMNIBUS DATE DEADLINES

1. Motions to Amend - Notice Requirements

Indictment or information may be amended in matters of substance or form, and names of material witnesses may be added upon giving written notice to defendant pursuant to deadlines listed below. Ind. Code § 35-34-1-5(b).

Upon State's motion, court may, at any time before, during, or after trial, permit an amendment to indictment or information which does not prejudice the substantial rights of defendant. Amended indictment or information must be signed by prosecuting attorney. Ind. Code § 35-34-1-5(b) and (c). See generally, "Information/ Indictment," IPDC Pretrial Manual, Chapter 1.V.

a. Felonies - Up to 30 Days before Omnibus

A felony indictment or information may be amended any time up to 30 days before omnibus date, or before the commencement of trial if the amendment does not prejudice the substantial rights of the defendant. Ind. Code § 35-34-1-5(b)(1)(A) and (2).

Gilley v. State, 560 N.E.2d 522 (Ind. 1990) (amendment to information adding voluntary manslaughter to charge of murder was not a material change required to be made more than 30 days prior to omnibus date; defendant could not have been convicted and sentenced for both murder and included offense of voluntary manslaughter arising from same conduct), *overruled in part by* Watts v. State, 885 N.E.2d 1228, 1233 (Ind. 2008).

Underwood v. State, 535 N.E.2d 507 (Ind. 1989) (information could be amended to add counts against defendant, where motions to amend were filed more than 30 days before omnibus date), *cert. denied,* 493 U.S. 900.

b. Misdemeanors - Up to 15 Days before Omnibus

A misdemeanor information may be amended at any time up to 15 days before omnibus date, or before the commencement of trial if the amendment does not prejudice the substantial rights of the defendant. Ind. Code § 35-34-1-5(b)(1)(B) and (b)(2).

c. Habitual Offender - No Later than 10 Days after Omnibus

Amendment of indictment or information to include habitual offender charge under Ind. Code § 35-50-2-8 must be made at least thirty (30) days before the commencement of trial. However, upon showing of good cause, the court may permit filing of a habitual offender charge at any time before the commencement of trial if the amendment does not prejudice the substantial rights of the defendant. Ind. Code § 35-34-1-5(e).

Hegg v. State, 514 N.E.2d 1061 (Ind. 1987) (no error in allowing State to amend information during trial to allege defendant was habitual offender, where full hearing was conducted; motion to amend filed nearly one month before hearing and trial).

Murphy v. State, 499 N.E.2d 1077 (Ind. 1986) (State implicitly moved to add habitual offender count when it filed amended information, which was not effective until trial court accepted it; not requesting leave of court to amend to add habitual

offender count did not violate Ind. Code § 35-34-1-5 (c)).

"Good cause" is not defined in the statute, but it must require something more than lack of prejudice. Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998), *abrogated in part on other grounds by* Williams v. State, 735 N.E.2d 785 (Ind. 2000).

Williams v. State, 735 N.E.2d 785 (Ind. 2000) (fact that State and defendant were engaging in plea negotiations up until date HO enhancement was filed constituted good cause to amend). See also Land v. State, 802 N.E.2d 45 (Ind. Ct. App. 2004) and Falls v. State, 797 N.E.2d 316 (Ind. Ct. App. 2003).

Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998) (trial court erred by allowing state to file HO count three days before trial without making affirmative finding of good cause for untimely addition), *overruled on other grounds by* Williams v. State, 735 N.E.2d 785 (Ind. 2000). See also Hooper v. State, 779 N.E.2d 596 (Ind. Ct. App. 2002).

2. Motions to Dismiss

a. Felonies - No Later than 20 Days Prior to Omnibus

Motion to dismiss felony charges under Ind. Code § 35-34-1-4 shall be made no later than 20 days before the omnibus date. Ind. Code § 35-34-1-4(b)(1).

