B. PRETRIAL PROCEEDINGS

B.1. Initial hearing (Ind. Code 35-33-7)

B.1.a. Procedure (Ind. Code 35-33-7-3)

TITLE: Fox v. State
INDEX NO.: B.1.a.
CITE: (1987), Ind., 506 N.E.2d 1090
SUBJECT: Initial hearing - reading of rights
HOLDING: Ind. Code 35-33-7-5 requires Tr. Ct. to advise D of his right to counsel, right to speedy trial, amount and condition of bail, privilege against self-incrimination, and nature of charges against him. In absence of showing of harm and in light of defense counsel's failure to bring omissions to court's attention before trial, Tr. Ct.'s failure at initial hearing to advise D of his rights did not warrant reversal. Conviction affirmed.

RELATED CASES: Heartfield, 459 N.E.2d 33 (arraignment or reading of charges may be waived).

TITLE: McElroy v. State
INDEX NO.: B.1.a.
CITE: (1990), Ind., 553 N.E.2d 835
SUBJECT: Initial hearing - waiver of rights
HOLDING: D waived right to remain silent when, during initial hearing at which D was not represented by counsel, D volunteered statements despite being admonished that D had right to remain silent and to have attorney with him when D was being questioned. Sixth Amendment right to counsel attaches at or after time adversary proceedings have been initiated by formal charge, indictment, information or arraignment. Brewer v. Williams, 430 U.S. 387 (1977). Although D claimed he wanted to plead guilty, tr. ct. entered plea of not guilty until D had adequate time to consult with attorney. Ct. fully complied with Ind. Code 35-33-7-5 and did not at any time attempt to interrogate D concerning facts of case. Held, conviction affirmed.

TITLE: Remsen v. State
INDEX NO.: B.1.a.
CITE: (1986), Ind., 495 N.E.2d 184
SUBJECT: Initial hearing - procedure - right to counsel
HOLDING: Absence of counsel during arraignment is not a violation of D's sixth amendment right to counsel given purpose of initial hearing and non-binding nature of not guilty plea. Purpose of initial hearing is to inform arrestee of status of proceedings and right to counsel. Ind. Code 35-33-7-5. Here, D was advised of his rights and of charge pending against him. Ct. entered plea of not guilty and one-week later pauper counsel was appointed. Even assuming absence of counsel at arraignment constituted denial of right to counsel, error harmless beyond reasonable doubt; prosecution did not benefit from or take advantage of absence. Held, denial of petition for post-conviction relief.

RELATED CASES: Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel attaches if evidence is taken or any determination exceeds mere review of probable cause for arrest).

TITLE: Seaton v. State
INDEX NO.: B.1.a.
CITE: (5/28/85), Ind., 478 N.E.2d 51
SUBJECT: Initial hearing - waiver
HOLDING: D shows no prejudice & has waived any objection to lack of formal arraignment.

Heartfield, 459 N.E.2d 33; Lindsey, 204 N.E.2d 357. Here, D claims he is entitled to a new trial because record does not affirmatively show he was formally arraigned. Ct. finds D was represented by counsel & his jury trial proceeded properly. Held, conviction affirmed.

RELATED CASES: Alexander, 514 N.E.2d 292 (Any error in failure to have probable cause hearing was waived by D's personal appearance and plea of guilty, which constituted submission to ct's jurisdiction). Costello, App., 643 N.E.2d 421 (D failed to object to absence of arraignment & showed no prejudice to warrant reversal).

TITLE: Walker v. State
INDEX NO.: B.1.a.
CITE: (2/2/83), Ind., 444 N.E.2d 842
SUBJECT: Initial hearing - procedure; retrial
HOLDING: Failure of Tr. Ct. to re-arraign Ds prior to retrial on first-degree murder charges following reversal of their convictions by Ind. S. Ct. neither prejudiced Ds nor contributed to their unsuccessful efforts to obtain a change of judge. Here, Ds convictions were reversed & a new trial ordered. Ds contend failure to re-arraign prevented them from timely filing a motion for change of judge. CR 12 provides that following remand for a new trial, a motion for change of judge must be filed not later than 10 days after party has knowledge that cause is ready to be set for trial. Ct. finds failure to hold second arraignment did not prejudice Ds' rights under CR 12. Purpose of arraignment is to give notice to accused of charges brought against him/her & to permit him/her to enter a plea. Here, Ds were arraigned & had entered plea of not guilty prior to first trial. Same charges were on file for second trial & pleas of not guilty were in record. Held, no error.

B. PRETRIAL PROCEEDINGS

B.1. Initial hearing (Ind. Code 35-33-7)

B.1.b. Probable cause determination/arrest without warrant (Ind. Code 35-33-7-2)

TITLE: Kaley v. U.S.
INDEX NO.: B.1.b.
CITE: (2/25/2014), 134 S.Ct. 1090 (U.S. S. Ct. 2014)
SUBJECT: No right to contest probable cause finding, even if result was release of assets allowing D to hire counsel of choice
HOLDING: Where the government seized D's assets before trial pursuant to 21 U.S.C. § 853(e)(1), she was not constitutionally entitled to contest and overturn the grand jury's probable cause finding, even though doing so was the only way she could get the government to release her assets. Without those assets, D lacked sufficient funds to hire counsel of choice, whom she had already hired two years earlier. See Wheat v. United States, 486 U. S. 153, 159 (1988) (discussing right to hire counsel of choice).

After police had investigated them for some time, D and her husband bought a $500,000 Certificate of Deposit, secured by their home, to set aside funds to defend against potential charges. The government eventually charged her with stealing and selling prescription medical devices.

Before trial, the government may seize the assets a D had intended to use to pay her attorney, so long as probable cause exists "to believe that the property will ultimately be proved forfeitable." United States v. Monsanto, 491 U.S. 600, 615 (1989). The Constitution does not confer a right a judicial "re-determination" of probable cause because our history and jurisprudence have long held that a properly convened grand jury "conclusively determines the existence of probable cause." Gerstein v. Pugh, 420 U. S. 103, 117 n.19 (1975). The Court has never authorized "looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." Costello v. United States, 350 U. S. 359, 362 (1956). While it is normally true that an adversarial procedure results in sounder decisions based on more fully vetted facts, such a "full-dress hearing" provides little benefit where the governing standard is probable cause, much lower than standards such as preponderance of evidence and proof beyond a reasonable doubt.

The right to hire counsel of choice is a vital interest. Wheat, 486 U. S. at 159. This right is separate from the right to effective representation and is at "the root meaning" of the Sixth Amendment. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006). Nonetheless, given that freezing assets is wrong only when there is no probable cause and that probable cause is easy to prove, an adversarial hearing, with counsel, is not necessary to determine if there is probable cause a person committed a crime. Chief Justice Roberts dissented, joined by Justices Breyer and Sotomayor, arguing that the majority's decision allows government "to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice without even an opportunity to be heard." Such a result "is fundamentally at odds with our constitutional tradition and basic notions of fair play." Kagan, J., joined by Scalia, Kennedy, Thomas, Ginsburg and Alito, J.J. Roberts, C.J., dissenting, joined by Breyer and Sotomayor, J.J.

RELATED CASES: Luis, 136 S.Ct. 1083 (U.S. 2016) (freezing D's assets unconnected to alleged crime to ensure funds were available to later pay fines and restitution, which prevented D from hiring her own lawyer, denied D's fundamental right to hire lawyer of her choice).

TITLE: Rhoton v. State
INDEX NO.: B.1.b.
CITE: (1991), Ind. App., 575 N.E.2d 1006
SUBJECT: Probable cause determination -adversarial hearing not required
HOLDING: Even when determination of probable cause is required as a condition for pretrial restraint of D's liberty, determination need not be made by adversarial hearing. Gerstein, 420 U.S.103 (1975); Ind. Code 35-33-7-2. D argued that he had right to adversarial probable cause hearing and thus should have been charged by indictment rather than information. Determination of probable cause relates to issuance of arrest warrant and not to procedure by which D is charged with criminal offense. State ex rel. French v. Hendricks Superior Court, 247 N.E.2d 519 (Ind. 1969). Here, because D challenged sufficiency of charging document and not arrest, argument concerning probable cause was misplaced. Held, judgment affirmed.

RELATED CASES: Kaley, 134 S.Ct. 1090 (2014) (Court affirmed denial of request for adversarial hearing to revisit and overturn grand jury's finding of probable cause; a properly convened grand jury conclusively determines probable cause; even though adversarial proceedings often result in sounder decisions based on more fully vetted facts, low threshold to meet probable cause standard made adversarial proceeding unnecessary; see full review, this section).