Foster v. State, 526 N.E.2d 696 (Ind. 1988) (defendant did not challenge allegedly erroneous habitual offender charge within period required by Ind. Code § 35-34-1-4(b)(1); alleged defect was not fundamental error, and defendant failed to show impediment to preparation of defense or other harm from inadequacies of habitual offender allegation).

Averhart v. State, 470 N.E.2d 666 (Ind. 1984) (motion to dismiss indictments due to defective grand jury proceedings was untimely filed fewer than 20 days before omnibus hearing date), *cert. denied,* 471 U.S. 1030.

Cf.

Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994) (failure to challenge deficiencies in charging information no later than 20 days before omnibus date ordinarily results in waiver of issue, unless omission so prejudicial fundamental error results; defendant failed to show he was misled or unable to prepare defense from omission of word "forcibly" from information charging resisting law enforcement).

b. Misdemeanors - No Later than 10 Days Prior to Omnibus

Motion must be made not later than 10 days before the omnibus date if defendant is charged with one or more misdemeanors. Ind. Code § 35-34-1-4(b)(2).

Brittain v. State, 565 N.E.2d 757 (Ind. Ct. App. 1990) (defendant moved to dismiss defective information after jury was sworn; motion not timely filed).

c. Exceptions

A motion to dismiss based upon a ground specified in Ind. Code § 35-34-1-4 (a)(6)-(11) may be made or renewed at any time before or during trial. A motion to dismiss based upon lack of jurisdiction over the subject matter may be made at any time. Ind. Code § 35-34-1-4 (b). The grounds set forth in Ind. Code § 35-34-1-4(a)(6)-(11) are: the defendant has immunity, the prosecution is barred by reason of a previous prosecution, the prosecution is untimely brought, the defendant has been denied the right to a speedy trial, there exists some jurisdiction impediment to conviction of the defendant for the offense charged, and any other ground that is a basis for dismissal as a matter of law.

3. Notice of Insanity Defense

a. Felonies

Defense must file notice of intent to plead insanity as defense 20 days before omnibus date. However, in interest of justice and upon a showing of good cause, court may permit the filing to be made at any time before commencement of trial. Ind. Code § 35-36-2-1.

Eveler v. State, 524 N.E.2d 9 (Ind. 1988) (after time for filing notice of insanity defense passes, trial court's discretion controls whether to allow defendant to plead insanity; no showing of good cause when defendant attempted to file belated notice).

Cornelius v. State, 425 N.E.2d 616 (Ind. 1981) (trial court did not violate defendant's right to fair trial by denying his belated motion for permission to enter insanity defense, filed more than 30 days after entry of not guilty plea; trial court appointed 2 psychiatrists after the defendant's second escape between his arrest and trial, and defendant was found sane at second escape).

Cf.

Gibbs v. State, 610 N.E.2d 875 (Ind. Ct. App. 1993) (State waived any objection to untimeliness of defendant's insanity notice, where State made no objection to untimely filing of notice at trial).

b. Misdemeanors

Defense must file notice of intent to plead insanity 10 days prior to omnibus date if defendant charged only with one or more misdemeanors. Ind. Code § 35-36-2-1. However, in the interest of justice and upon a showing of good cause, the court may permit the filing to be made at any time before commencement of the trial.

4. Notice of Alibi Defense

a. Statutes - Failure to File a Timely Notice of Alibi May Result in Exclusion of Alibi Evidence

Defendant must file with court and serve upon prosecuting attorney a written statement of intention to offer defense of alibi no later than 20 days prior to omnibus date if defendant charged with felony, or 10 days prior to omnibus date if defendant charged with only one or more misdemeanors. Ind. Code § 35-36-4-1.

The notice must include specific information concerning exact place where Defendant claims to have been on the date stated in indictment or information.

Ind. Code § 35-36-4-3(b) provides untimely filing and service of alibi notice shall result in exclusion of alibi evidence unless Defendant can show good cause for failure to comply with filing limitations.

Baxter v. State, 522 N.E.2d 362 (Ind. 1988) (where defendant and his attorney were not diligent in pursuing an alibi defense, and made no offer of proof at trial, the trial court did not err by excluding alibi testimony).