TITLE: Riverside County, Calif. v. McLaughlin
INDEX NO.: B.1.b.
CITE: 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)
SUBJECT: Probable cause determination - when must it occur?
HOLDING: 4th Amend. requires prompt judicial determination of probable cause as prerequisite to extended pretrial detention following warrantless arrest. Gerstein v. Pugh, (1975), 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54. In section 1983 action Court here determines that jurisdiction which provides judicial determination of probable cause within 48 hours of arrest will generally comply with Gerstein & jurisdiction will be immune from systemic challenges. Individual may nonetheless establish Gerstein violation even if hearing held within 48 hours if individual can establish probable cause determination delayed unreasonably. Examples of unreasonable delay 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. Where arrestee does not receive probable cause hearing within 48 hours, burden is on state to demonstrate existence of bonafide emergency/extraordinary circumstance. Where jurisdiction consolidates pretrial proceedings (such as arraignment & probable cause hearings) & 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. Marshall, T., joined by Blackmun & Stevens, DISSENTING. Scalia, J. DISSENTING (all agreeing that probable cause hearing must take place immediately upon completion of administrative steps incident to arrest).

TITLE: State v. Huddleston

INDEX NO.: B.1.b.

CITE: 924 S.W.2d 666 (Tenn. 1996)

SUBJECT: Tennessee Court Holds That Failure to Hold Probable Cause Determination Within 48 Hours of Warrantless Arrest Triggers Exclusionary Rule

HOLDING: Tennessee Supreme Court holds that exclusionary rule applies to violation of 4th Amendment's requirement of prompt probable cause determination following warrantless arrest. Accordingly, voluntary confession obtained after expiration of 48-hour presumptive time limit set in Riverside County, Calif. v. McLaughlin, 500 U.S. 44 (1991), should have been suppressed. Extension of exclusionary rule to particular 4th Amendment violation involves balancing cost of excluding reliable evidence against benefit of deterring future police wrongdoing. Here, majority found that ignoring McLaughlin rule is functional equivalent of ignoring warrant requirement and that police would be deterred by application of exclusionary rule. **NOTE**: Cf. Myers v. State, Ind., 510 N.E.2d 1360 (1987) (violation of state law requiring that D be promptly brought before magistrate is merely one factor to consider in totality of circumstances to determine whether statement was voluntary).

TITLE: State v. Smith
INDEX NO.: B.1.b.
CITE: (12/07/2021) 179 N.E.3d 516 (Ind. Ct. App. 2021)
SUBJECT: Trial court misapplied the law in dismissing burglary and kidnapping charges
HOLDING: Defendant filed a motion to dismiss burglary, kidnapping, and criminal confinement charges because of insufficient evidence. At a hearing on the motion, the alleged victim denied that the defendant (her ex-boyfriend) had broken into her home or removed her against her as the charging information alleged. The defendant argued that the trial court had factfinding discretion because it was able to observe the demeanor of the sole alleged victim, and that the Information should be dismissed in the interests of judicial economy. The trial court dismissed the charges and the State appealed. The Court held of Appeals that while trial courts have some discretion to determine factual issues when considering a motion to dismiss, that discretion does not extend to usurping the function of the jury. The Court also pointed out that there was other evidence of criminality based on the officer's observations of the scene, the alleged victim's conflicting accounts of how she came to be three hours from her home, and a text message she sent her aunt shortly after the event accusing the defendant of domestic violence. The case was remanded with instructions to reinstate the charges.

B. PRETRIAL PROCEEDINGS

B.1. Initial hearing (Ind. Code 35-33-7)

B.1.c. Delay/effects of delay (see, also I.1.a.5)

TITLE: Broering v. State

INDEX NO.: B.1.c

CITE: (05/03/21), Ind. Ct. App., 169 N.E.3d 412

SUBJECT: Failure to show prejudice from State's failure to hold initial hearing six days after arrest

HOLDING: Ind. Code § 35-33-7-1(a) provides that a "person arrested without a warrant for a crime shall be taken promptly before a judicial officer . . . for an initial hearing in court" in which bail can be set. "If the prosecuting attorney states that more time is required to evaluate the case and determine whether a charge should be filed...then the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays." Ind. Code § 35-33-7-3(b). Here, majority of Court implicitly concluded that a six-day delay in bringing Defendant before judge for an initial hearing automatically violated the promptness requirement of I.C. 35-33-7-1(a). When the State filed its request for a 72-hour extension, the trial court should have denied the request and set an initial hearing at which the prosecuting attorney could make the request on the record with Defendant present. However, Defendant did not show prejudice from State's failure to promptly bring him before a judicial officer for an initial hearing within 48 hours of his arrest. Held, denial of motion to reduce bond affirmed; Bradford, C.J., concurring in result with separate opinion.

TITLE: Griffith v. State
INDEX NO.: B.1.c
CITE: (5-16-03), Ind., 788 N.E.2d 835
SUBJECT: Delay between arrest and initial hearing - voluntariness of confession
HOLDING: Although 63 hours passed between D's arrest and his appearance before magistrate for determination of probable cause, Tr. Ct. properly denied D's motion to suppress confession, because it occurred two days after D's initial hearing, during an interview which he requested. An individual detained following warrantless arrest is entitled to a prompt judicial determination of probable cause as prerequisite to any further restraint on his liberty. Gerstein v. Pugh, 420 U.S. 103 (1975). Where arrested individual does not receive probable cause determination within 48 hours, burden shifts to government to demonstrate existence of bonafide emergency or other extraordinary circumstance. Riverside v. McLaughlin, 500 U.S. 44 (1991). Delay in this case resulted from fact that D was not included on jail population list, which does not constitute an extraordinary circumstance under Riverside. Thus, 63-hour detention was unreasonable. However, suppression of D's confession was not required because Tr. Ct. ordered suppression of any evidence gained after forty-eight hours elapsed but before probable cause hearing occurred. D's confession did not occur until two days after he saw magistrate, and it occurred because he asked to speak with police officers. Held, judgment affirmed.

NOTE: In Corley v. United States, 129 S.Ct. 1558 (2009), Court interpreted 18 U.S.C. § 3501 and Fed. R.C.P. 5(A) to require that even voluntary confessions to federal crimes still are not to be admitted, if the suspect had not been taken to a federal magistrate within six hours of arrest, unless a longer delay was reasonable considering the means of transportation and the distance to be traveled to the nearest available magistrate.

TITLE: Music v. State
INDEX NO.: B.1.c.
CITE: (3/12/86), Ind., 489 N.E.2d 949
SUBJECT: Initial hearing - effects of delay
HOLDING: Because issue of charge was known & available to D at trial & in original appeal, failure to raise it until PCR petition waives issue. Ct. finds record shows D was arrested on Saturday morning. Neither prosecutor's office nor Tr. Ct. will open until following Monday. Necessary pleadings were prepared & petitioner was brought before magistrate on Tuesday morning. D does not claim failure to bring him before magistrate during that weekend resulted in him being subjected to duress from which incriminating evidence was obtained from him. He shows no prejudice resulting from detainment, arguing only that under circumstances, 70 hours was too long. Ct. finds in view of circumstances, no error is presented. James, 281 N.E.2d 469, 471-72; Hashfield, 210 N.E.2d 429, 437-38. Held, denial of PCR affirmed. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Peterson, App., 653 N.E.2d 1022 (D failed to rebut presumption that 36-hour detention between warrantless arrest & determination of probable cause was reasonable); May, 502 N.E.2d 96 (Arrest 70(2); Tr. Ct. did not err in denying D's motion to dismiss premised upon failure to bring D, arrested on 9/25, before magistrate for arraignment until 10/5; probable cause hearing was held 9/28 (D was in custody, but not present at hearing); D was served with arrest warrant on 9/29; D argued delay prevented him from obtaining counsel & securing witness who left state & became unavailable); Anthony, 540 N.E.2d 602 (18-day delay between D's release from hospital & initial hearing was not reversible error; D did not show prejudice).

TITLE: Peterson v. State
INDEX NO.: B.1.c.
CITE: (12-13-96), Ind., 674 N.E.2d 528
SUBJECT: Initial hearing - effect of delay
HOLDING: Confession made during period of illegal detention is not inadmissible solely because of delay in presenting arrestee to magistrate. Such delay is only one factor to consider in determining statement's admissibility. Pawloski v. State, 269 Ind. 350, 380 N.E.2d 1230 (1978). Here, while in custody, D confessed to two murders before his first appearance before magistrate. D was not brought before magistrate until 36 hours after arrest. Ind. Code 36-8-3-11 (repealed by P.L. 148-1995) prohibited arrested person from being detained longer than 24 hours, except when Sunday intervened, without being brought before Ct. having jurisdiction of offense. Ct. held that State's violation of this rule did not automatically require suppression of any statements made by D. Suppression is only required if statement is found by Tr. Ct. to have resulted from inherently coercive effect of prolonged, illegal detention. Minnick v. State, 544 N.E.2d 471 (Ind. 1989). It is only when confession is product of that detention that it must be suppressed. Because record indicated that D's confession was product of his own free will, & not product of his unlawful detention, his confession was admissible. Held, denial of D's motion to suppress affirmed; conviction affirmed.

RELATED CASES: Buie, 633 N.E.2d 250, *overruled* on other grounds by Richardson v State, 717 N.E.2d 32 (Ind. 1999) (although week passed between arrest and initial hearing, denial of motion to suppress statement made to police within twenty-four hours of arrest was upheld); Ford, 521 N.E.2d 1309 (alleged detention of D in police custody for unlawful period without hearing before neutral judicial officer was not fundamental error; D's failure to make timely objection to admission of his custodial confession resulted in waiver of issue, where D did not maintain that confession was induced by force, fear or promise).

TITLE: Stafford v. State

INDEX NO.: B.1.c.

CITE: (4th Dist., 07-22-08), Ind. App., 890 N.E.2d 744

SUBJECT: Unreasonable delay in probable cause hearing - remedy is not dismissal or suppression of all evidence

HOLDING: Tr. Ct. did not abuse its discretion in admitting evidence regarding the officer's arrest and identification of D. An individual detained following a warrantless arrest is entitled to a "prompt" judicial determination of probable cause as a prerequisite to further restraint on his liberty. Griffith v. State, 788 N.E.2d 835, 840 (Ind. 2003); Ind. Code 35-33-7-1; Union County Circuit Local Rule LR81-CR00-1. However, the normal remedy for the violation of such a delay is suppression of the evidence obtained during the unreasonable delay, and it is the D's burden to show that the delay was both prejudicial and unreasonable. Here, there was a six-day delay between D's arrest and probable cause hearing. D moved for discharge and filed a motion to suppress "all evidence" due to the delay. Assuming that delay is unreasonable, neither D's motion to suppress nor his appellate brief specified the evidence that should have been suppressed or not admitted. Further, D failed to show how he was prejudiced by the delay or argue that evidence presented at trial resulted from the delay. Thus, Tr. Ct. did not abuse its discretion in denying D's motion to suppress and admitting evidence. Held, judgment affirmed.

TITLE: U.S. v. Davis
INDEX NO.: B.1.c.
CITE: 174 F.3d 941 (8th Cir. 1999)
SUBJECT: Two-hour Delay for Investigation Held Unreasonable
HOLDING: Two-hour detention of D for questioning before probable cause hearing was unreasonable where delay was for purpose of questioning her about possible additional offenses. D was arrested without a warrant after admitting to filing a false report of firearm theft. Officers detained her for two hours to allow federal authorities to question her about her boyfriend, whose gun-running operation they had been investigating. In Riverside County, CA, v. McLaughlin, 500 U.S. 44 (1991), U.S. Supreme Court held that delays in probable cause hearings of less than 48 hours may be unreasonable if delay was for purpose of justifying original arrest. Federal circuits have *clarified* that this principle extends to delay for purpose of investigating additional crimes. See Willis v. Chicago, Ill., 999 F.3d 284 (7th Cir. 1993); Kanekoa v. Honolulu, 879 F.2d 607 (9th Cir. 1989).

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

TITLE: Amwest Surety Insurance Co. v. State
INDEX NO.: B.2.
CITE: (6-25-01), Ind. App., 750 N.E.2d 865
SUBJECT: Bail forfeiture - Surety's right to surrender D
HOLDING: Tr. Ct. did not abuse its discretion by denying Surety's motion to be released from bail bond. In this case, the Surety had information that two Ds had moved to new addresses within the jurisdiction without notifying the Surety. The Surety called the Sheriff's Department to inform Department that it would be apprehending one of the Ds & returning them to jail. A Department employee told the Surety that the jail would not accept the Ds unless the Surety provided a copy of an arrest warrant. The Ds fled the jurisdiction & the Surety sought to be released from bond. Ct. held that a Surety may surrender a D under Ind. Code 27-10-2-5 & Ind. Code 27-10-2-7 before the D has breached the terms of the undertaking, without an arrest warrant, if the surety meets the requirements of Ind. Code 27-10-2-5 or 27-10-2-7 in full. Sheriff's Department did not interfere with surety's right to surrender a D by telling the surety that the Ds could not be surrendered without arrest warrants. Surety could have apprehended the Ds & attempted to surrender them without warrants or could have sought relief in the Tr. Ct's. by requesting clarification of its statutory rights or by requesting arrest warrants. Held, judgment affirmed; Mattingly-May, concurring.

TITLE: Beachey v. State
INDEX NO.: B.2.
CITE: (9-28-21), Ind. Ct. App., 177 N.E.3d 850
SUBJECT: - Trial court must consider Indiana pretrial risk assessment in determining bond amount
HOLDING: The trial court abused its discretion in denying Defendant's motion to reduce bail because it failed to order and consider the results of a pretrial risk assessment report as mandated by Indiana Criminal Rule 26 and IC 35-33-8-3.8. In light of the trial court's failure to adhere to the pre-risk assessment requirement, the Court of Appeals did not address Defendant's constitutional argument that the $520,000 surety bond was excessive. The trial court's order denying modification of bond was vacated and remanded for proceedings consistent with the opinion.

TITLE: DeWeese v. State
INDEX NO.: B.2.
CITE: (02/03/2022), Ind. Ct. App., 180 N.E.3d 261
SUBJECT: Denial of bail modification affirmed
HOLDING: Trial court did not abuse its discretion in refusing to reduce bond or grant conditional release to an 18-year-old Defendant who drove three men to an armed home invasion resulting in the exchange of gunfire and injury to one of the accomplices. Defendant was charged with Level 2 felony aiding, inducing, or causing burglary with a deadly weapon. Using the Indiana Risk Assessment System's (IRAS's) Pretrial Assessment Tool, court services assessed Defendant for pretrial release and rated her at a moderate risk of rearrest and failure to appear at future court hearings. The trial court subsequently denied her motion for reducing her $50,000 cash only bond. Acknowledging Defendant's strong family ties and lack of criminal record, the trial court was swayed by the "extremely serious" nature of the crime and burglary victim's testimony that he lived in fear since the break-in. However, the Court of Appeals reversed and ordered Defendant to be released to pretrial electronic home detention with GPS monitoring. On transfer, the Indiana Supreme Court affirmed the trial court's ruling, finding the State met its burden of showing Defendant posed a substantial flight risk and danger to others, including the victim of the home invasion. Before reaching its decision, the Court examined Indiana's bail reform efforts, concluding Criminal Rule 26 and the Legislature's codification of that rule enhance, rather than restrict, the trial court's discretion when determining bail and "strike the proper balance between preserving a defendant's pretrial liberty interests and ensuring public safety." Indiana Code § 35-33-8-3.8 mandates that a trial court consider the results of the IRAS, but the statute does not compel that the defendant be released or require the trial court to use the IRAS assessment in setting bail. Indeed, the Legislature encouraged trial courts to incorporate other information that is relevant in the bail determination.

The Court also admonished the Court of Appeals for reversing the trial court and issuing a ruling that required her to be released immediately. Even while an individual's liberty is at stake in a bail decision and deviating from Appellate Rule 65(E) may be justified, the Court urged "prudence and restraint" when deviating from the rule. But the Supreme Court's opinion did not affect Defendant's conditional release. Instead, if either party wanted to modify her release, then the trial court would have to conduct a hearing consistent with the Supreme Court's opinion in this case. Held, transfer granted, Court of Appeals opinion at 163 N.E.3d 357 vacated, judgment affirmed.

RELATED CASES: Jones, 187 N.E. 3d 227 (Ind. Ct. App. 2021) (denial of motion to reduce bail affirmed); Medina, 188 N.E.3d 897 (Ind. Ct. App. 2021) (trial court did not abuse its discretion in refusing to reduce $150,000 bail for an 18-year-old defendant whose boyfriend died after the car she was driving crashed. Defendant was charged with operating a motor vehicle while intoxicated, a Level 4 felony, and causing death when operating a vehicle with a Schedule I or II controlled substance, or its metabolite, in her blood, a Level 4 felony).