Manning v. State, 557 N.E.2d 1335 (Ind. Ct. App. 1990) (defendant's belief that testimony of defense witness was impeachment, rather than alibi, testimony did not constitute good cause for defendant's failure to file notice of alibi testimony).

Washington v. State, 840 N.E.2d 873 (Ind. Ct. App. 2006) (belated notice of alibi - witnesses improperly excluded where delay more product of negligence rather than willful delay to gain a tactical advantage; error harmless, however, where alibi testimony did not provide a complete defense and significant physical evidence linked defendant to kidnapping).

Edwards v. State, 930 N.E.2d 48 (Ind. Ct. App. 2010) (evidence that defendant was not at crime scene, but not that he was at a specific other place, is "rebuttal" evidence, not alibi evidence).

b. Cannot Exclude Defendant's Own Testimony

Whether the defendant files a timely and adequate notice of alibi or not, the defendant's own testimony cannot be excluded, under the U.S. and Indiana Constitutions.

Article 1, § 13 of the Indiana Constitution guarantees a criminal defendant the right to be heard by himself and counsel.

Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (exclusion of defendant's own alibi testimony under alibi notice statute is an impermissible infringement upon right of accused to testify), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32, 49 (1999).

The 5th, 6th and 14th amendments to the U.S. Constitution guarantee all criminal defendants the right to testify in their own defense. A state procedural rule that limits a defendant's right to testify may not be arbitrary or disproportionate to the purposes it is intended to serve. Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 2711 (1987).

c. Effect of Notice of Alibi

McNeely v. State, 529 N.E.2d 1317 (Ind. Ct. App. 1988) (filing of alibi defense makes time of alleged offense of essence, and State's answer to notice of alibi restricts state to proof of date in answer).

E. STATUTORY MOTIONS WITH TIME LIMITS

Not all motions require hearings, but some must be filed by certain time limits, or they are

waived. Motions other than those made during hearing or trial must be in writing, unless court permits oral motions. Ind. Code § 35-35-2-1(b).

1. Alibi Defense

See Ind. Code § 35-36-4-1 and IPDC Pretrial Manual, Chapter 2 § II.D.4 (notice to be filed no later than 20 days before omnibus date in felony cases and 10 days before omnibus date in misdemeanor cases).

2. Insanity Defense - Felonies

See Ind. Code § 35-36-2-1 and IPDC Pretrial Manual, Chapter 2 § II.D.3 (notice to be filed no later than 20 days before omnibus date).

3. Insanity Defense – Misdemeanors

See Ind. Code § 35-36-2-1 and IPDC Pretrial Manual, Chapter 2 § II.D.3 (notice to be filed no later than 10 days before omnibus date).

4. Dismissal - Felonies

See Ind. Code § 35-34-1-4(b)(1) and IPDC Pretrial Manual, Chapter 9, Motions to Dismiss (motion to be made no later than 20 days prior to omnibus date).

5. Dismissal – Misdemeanors

See Ind. Code § 35-34-1-4(b)(2) and IPDC Pretrial Manual, Chapter 9, Motions to Dismiss (motion to be made no later than 10 days prior to omnibus date).

6. Joinder

See Ind. Code § 35-34-1-10(a)(b) (made before commencement of trial).

7. Severance

See Ind. Code § 35-34-1-12(a)(b) (made before commencement of trial or may be made before or at close of all evidence during trial if based upon ground not previously known, or if the motion is denied, it may be renewed on the same grounds before or at the close of all the evidence during trial).

8. Continuance

See Ind. Code § 35-36-7-1 (must file affidavit not later than 5 days before date set for trial; if a defendant fails to file an affidavit by this time, then he must establish, to the satisfaction of the court, that he is not at fault for failing to file the affidavit at an earlier date.).