TITLE: Mishler v. State
INDEX NO.: B.2.
CITE: (3rd Dist., 1-10-96), Ind. App., 660 N.E.2d 343
SUBJECT: Bail bondsmen - forcible entry of third party's residence
HOLDING: Bail bondsmen were not lawfully entitled to conduct forced entry of third party's home to search for D. Bail agent's authority to arrest & surrender D is derived from Ind. Code 27-10-2-7, which empowers surety to apprehend D, & Ind. Code 35-33-1-4, which permits citizen to arrest another individual under certain circumstances. Statutes neither address nor authorize power of bondsman to forcibly enter private dwelling of third party to arrest D. Here, bondsmen went to home of D's mother, who stated that she did not know of D's whereabouts and attempted to close door. Bail agent planted his foot inside door to prevent it from being closed & second agent kicked door open. Both men entered apartment & bumped D's mother, causing her to fall backwards. D's mother was not party to surety-principal contract & bail bondsmen were not empowered to enter her home under these circumstances. Evidence was sufficient to support conviction for criminal trespass & battery. Held, convictions affirmed.

RELATED CASES: Dewald, App., 898 N.E.2d 488 (in affirming D's criminal confinement convictions, Ct. declined D's invitation to expand law pertaining to authority of bail bondsmen to permit bondsmen to conduct investigatory stops of third parties).

TITLE: Utley v. State

INDEX NO.: B.2.

CITE: (4-7-21), Ind. Ct. App., 167 N.E.3d 777

SUBJECT: Date of arrest is not counted when computing the 15 days a person arrested for a probation violation and not admitted to bail may be held in jail without a hearing

HOLDING: Defendant arrested on a probation violation and held without bond argued he did not have a hearing within fifteen days as required by I.C. 35-38-2-3(d). Considering Trial Rule 6(A) and the general rule that when computing time for performance of an act which must take place within a certain number of days of the triggering event, Court of Appeals held that the day of the triggering event is not included. Here, Defendant had a hearing on the 15th day, excluding the day of his arrest. Held, probation violation affirmed.

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.a. Right to bail/excessive bail (8th Amend; Ind. Const. Art I, 16, 17)

TITLE: Schmidt v. State
INDEX NO.: B.2.a.
CITE: (1st Dist., 4-3-01), Ind. App., 746 N.E.2d 369
SUBJECT: Right to bail attaches at initial hearing
HOLDING: Indiana Constitution, Article 1, section 17, is silent regarding when right to bail attaches. Neither Indiana Constitution nor Ind. Code 35-33-7-5 gives accused right to immediate bail, although statute specifies that accused must be informed of amount & conditions of bail at initial hearing. Therefore, while judge, in her discretion, may allow bail to be posted immediately after arrest, right to bail does not vest until initial hearing. Here, bail was set at same time as probable cause determination. However, D was not informed of terms of his bail before he pleaded guilty at his initial hearing. Despite fact that D was not advised of amount & conditions of his bail prior to entering his plea of guilty, Ct. rejected argument that D's guilty plea was coerced & involuntary. Held, denial of post-conviction relief affirmed.

TITLE: Sherelis v. State
INDEX NO.: B.2.a.
CITE: (3d Dist. 8/15/83), Ind. App., 452 N.E.2d 411
SUBJECT: Bail - excessive
HOLDING: Tr. Ct. abused its discretion by refusing to reduce D's $1,000,000 bail. D was charged with 4 Class A felonies & one Class B felony. Pre-release report indicated D had lived in Elkhart 12½ years & in his home 6½ years, had been married 25 years, had 3 children (2 in Indiana colleges, one in high school in Elkhart), possessed a master's degree & had completed work on Ph.D., was board chairman & 50% shareholder of Local Corporation, had no prior criminal history & no assets outside Elkhart. Pretrial release officer recommended bail be reduced, provided D surrender his passport. Tr. Ct. rejected recommendation, finding gravity of offense & potential penalty (220 years) presented risk of non-appearance & D had adequate resources to post bond. Ct. found $1,000,000 bond excessive, under Ind. Const. Art. 1, §16 & 17; Ind. Code 35-33-8-4; Stack v. Boyle, 342 U.S. 1; Hobbs v. Lindsey, 162 N.E.2d 85. Once bail is available, amount set shall not be excessive, as this constitutes denial of right altogether. Bail is excessive if amount set is higher figure than that reasonably calculated to assure D's presence at trial. Nature & gravity of offenses alone were insufficient to rebut overwhelming evidence indicating strong likelihood of appearance.

RELATED CASES: Custard, App., 629 N.E.2d 1289 (Tr. Ct. did not abuse discretion in refusing to reduce D's $275,000 bond. D was charged with class A felony, was unemployed, had prior criminal history, & had lived in state for only 6 months); Mott 490 N.E.2d 1125 ($40,000 bail not excessive in light of lack of personal community ties, extensive criminal record & fact it was set in accordance with bail schedule); Shanholt, App., 448 N.E.2d 308 ($25,000 bail not unreasonable where D had no permanent residence, no present income or job in the community & had removed her 2 minor children (of whom her ex-husband had custody) from Ind. to Ariz.).

TITLE: U.S. v. Salerno
INDEX NO.: B.2.a.
CITE: 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)
SUBJECT: Consideration of future dangerousness - excessive bail
HOLDING: 8th Amend. provides that "[e]xcessive bail shall not be required." Here, Federal Bail Reform Act authorizes federal court to detain arrestee pending trial if government demonstrates by clear & convincing evidence after adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person & the community." Court notes that primary function of bail is to safeguard court's role in adjudicating guilt or innocence by assuring D's appearance at trial. 8th Amend. says nothing about whether bail should be available at all. Nor does 8th Amend. prohibit government from pursuing compelling interests other than flight through regulation of pretrial release. In determining whether bail is "excessive" under 8th Amend., it must be compared against interests government seeks to protect. Held, where legislature mandates detention on basis of compelling interest other than prevention of flight, 8th Amend. does not require release on bail. Marshall, joined by Brennan, DISSENTS; Stevens DISSENTS.

NOTE: Under Ind. Code 35-33-8-3(a) the sole consideration in determining the amount of bail & conditions is "to assure the D's appearance. . . ."

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.b. Conditions to assure appearance (Ind. Code 35-33-8-3)

TITLE: Bennett v. State
INDEX NO.: B.2.b
CITE: (4th Dist., 7-11-96), Ind. App., 668 N.E.2d 1256
SUBJECT: Application of bail bond to payment of judgment prohibited
HOLDING: Fine, costs, & restitution may not be deducted from D's cash bond deposit. As part of agreement to receive benefit of ten-percent cash deposit, D agreed to provision permitting Tr. Ct. to apply bond deposit funds to satisfy judgment. Purpose of bail statute is to ensure appearance of D, & if that end has been achieved, Tr. Ct. may not appropriate deposit towards other ends except as provided in Ind. Code 35-33-8-3.1 & Ind. Code 35-33-8-7. Fines, costs, & restitution are not expressly enumerated by statute for application by Tr. Ct. Held, judgment reversed & remanded.

NOTE: In 1998, statute was amended to allow Ct. to retain all or part of cash deposit to pay D's fines, costs, and restitution.

TITLE: Harvey v. State
INDEX NO.: B.2.b.
CITE: (6-7-01), Ind. App., 751 N.E.2d 254
SUBJECT: Random drug testing as condition of bond - must object to preserve issue
HOLDING: D must object to imposition of random drug testing as condition of bond in order to preserve issue for appellate review or any subsequent objection. When D showed up for final pre-trial hearing, she was instructed that she would have to meet with probation officer for drug test. D refused to do so & bond was revoked. D argued that Tr. Ct.'s order requiring submission to random drug tests as condition of bond is unconstitutional search & seizure because it requires submission to such test without reasonable suspicion. Ct. disagreed & held that D's failure to object when Tr. Ct. imposed random drug testing as condition of probation waived subsequent objections to such testing, as well as appellate review of issue. Held, judgment affirmed.

RELATED CASES: Steiner, App., 763 N.E.2d 1024 (it is unreasonable & an abuse of discretion for Tr. Ct. to order random urine screens as condition of bail, where there is no individualized determination that D is likely to use drugs while on bail; see full review, this section).

TITLE: Hendrix v. State
INDEX NO.: B.2.b.
CITE: (1993), Ind. App., 615 N.E.2d 483
SUBJECT: Application of bail to payment of appellate costs prohibited
HOLDING: Cash trial bond was improperly applied toward costs of D's appeal. When D has complied with terms of bond, D is entitled to return of money, less certain fees & costs of publicly paid representation for trial and sentencing. Ind. Code 35-33-8-3.1. D was admitted to bail by paying cash bond and appeared for all proceedings, including sentencing on April 16, 1992. Statute provides no authority for applying cash bond to future costs of public representation. According to ct., costs of appellate attorney's fees are properly determined after appeal is concluded, and there is no state or federal constitutional right to bail pending appeal. Therefore, 30-day time limit of statute and realities of appellate practice preclude application of bond money to public appellate representation. Ct. ordered to remit bail deposit to D.

RELATED CASES: Sandoval, 70 N.E.3d 889 (Ind. Ct. App. 2017) (Tr. Ct. erred in holding the balance of D's bond in trust towards possible future appellate public defender fees).

TITLE: Mott v. State
INDEX NO.: B.2.b.
CITE: (3d Dist. 3/19/86) Ind. App., 490 N.E.2d 1125
SUBJECT: Bail - conditions
HOLDING: Tr. Ct. did not abuse discretion by requiring posting of bail in form of surety bond rather than 10% cash deposit. Ind. Code 35-33-8-3. Ct. finds statute places matter of executing bail within discretion of trial judge. Same factors relevant in determining amount of bail are relevant in determining particular matter of execution. In light of D's lack of personal community ties & extensive criminal record, Ct. finds no abuse in requiring surety bond. Held, no error.

RELATED CASES: Samm, Jr., App., 893 N.E.2d 761 (although bond set within the bond schedule is presumed to be reasonable, bond set outside the bond schedule is not presumed to be unreasonable).

TITLE: Sandoval v. State
INDEX NO.: B.2.b.
CITE: (2/24/2017), 70 N.E.3d 889 (Ind. Ct. App. 2017)
SUBJECT: Judge may not hold bond money for future public defender fees
HOLDING: Trial court erred in holding the balance of Defendant's bond in trust towards possible future appellate public defender fees. See Hendrix v. State, 615 N.E.2d 483, 485 (Ind. Ct. App. 1993). Court declined to find waiver because D did not assent to this use of his bond, and a claim that trial court violated its statutory authority in imposing a sentence may be raised for the first time on appeal. Edsall v. State, 983 N.E.2d 200 (Ind. Ct. App. 2013). Held, judgment reversed and remanded to return balance of Defendant's bond immediately.

TITLE: Steiner v. State
INDEX NO.: B.2.b.
CITE: (3-7-02), Ind. App., 763 N.E.2d 1024
SUBJECT: Drug screens as condition of bail - individualized determination that D likely to use drugs required
HOLDING: It is unreasonable & an abuse of discretion for Tr. Ct. to order random urine screens as condition of bail, where there is no individualized determination that D is likely to use drugs while on bail. Ind. Code 35-33-8-3.2(a)(8) provides that Tr. Ct. can impose any type of condition for bail to assure D's presence in Ct. or to protect community. Because random urine screens invoke Fourth Amendment rights, determination of what is reasonable under statute must factor in those rights. Ct. relied on cases from other jurisdictions in holding that Tr. Ct. must make individualized determination that D is likely to use drugs while on bail before it is reasonable to place restrictions on person based on that contingency. Oliver v. United States, 682 A.2d 186 (D.C. 1996); Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987).

Here, D was accused of misdemeanor possession of marijuana. However, she had no history of substance abuse or any other convictions or arrests. While evidence of history of drug use or prior drug or alcohol arrests would be proper basis for imposing drug screens as condition of bail, no such evidence was introduced that would lead Tr. Ct. to make individualized determination that D would use drugs during pretrial release. Further, D did not waive issue despite not objecting at time conditions were imposed. Distinguishing Harvey v. State, 751 N.E.2d 254 (Ind. Ct. App. 2001), Ct. noted that D had already bonded out at time condition was imposed, received no advantage by not objecting, & had submitted to numerous screens before she filed her motion to terminate drug screens. Held, judgment reversed; Barnes, J., dissenting.

TITLE: Tinsley v. State
INDEX NO.: B.2.b.
CITE: (1st Dist. 8/25/86) Ind. App., 496 N.E.2d 1306
SUBJECT: Bail - conditions to assure appearance
HOLDING: Tr. Ct. erred in establishing bail condition unrelated to purpose of assuring D's appearance at future legal proceedings. Here, condition of bail forbade Ds from returning to theater at which they were arrested for engaging in allegedly obscene performance. Right to freedom by bail pending trial is interrelated to doctrine that one accused is presumed innocent until guilt is proven beyond a reasonable doubt. Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951); Hobbs v. Lindsey, 162 N.E.2d 85. Purpose of bail is to ensure appearance at appropriate legal proceeding. Ind. Code 35-33-8-1. Ct. may impose certain conditions pursuant to Ind. Code 35-33-8-3. State contends paragraph 3 of that statute allows Ct. to impose reasonable restrictions on activities, movements, associations, & residence of D during period of release. Nonetheless, Ct. finds proper statutory construction requires each section of statute to be considered with reference to other sections & determines that paragraph 3 when read with paragraph 7, which includes reference to assuring Ds' presence in Ct., precludes state's interpretation. Ct. also rejects state's view that because Ct. could revoke Ds' bail entirely for engaging in allegedly obscene performance while released on bond, Tr. Ct. could, therefore, prevent them from entering premise of theater. Ct. finds cases cited by state inapposite. State has not proven how bond condition is relevant to assuring Ds' appearance at future Ct. proceedings. Held, remanded with instruction to vacate condition banning Ds from theater premise.

RELATED CASES: State ex rel. Williams v. Ryan, 490 N.E.2d 1113 (Tr. Ct. did not err in placing following conditions on posting of statutory 10% cash bail: (1) posted in name of D; (2) considered personal asset of D, and (3) available for payment of court costs, fines, restitution and necessary attorney fees).

TITLE: Wright v. State
INDEX NO.: B.2.b.
CITE: (05-27-11), 949 N.E.2d 411 (Ind. Ct. App. 2011)
SUBJECT: Retention of cash bail bond for fines, costs and fees - indigency hearing not required
HOLDING: Tr. Ct. did not err in disbursing funds in a bond escrow account to pay for court fines and costs and reimburse I.M.A.G.E. Drug Task Force. D was charged with B felony dealing in methamphetamine. D entered into a cash bail-bond agreement in which she agreed to deposit a cash bail bond of $1000 and gave Tr. Ct. the authority, in the event she failed to appear as required or was convicted, to use all or part of that money to pay fines, costs, and fees pursuant to Ind. Code 35-33-8-3.2(a)(2). D paid ten percent of her bond by depositing $1000 in escrow. Upon D's conviction, Tr. Ct. ordered fees, costs and fines to be paid out of the $1000 in escrow, and paid the balance back to D. *Citing* Maroney v. State, 849 N.E.2d 745 (Ind. Ct. App. 2006), D argued that an indigency hearing is required before she should have to pay any fees or fines. However, Ind. Code 35-33-8-3.2(a)(2) has been amended since Maroney, and provides that the absence of language requiring an indigency hearing means that when a bail-bond agreement is executed, such a hearing is not required. To impose the hearing requirement of Ind. Code 33-37-2-3(a), where a D executed a cash bail-bond agreement pursuant to Section 35-33-8-3.2(a)(2), would render the bail bond agreement meaningless. Held, judgment affirmed.

TITLE: Zanders v. State
INDEX NO.: B.2.b.
CITE: (3rd Dist., 12-23-03), Ind. App., 800 N.E.2d 942
SUBJECT: Erroneous retention of bond deposit for extradition expenses after charges dismissed
HOLDING: Tr. Ct. erred in retaining a portion of D's bond deposit for extradition expenses as "costs" under Ind. Code 35-33-8-3.2 after charges against him were dismissed. After failing to appear at a hearing in 1999, a warrant was issued for D's arrest. From a Virginia prison in 2002, D filed his "Inmate's Notice of Imprisonment & Request of Disposition" pursuant to Article 3 of the Interstate Agreement on Detainers Act (IADA). In May 2003, D was extradited to Indiana. Shortly thereafter, D filed a Motion to Dismiss due to State's failure to try him within the 180 days prescribed by the IADA, which the Tr. Ct. granted & dismissed the charges with prejudice. D was returned to Virginia with Lake County in Indiana incurring $681.40 in costs for his transfer. The Tr. Ct. ordered these extradition costs be retained from D's 10 percent bond pursuant to Ind. Code 35-33-8-3.2(b). Tr. Ct. incorrectly relied on Vestal, App., 745 N.E.2d 249, holding that extradition expenses are reimbursement costs that a Ct. may order a D to pay at sentencing. Vestal did not address the primary issue of whether a Tr. Ct. may order such costs retained when charges are dismissed with prejudice. While finding that Ind. Code 35-33-8-3.2 could plausibly be interpreted as Tr. Ct. suggests, Ct. finds that phrase "If the D is convicted ..." found in section (a)(2) of the statute extended to the restitution portion of the statute. Further, Ct. found that Tr. Ct.'s authority to impose fines, costs, fees, & restitution does not attach until sentencing, noting that applicable statutes for garnering such monies generally speak about being effective after conviction. State ex rel. Williams v. Ryan, 490 N.E.2d 1113 (Ind. 1986) (bail not to effect punishment prior to conviction). Ct. rejected State's claim that retention was correct due to D's failure to appear for hearing. While Ind. Code 35-33-8-7 allowed for forfeiture based on failing to appear, Tr. Ct. never initiated bond forfeiture statute after D's failure to appear. Held, judgment reversed.