9. Motion to Withdraw

See Ind. Code § 35-36-8-2 and IPDC Pretrial Manual, Chapter 15 (under subsection (a), counsel may withdraw for any reason at any time up to 30 days before omnibus date);

Under subsection (b), any time within 30 days of, and at any time after, omnibus date if with

specific showing of:

(1) a conflict of interest;
(2) Other counsel has been retained/ assigned, substitution of new counsel would not cause any delay, and defendant consents to or requests substitution of the new counsel;
(3) The attorney-client relationship has deteriorated such that counsel cannot render effective assistance;
(4) The defendant insists upon self-representation and the defendant understands that the withdrawal of counsel will not be permitted to delay the proceedings; or
(5) There is a manifest necessity requiring counsel to withdraw.

10. "Rape Shield" Law

Indiana Rules of Evidence, Rule 412 (see also Ind. Code § 35-37-4-4(c)(1)) (not less than 10 days before trial; or, under subsection (d) if new information discovered, within 10 days before trial or during course of trial, the trial court shall hold hearing out jury's presence to determine if proposed evidence is admissible under this chapter).

III. PRETRIAL CONFERENCE

A. IN GENERAL

1. Purpose

Purpose of pretrial conference:

(1) consolidate hearings on pretrial motions and other requests to maximum extent practicable;
(2) rule on motions and requests and ascertain whether case will be disposed of by guilty plea, jury trial, or bench trial; and
(3) make any other orders appropriate under circumstances and expedite proceedings.
(4) to consider any matters that will promote fair and expeditious trial; matters related to disposition of proceedings, including simplification of issues; and admissions of fact and documents to avoid unnecessary proof. Ind. Code § 35-36-8-3(b).

See Ind. Code § 35-36-8-3(a).

2. Local Rules

Local court rules and customs dictate function, extent and timing of pretrial conferences.

PRACTICE POINTER: Certain objections (particularly with respect to speedy trial requests and CR (4) should be noted and raised at each and every conference to foreclose possibility of waiver. Pretrial rulings are not final orders; objections at trial are necessary to properly preserve allegations of error.

3. Timing

Upon motion of any party or upon its own motion, court may call pretrial conference. Pretrial

conference may be held on any date prior to trial, including omnibus date. Ind. Code § 35-36-8-3(a).

Owen v. State, 269 Ind. 513, 381 N.E.2d 1235 (1978) (denial of motion for pretrial conference, even if erroneous, does not justify reversal on appeal).

4. Memorandum Required

At conclusion of pretrial conference court shall prepare and file memorandum of matters agreed upon. Ind. Code § 35-36-8-3(c).

5. Presence of Defendant/Use of Admissions by Defendant

An admission made by defendant or his attorney at pre-trial conference may not be used against defendant unless it has been reduced to writing and signed by defendant and his attorney. Ind. Code § 35-36-8-3(c).

The defendant's presence is not required if no evidence is taken at the pretrial hearing.

Lock v. State, 273 Ind. 315, 403 N.E.2d 1360 (1980) (no Sixth Amendment right to be present at pretrial proceedings, because trial court is not constitutionally required to allow defendant to act as his co-counsel).

Carter v. State, 512 N.E.2d 158 (Ind. 1987) (when accused elects to be represented by counsel, he surrenders to his attorney right to make binding decisions concerning trial strategy and procedure).

Ard v. State, 238 Ind. 222, 149 N.E.2d 825 (1958) (defendant's absence from proceedings other than trial, verdict and sentencing does not constitute error where defendant is represented by counsel and has not been denied substantial rights).

B. MOTIONS PRACTICE

1. Petition for Treatment in Lieu of Prosecution

Petition for treatment in lieu of prosecution filed before trial must be heard before trial. Harrington v. State, 421 N.E. 2d 1113 (Ind. 1981). See IPDC Pretrial Manual, Chapter 1.

2. Motion to Suppress

Pretrial hearings may be used for motions to suppress evidence and confessions. Magley v. State, 263 Ind. 618, 335 N.E.2d 811 (1975), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997). See IPDC Pretrial Manual, Chapter 9 § II.

CAVEAT: Motions other than those made during hearing or trial must be in writing unless the court permits oral motions. Ind. Code § 35-35-2-1(b).