RELATED CASES: Maroney, App., 849 N.E.2d 745 (Tr. Ct. can retain 10% deposit of bail to pay for extradition costs after D is convicted).

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.c. Factors to consider in setting bail (Ind. Code 35-33-8-4(b))

TITLE: Mott v. State
INDEX NO.: B.2.c
CITE: (3d Dist. 3/19/86) Ind. App., 490 N.E.2d 1125
SUBJECT: Bail - factors to consider
HOLDING: Tr. Ct. did not err in setting D's bail at $40,000 where D had few personal community ties & extensive criminal record. Ind. Code 35-33-8-4(b). Ct. rejects D's contention that consideration of possible penalty for crime charged in determining bail denies accused right to presumption of innocence. Subsection (b)(7) specifically provides for consideration of nature/gravity of offense & potential penalty faced in so far as relevant to risk of non-appearance. Stack v. Boyle (1951), 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3; [other citations omitted]. Ct. compares D's circumstances to that of Sherelis, App., 452 N.E.2d 41, in which Ct. found bail excessive [card at B.2.a]. Ct. notes inability to procure amount necessary to make bond does not in & of itself render amount unreasonable. Anderson, App., 393 N.E.2d 238. Held, no error.

TITLE: Reeves v. State
INDEX NO.: B.2.c.
CITE: (03-10-10), 923 N.E.2d 418 (Ind. Ct. App. 2010)
SUBJECT: Failure to consider statutory criteria in setting bail
HOLDING: Tr. Ct. abused its discretion in denying motion to reduce bail because it failed to state nexus between criteria for bail in Ind. Code 35-33-8-4(b) and bond of $1.5 million (with no 10% cash bail allowed). Indiana's Constitution prohibits excessive bail. Ind. Const. art. I, § 16. Fundamental purpose of bail is to ensure D's presence when required. Mott v. State, 490 N.E.2d 1125, 1127 (Ind. Ct. App. 1986). Bail is excessive where amount is higher than reasonably calculated to assure D's presence at trial. Sherelis v. State, 452 N.E.2d 411, 413 (Ind. Ct. App. 1983). Criteria for bail include D's job status, family ties to community, and character and reputation. Ind. Code 35-38-8-4(b).

Here, D was charged with ten counts of class C felony securities fraud. D was in business with his father and brothers helping churches and nonprofit get financing for building projects and refinance mortgages for those entities. Probable cause affidavit alleged the Ds used a Ponzi scheme where they used money from churches and bondholders to pay prior investors, and that D received about $1.8 million of $6 million in ill-gotten gains.

Review of Tr. Ct.'s bond ruling was burdensome because it did not explain why it imposed bail 100 times more than local rule suggested for single Class C felony or ten times more than amount for ten Class C felonies. Bail of $1.5 million bail appears more than necessary to assure D's presence at trial. Statutory criteria perhaps favoring D suggest bail is excessive. Held, remanded for consideration of factors in Ind. Code 35-33-8-4(b) and explanation for bail imposed.

RELATED CASES: Sneed, 946 N.E.2d 1255 (Ind. Ct. App. 2011) (although Ind. Code 35-33-8-4 and 5 require Tr. Ct. to consider relevant factors, they do not require Tr. Ct. to explain its reasoning for setting or failing to reduce bail especially where, as here, the bail initially set is not prima facie excessive).

TITLE: Samm, Jr. v. State
INDEX NO.: B.2.c.
CITE: (3rd Dist., 09-22-08), Ind. App., 893 N.E.2d 761
SUBJECT: Bond - court must consider evidence of statutory factors
HOLDING: Although Tr. Ct. abused its discretion in failing to acknowledge uncontroverted evidence of several of the statutory factors in setting bond, D's $100,000 cash only bond was not excessive. In addition to considering the seriousness of charges, when setting bond, a Tr. Ct. should also consider: the length and character of the D's residence in the community; the D's employment status and history; the D's family ties and relationship; the D's criminal record; and the D's previous record in not responding to court appearances. Ind. Code 35-33-8-4.

Here, D presented uncontroverted testimony that: he was 45-years old and had resided in the county his entire life; he was currently receiving only disability income; he had lived with his mother who also lived in the community; he had submitted to authorities when previously convicted; and he had cooperated with the police prior to arrest by performing controlled buys. In issuing the $100,000 cash bond, Tr. Ct. relied primarily upon the number of charges that D was facing to determine the amount of bond. Although it is possible that Tr. Ct. considered all factors, including those based on D's evidence, without statements on the record the appellate court cannot assume that it did so. Although Tr. Ct. abused its discretion by failing to acknowledge uncontroverted evidence of several of the factors listed Ind. Code 35-33-8-4, the $100,000 cash only bond for multiple dealing charges, including a Class A felony, was not excessive. Held, judgment affirmed and remanded; Baker, C.J., dissenting on basis that the majority should not have decided this case under an exception to the mootness doctrine, and rather the case should have been dismissed because it was moot when D eventually was released on a $5,000 surety bond.

TITLE: U.S. v. Salerno
INDEX NO.: B.2.c.
CITE: 481 U.S. 739 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)
SUBJECT: Consideration of future dangerousness - due process
HOLDING: Federal Bail Reform Act authorizes federal Ct. to detain arrestee pending trial if government demonstrates by clear & convincing evidence after adversary hearing that no release conditions "will reasonably assure ... the safety of any other person & the community." Ct. finds Act does not violate due process. Pretrial detention under Act is regulatory, not penal. Therefore, it does not constitute punishment before trial. Government's regulatory interest in community safety must be weighed against individual's liberty interest. Government's interest in preventing crime by arrestees is legitimate & compelling. Act applies only to extremely serious offenses & government is required to offer evidence that D presents demonstrable danger to community. Ct. recognizes significant liberty interest of individual but finds it insufficient to outweigh government's interest. Therefore, Act does not violate substantive due process. Act provides Ds right to counsel, to compulsory process, & to CX witnesses. Judicial officer is guided by statutorily enumerated factors & he/she must include written findings of fact/statement of reasons for decision to detain. Government must prove its case by clear & convincing evidence. Therefore, Act does not violate procedural due process. Marshall, joined by Brennan, DISSENTS; Stevens DISSENTS.

NOTE: Ind. Code 35-33-8-3.1(b) has been amended to permit Ct. to consider, along with assurance of D's appearance, "the physical safety of another person or the community if the Ct. finds by clear and convincing evidence that the D poses a risk to the physical safety of another person or the community" when setting bail.

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.d. Procedure

TITLE: Goffinet v. State
INDEX NO.: B.2.d.
CITE: (10-8-02), Ind. App., 775 N.E.2d 1227
SUBJECT: Retention of costs & fees from cash bond remittance
HOLDING: Tr. Ct. abused its discretion by retaining from bond remittance Ct. costs, administrative fee, appeal costs, & drug fee. D's father paid entire $20,000 bond in cash, which Ct. remitted with clerk retaining $5,679 for various costs & fees. Ind. Code 35-33-8-3.2 does not authorize Tr. Ct. to order any money retained from bond remittance for any purpose unless bond was 10% cash or securities deposit. Since D's father paid entire amount in cash, Tr. Ct. abused its discretion in retaining costs & fees. On remand, Tr. Ct. can either hold indigency hearing before imposing Ct. costs on D or amend its sentencing statement to include required non-imprisonment language. Ct. may not impose any administrative fee because entire bond was paid in cash. Finally, Ct. must determine D's ability to pay before ordering drug fee, which may not exceed $1,000 pursuant to Ind. Code 33-19-6-9. Held, affirmed in part, vacated in part, & remanded with instructions.