3. Procedure Following Pretrial Ruling

A ruling on a pretrial motion to suppress is not a final ruling on admissibility. Gajdos v. State, 462 N.E.2d 1017 (Ind. 1984).

To preserve error in a pretrial ruling in favor of the admission of evidence, the defendant must renew the objection at trial at the time the evidence is introduced. Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). See also Casillas v. State, 190 N.E.3d 1005, 1012 (Ind. Ct. App. 2022) (State waived challenge to timeliness of defendant's objection by not raising it at trial). To preserve error in a pretrial ruling against the admissibility of evidence, the defendant must offer the evidence at trial and make an offer of proof. See Wright v. State, 593 N.E.2d 1192 (Ind. 1992) and Green v. State, 542 N.E.2d 977 (Ind. 1989).

After a pretrial ruling on motion to suppress:

(1) When No New Grounds or Evidence Are Presented at Trial

A simple trial objection will preserve error. A new hearing is not requred. Magley v. State, 335 N.E.2d 811 (Ind. 1975), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997). See also Strickland v. State, 119 N.E.3d 140 (Ind. Ct. App. 2019).

(2) Where New Grounds or Facts Are Presented

A simple ruling is generally not enough. The trial judge may require a summary description of new matter. After summary, judge may rule or hold new hearing to reconsider issue of admissibility. Magley v. State, 335 N.E.2d 811 (Ind. 1975), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997).

(3) Different Trial Judge and Pretrial Judge

The trial judge may order new hearing and may review transcript of pretrial hearing if the motion to suppress is relitigated. Magley v. State, 335 N.E.2d 811 (Ind. 1975), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997).

4. Motion *in Limine*

A motion *in limine* requests a temporary order and serves to prevent display of prejudicial material to jury until the trial court has an opportunity to make an evidentiary ruling within trial context. Hadley v. State, 496 N.E.2d 67, 71 (Ind. 1986).

An order *in limine* requires a party to notify court before introducing or mentioning the matter covered by the motion. Davidson v. State, 442 N.E.2d 1076, 1078 (Ind. 1982) and Shaw v. State, 489 N.E.2d 952 (Ind. 1986).

Stewart v. State, 601 N.E.2d 1 (Ind. Ct. App. 1992) (a trial court's denial of motion *in limine* is not final ruling that evidence sought to be excluded at trial will not be admitted).

PRACTICE POINTER: Motions other than those made during hearing or trial must be in writing, unless the court permits oral motions. Ind. Code § 35-35-2-1(b).

a. Resolve Preliminary Admissibility Questions

Indiana Rules of Evidence, Rule 104 provides that preliminary questions of admissibility of evidence shall be determined by the court. During hearings on motions *in limine*, counsel will be able to litigate the admissibility of evidence prior to trial, and outside the

presence of the jury.

Resolution of issues before trial allows counsel to plan a coherent strategy of defense. A significant topic often considered at a hearing on a motion in *limine* is evidence of prior acts under Evidence Rule 404(b).

b. Procedure Following Pretrial Order

In order to preserve error in the denial of a motion *in limine*, a party must object to the introduction of the evidence at trial. Sharkey v. State, 542 N.E.2d 556 (Ind. 1989). See IPDC Pretrial Manual, Chapter 9.

Tyra v. State, 506 N.E.2d 1100, 1102-03 (Ind. 1987) (merely challenging trial court's ruling on motion in *limine* fails to preserve any error for review; information must be offered at trial to give court opportunity to determine admissibility).

Baker v. State, 750 N.E.2d 781 (Ind. 2001) (failure to make offer of proof at trial waives appellate review of error, even where trial court has granted earlier motion *in limine*).

Tyson v. State, 619 N.E.2d 276, 289 (Ind. Ct. App. 1993) (defendant failed to preserve error in grant of State's motion in *limine* by failing to seek leave to cross-examine witnesses on subject matter covered by order, and by failing to make offer of proof; prosecutor's statement that the issue was preserved for appellate purposes without need to revisit it during trial was mere statement of legal opinion, upon which defense could not reasonably rely).