RELATED CASES: Dillman, 16 N.E.3d 445 (Ind. Ct. App. 2014) (although the Tr. Ct. erred in releasing D's cash bond to pay costs and fees, this not constitute an illegal sentence and fundamental error that would allow the Court to review D's appeal on the merits despite his failure to timely appeal the Tr. Ct.'s order; see full review at E.13.b); Dillman, 2 N.E.3d 774 (Ind. Ct. App. 2014) (because D's $250 bond was a cash bond posted under Ind. Code 35-33-8-3.2(a)(1) rather than a 10% cash or security deposit, Tr. Ct. was not authorized to retain the bond for any purpose); Wright, 949 N.E.2d 411 (Ind. Ct. App. 2011) (pursuant to Ind. Code 35-33-8-3.2(a)(2), Tr. Ct. has authority to retain cash bail bond for fines, costs and fees where D executes cash bail-bond agreement authorizing retention of all or part of bond in the event D fails to appear or is convicted; indigency hearing not required; see full review, this section); Blixt, App., 872 N.E.2d 149 (effective 7/1/06, Ind. Code 35-33-8-3.2(a) authorizes retention of cash bond if agreed to, & prior to that date, failure to object to agreement to retain cash bond constitutes waiver of issue on appeal); Traylor, App., 817 N.E.2d 611 (D posted entire amount of bail in cash & is therefore entitled to remittance of $30,000 cash bond).

TITLE: J.J. Richard Farm Corporation v. State
INDEX NO.: B.2.d.
CITE: (4th Dist., 11-29-94), Ind. App., 642 N.E.2d 1384
SUBJECT: Return of cash bail
HOLDING: In Ind., third party who posts cash bail for another does not lose his or her interest in money & is entitled to its return if D appears in Ct. as required. Here, Tr. Ct. erred in ordering $50,000 cash bail to be disbursed to D less $24,135 to satisfy child support arrearage & future appellate costs.

RELATED CASES: Jones, App., 716 N.E.2d 556 (statutory provision for retention of bond money as compensation for publicly-provided representation applies only when D has posted ten percent bond with clerk of Ct.); Cody, App., 702 N.E.2d 364 (Tr. Ct. erred in forfeiting D's cash bond for reimbursement of his public defender expenses; because D posted full amount of bail in cash bond under Ind. Code 35-33-8-3.1(a)(1), Tr. Ct. was not authorized to retain balance of his bond for costs of his defense; there is no language in cash bond subsection of statute that allows clerk to retain any portion of full amount for reimbursement of costs of defense); Turner v. Clary, 606 N.E.2d 878, App., 1993 (when cash bail bond is posted to secure release of D, funds are held by clerk while D is at large & depositor has an interest in bond until bond is actually forfeited due to D's failure to appear).

TITLE: Williams v. State
INDEX NO.: B.2.d.
CITE: (1981), Ind., 417 N.E.2d 328
SUBJECT: Bail - hearing to increase or decrease bond
HOLDING: As long as D has opportunity to have judge with jurisdiction to consider bond reduction, it is irrelevant that prior judge who possibly did not possess jurisdiction increased bond. Here, upon motion of D and after hearing, bond was reduced from $110,000 to $20,000, which D posted and was released. However, judge, at time motion to change judge was being considered and over D's objection based on lack of judge's jurisdiction, ordered a hearing for reconsideration of reduction in bond, at which bond was increased back to $110,000. Motion to change judge was eventually granted, and new judge denied motion to reduce bond after hearing on subject. Held, first Tr. Ct.'s jurisdiction was not at issue, and second Tr. Ct. did not abuse discretion in denying motion to reduce $110,000 bond set for D who was ultimately convicted of burglary, robbery and rape.

RELATED CASES: Hughes v. Sheriff of Vigo County, 373 N.E.2d 144 (Ct may initiate hearing; trial judge justified in increasing bond from $5,000 to $10,000, given (1) consideration of juvenile record, (2) conduct while out on bond, (3) convictions for additional felonies, and (4) additional criminal complaints).

TITLE: Wright v. State
INDEX NO.: B.2.d.
CITE: (05-27-11), 949 N.E.2d 411 (Ind. Ct. App. 2011)
SUBJECT: Retention of cash bail bond for fines, costs and fees - indigency hearing not required
HOLDING: Tr. Ct. did not err in disbursing funds in a bond escrow account to pay for court fines and costs and reimburse I.M.A.G.E. Drug Task Force. D was charged with B felony dealing in methamphetamine. D entered into a cash bail-bond agreement in which she agreed to deposit a cash bail bond of $1000 and gave Tr. Ct. the authority, in the event she failed to appear as required or was convicted, to use all or part of that money to pay fines, costs, and fees pursuant to Ind. Code 35-33-8-3.2(a)(2). D paid ten percent of her bond by depositing $1000 in escrow. Upon D's conviction, Tr. Ct. ordered fees, costs and fines to be paid out of the $1000 in escrow, and paid the balance back to D. *Citing* Maroney v. State, 849 N.E.2d 745 (Ind. Ct. App. 2006), D argued that an indigency hearing is required before she should have to pay any fees or fines. However, Ind. Code 35-33-8-3.2(a)(2) has been amended since Maroney, and provides that the absence of language requiring an indigency hearing means that when a bail-bond agreement is executed, such a hearing is not required. To impose the hearing requirement of Ind. Code 33-37-2-3(a), where a D executed a cash bail-bond agreement pursuant to Section 35-33-8-3.2(a)(2), would render the bail bond agreement meaningless. Held, judgment affirmed.

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.e. Bail schedules

TITLE: Mott v. State
INDEX NO.: B.2.e.
CITE: (3d Dist. 3/19/86) Ind. App., 490 N.E.2d 1125
SUBJECT: Bail - schedules
HOLDING: Elkhart County bail schedule (set forth in opinion) did not violate D's constitutional right to bail. Here, D contends Elkhart County Rule 10 denies posting of 10% cash bond to those charged with Class A & B felonies. Ct. finds rule does not prohibit cash bond to particular class; rather, rule creates mandatory release on posting of 10% cash for those accused of Class C & D felonies & within purviews of subsections 1 through 4 of the rule. Otherwise, provisions of Ind. Code 35-33-8-3 apply. Differences in classification of cases for purposes of bail are not prohibited. Carlson v. Landon, (1952), 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547. See Gregory v. State ex rel. Gudgel, (1884), 94 Ind. 384 (no general sum can be fixed for all cases). Held, no error.

RELATED CASES: Sneed, 946 N.E.2d 1255 (Ind. Ct. App. 2011) (although $25,000 bond was not excessive given severity of charges, Tr. Ct. abused its discretion by requiring a cash-only payment of bail and denying D's request for the option of a surety bond).

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.f. Alteration/Revocation

TITLE: Cole v. State
INDEX NO.: B.2.f.
CITE: (11/13/2013), 997 N.E.2d 1143 (Ind. Ct. App. 2013)
SUBJECT: No good cause for alteration of bail
HOLDING: Tr. Ct. abused its discretion in increasing D's bail from $2,500 to $10,000 sua sponte, without State showing "good cause" for the increase as required by Ind. Code 35-33-8-5(a). After bond was fixed at $2500 surety during initial hearing, D's newly-appointed public defender requested a bond reduction and Tr. Ct. at first denied the request. However, after counsel persisted, the court, without any request from the prosecution and without any additional evidence in support thereof, increased bond to $10,000. Both Tr. Ct. and State were aware of D's extensive criminal history but State repeatedly declined to cross-examine him and requested only that his bail not be reduced. Thus, State did not make a "showing of good cause," Ind. Code 35-33-8-5(a), in support of an alteration of bail. Held, judgment reversed.

TITLE: Hunter v. State
INDEX NO.: B.2.f.
CITE: (5/16/2018), 102 N.E.3d 326 (Ind. Ct. App. 2018)
SUBJECT: Bail revocation, not criminal contempt, is appropriate remedy for violation of bail condition
HOLDING: Tr. Ct. abused its discretion by imposing a 180-day criminal contempt sanction for D's violation of a condition of bail. After agreeing to bail condition prohibiting him from being around anyone under the age of 18, D defied Tr. Ct.'s order by leaving the courthouse with minors. D testified that he did not know whether he was supposed to wait while his girlfriend drove the minors back and returned to pick him up, or first leave without the minors. In imposing a punitive contempt sanction, Tr. Ct. determined that D "contemptuously ignored "its orders" because to comply would have been inconvenient for him." But D's conduct did not affect the dignity or operation of the court, which is required in order to punish for criminal contempt. State v. Heltzel, 552 N.E.2d 31 (Ind. 1990). Ultimately, D failed to comply with a condition of his bail. Under such circumstances, an appropriate remedy was to revoke bail-- a remedy the State should have sought in accordance with Ind. Code § 35-33-8-5, the controlling statute. In footnote, Court reminded judges to "exercise their extraordinary contempt powers with the utmost sense of responsibility and circumspection, "and in selecting contempt sanctions," exercise the least-possible power adequate to the end proposed. (*quoting* Matter of Craig, 552 N.E.2d 53, 56 (Ind. Ct. App. 1990) and Mockbee v. State, 80 N.E.3d 917, 921 (Ind. Ct. App. 2017)). Held, judgment reversed.