5. Requests for Admissions, Interrogatories

Request for admissions is unnecessary in criminal pretrial procedure. State ex rel. Grammer v. Tippecanoe Circuit Court, 377 N.E.2d 1359 (Ind. 1978).

Although Criminal Rule 21 (as amended March 1, 1997) provides that the Trial Rules apply to all criminal proceedings, some Trial Rules are presumably impractical to apply in criminal cases. For example, requests for admissions under Rule 36 and interrogatories under Rule 33 may either be unnecessary in view of the criminal pretrial procedures, or, if directed to a defendant, will produce nothing but objections grounded on constitutional rights. State v. Cline, In Re WTHR-TV, 693 N.E.2d 1, 5, n.3 (Ind. 1998).

See "Discovery," IPDC Pretrial Manual, Chapter 6 § IV.I.

6. Pretrial Stipulation

A stipulation to the admissibility of evidence is not the same as an admission that the evidence is true. Defense counsel must carefully review the effect of such stipulations on other rights personal to defendant, such as Fifth Amendment privilege. Consultation with the defendant is recommended, even if the law does not require it. A pretrial stipulation by defendant's counsel regarding admissibility of evidence can be binding on defendant without his signature or recorded acquiescence.

Ross v. State, 172 Ind. App. 484, 360 N.E.2d 1015 (1977) (record indicated a waiver of objection to admissibility of polygraph results taken by defendant; signature requirement

of Ind. Code § 35-36-8-3(c) did not apply nor did court have to determine defendant understood nature of waiver).

In some cases, a defendant may use a pretrial stipulation to certain facts as a tactical device to keep out other, more prejudicial facts. Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644 (1997).

Sams v. State, 688 N.E.2d 1323 (Ind. Ct. App. 1997) (error to admit defendant's entire driving record into evidence instead of allowing the defendant to stipulate that his license was suspended for life. Although the prosecution is entitled to prove its case by evidence of its own choice, and a defendant may not stipulate his way out of full evidentiary force of case against him, this general rule does not apply where the issue is the defendant's legal status independent of criminal behavior later charged against him. Trial court should have excluded this evidence under Ind. Evid. R. 403 because its probative value was substantially outweighed by the danger of unfair prejudice. Error was harmless because of strong evidence of guilt and because the defendant did not request limiting instruction).

7. CR 4 Motions for a Speedy Trial

Failure to assert CR 4 rights at a pretrial conference may result in waiver of right to a speedy trial. Utterback v. State, 261 Ind. 685, 310 N.E.2d 552 (1974); State ex rel. Wernke v. Superior Court of Hendricks County, 264 Ind. 646, 348 N.E.2d 644 1976).

A defendant waives any speedy trial issue by pleading guilty.

Gosnell v. State, 439 N.E.2d 1153 (Ind. 1982) (waiver of right to trial impliedly waives speedy trial claim). See IPDC Pretrial Manual, Chapter 11.

Sumner v. State, 453 N.E.2d 203 (Ind. 1983) (failure to object to setting of pre-trial conference beyond required 70-day period waives CR 4(B) rights, because it is construed as acquiescing in late trial date).

PRACTICE POINTER: Motions other than those made during hearing or trial must be in writing unless the court permits oral motions. Ind. Code § 35-35-2-1(b).

8. Discovery Matters

Discovery problems should be resolved as early as possible since continuances may be denied at trial court's discretion.

Bryan v. State, 438 N.E.2d 709 (Ind. 1982) (motion filed on date of trial for purpose of obtaining psychiatric evaluation; defendant failed to show why he was unable to obtain an evaluation in four months since arrest and three months since filing notice of insanity defense).

Stout v. State, 528 N.E.2d 476 (Ind. 1988) (motion denied where defendant failed to specify steps to be taken and precise additional time required to obtain military records allegedly relevant to issue of sanity).

See "Discovery," IPDC Pretrial Manual, Chapter 6 § III.B.