TITLE: Johnson v. State
INDEX NO.: B.2.f.
CITE: (11/29/2018), 114 N.E.3d 908 (Ind. Ct. App. 2018)
SUBJECT: Bail increase affirmed
HOLDING: Trial court did not abuse its discretion by increasing D's bond from $175,000 to $500,000. Detective testified at bond reduction hearing that, after D's incarceration, he arranged for the assault of a confidential informant (C.I.) who he is accused of raping. At D's direction, three people assaulted the C.I. and D arranged for his girlfriend to obtain a gun. Based on jail phone calls, Detective believed that D was unlikely to obey the law upon release from jail. In addition, D had a spotty employment history, had a criminal history in four different states and a history of failing to appear for other criminal proceedings. Distinguishing Cole v. State, 997 N.E.2d 1143 (Ind. Ct. App. 2013), Court noted State requested a bail increase in this case pursuant to Ind. Code § 35-33-8-5(b) and provided clear and convincing evidence that D posed a risk to the physical safety of the C.I. Held, judgment affirmed.

TITLE: Lopez v. State
INDEX NO.: B.2.f.
CITE: (4/8/2013), 985 N.E.2d 358 (Ind. Ct. App. 2013)
SUBJECT: Erroneous denial of bail reduction
HOLDING: In corrupt business influence, forgery and perjury prosecution, Tr. Ct. abused its discretion when it denied D's motion for bond reduction. State's ten charges involved allegations of failure to properly report restaurant sales, failure to pay state sales taxes, falsification of tax forms, and the use of false social security numbers. Tr. Ct. set bond at $3,000,000 surety plus $250,000 cash. At bail reduction hearing, Tr. Ct. gave little weight to six factors in Ind. Code 35-33-8-4(b) that weighed in D's favor and did not account for fact that State had already seized $3,000,000 from D's safety deposit boxes. Nonappearance by D jeopardizes his ability to eventually recover any portion of that large sum of money. This fact alone indicates that the risk of nonappearance is lowered and that the extraordinary bail set here is at an amount significantly higher than reasonably calculated to assure D's presence in court. Court emphasized "we are dealing with a constitutional right here, and the goal is not to punish in advance of conviction but to assure the D's appearance in court." See Samm v. State, 893 N.E.2d 761 (Ind. Ct. App. 2008). Held, judgment reversed and remanded.

TITLE: Matter of Brettin
INDEX NO.: B.2.f
CITE: (3rd Dist., 2-4-00), Ind. App., 723 N.E.2d 913
SUBJECT: Modification of bail without hearing - due process violation
HOLDING: Tr. Ct.'s order increasing D's bail constituted alteration of previous amount & therefore entitled D to hearing pursuant to Ind. Code 35-33-8-5. When Tr. Ct. first discussed & set bail, no formal charges had been filed against D. Tr. Ct. set bail at $50,000 based upon State's representations to Ct. concerning nature & number of offenses to be charged against D. Subsequently, State filed twice as many charges as it had originally anticipated & requested increase in amount of bail. After State filed charges, Tr. Ct. reconvened initial hearing & notified D that it had increased his bail to $300,000.

Ind. Code 35-33-8-5 requires hearing before bail can be altered or revoked. If bail is set on additional charges, Ind. Code 35-33-8-4 permits Tr. Ct. to make bail determination ex parte, without hearing. Had State charged D with known offenses at time of first initial hearing, State could have added additional charges at later date & Tr. Ct. could have then set bail on additional charges without hearing pursuant to Ind. Code 35-33-8-4. Instead, State chose to wait seventy-two hours to file charges & Tr. Ct. set bail based upon anticipated charges. Ct. disagreed with State's characterization that it requested that bail be set on additional charges. State's affidavit for additional/increase in bail requested increased bail based upon alleged risk D posed to community. State's request was for alteration of bail, & Ind. Code 35-33-8-5 entitled D to hearing. Thus, Tr. Ct. erred when it denied D's application for writ of habeas corpus. Held, reversed & remanded with instructions to release D from custody of sheriff on original bond until & unless Tr. Ct. determines after hearing that State has met its burden in seeking increase in bail.

TITLE: Ray v. State
INDEX NO.: B.2.f.
CITE: (2nd Dist., 5-28-97), Ind. App., 679 N.E.2d 1364
SUBJECT: Erroneous revocation of bail
HOLDING: Tr. Ct. erred when it revoked D's bail & ordered him held without bail pending trial. In providing constitutional right to bail, Indiana Constitution, Art. 1, § 17 affords greater right than that provided by United States Constitution. Aside from listed qualified exceptions found in Art. 1, § 17, statement that all offenses "shall be bailable" provides, without equivocation, "right" to have bail set pending trial. Platt, App., 664 N.E.2d 357; Mott, App., 490 N.E.2d 1125. Here, Tr. Ct. granted State's motion to revoke bail on grounds that D had been convicted one year earlier of stalking same victim. Because D's bail was revoked rather than denied per se, neither U.S. nor Indiana constitutional provisions regarding excessive bail were implicated. Nevertheless, evidence that D had prior conviction for stalking same victim was insufficient, as matter of law, to support bail revocation under Ind. Code 35-33-8-5, which provides for revocation upon showing of good cause. State introduced no evidence & failed to establish any grounds for revoking bail. Held, judgment reversed; Staton, J., concurring in result.

NOTE: Majority opinion concluded that new "community safety" exception found under Ind. Code 35-33-8-4(b) likewise did not apply in this case, as exception is relevant to setting amount of bail rather than revoking bail.

RELATED CASES: Perkins, App., 694 N.E.2d 292 (interpreting Ind. Code 35-33-8-5 to mean that any circumstances under which D's bail may be revoked are listed under Ind. Code 35-33-8-5(d)).

TITLE: Winn v. State
INDEX NO: B.2.f.
CITE: (09-04-12), 973 N.E.2d 653 (Ind. Ct. App. 2012)
SUBJECT: Erroneous denial of bail reduction - D without funds to post entire amount
HOLDING: In burglary prosecution, Tr. Ct. abused its discretion in denying D's motion for bond reduction. Bail was set at $25,000 cash after D was charged with thirteen counts of burglary. D's motion to reduce bond asked for modification of the manner of payment to allow him to post ten percent of the bail. The only factor in Ind. Code 35-33-8-4(b) weighing against bond reduction was the potential penalty faced, which was sufficient to warrant refusal to reduce the amount of bail. However, as in Sneed v. State, 946 N.E.2d 1255 (Ind. Ct. App. 2011), Tr. Ct. should have granted D's request to modify the method of payment, as he was without funds to post the entire $25,000 in cash. By denying D the option of depositing cash or securities in an amount not less than ten percent of the bail, Tr. Ct. condemned him to jail pending trial without explicitly ordering him to be held or articulating any reason for doing so. The absence of any other statutory factors suggesting that D was a flight risk led Court to conclude that Tr. Ct. should have granted D's motion to deposit ten percent of bail under Ind. Code 35-33-8-3.2(a). Held, judgment reversed and remanded. Brown, J., concurring, agrees with reversal but would allow Tr. Ct. discretion on remand as to other possible methods of payment as allowed by Ind. Code 35-33-8-3.2.

TITLE: Yeager v. State
INDEX NO: B.2.f.
CITE: (05-05-20), 148 N.E.3d 1025 (Ind. Ct. App. 2020)
SUBJECT: Denial of motion to reduce bond reversed and remanded with instructions to release Defendant to pretrial supervision with electronic monitoring
HOLDING: If an arrestee does not present a substantial risk of flight or danger to themselves or others, a trial court should release the arrestee without money bail or surety subject to such restrictions to ensure appearance for trial. Here, Defendant was charged with four Level 3 felony offenses stemming from allegations he battered his girlfriend's two-year-old son. He filed a motion to reduce his bail from $250,000 cash only and presented evidence that he had no criminal history besides underage drinking, lived in the area his whole life, lived in the same house (which he was purchasing) for twelve years, had a job to which he could return, and had a good relationship with his family who also lived in the area and was supportive of him. Additionally, the director of the pretrial release program recommended that Defendant be released to pretrial supervision with the added condition of electronic monitoring. The trial court denied his motion. The Court of Appeals reversed and found the trial court abused its discretion because Defendant presented evidence of substantial mitigating factors showing that he recognized the court's authority to bring him to trial, as required by Ind. Code 35-33-8-5 (c), and there was no evidence he posed a risk to the physical safety of the victim or community. The Court noted that the result is consistent with the new evidence-based risk-assessment that Indiana has adopted pursuant to Indiana Criminal Rule 26.

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.g. Forfeiture

TITLE: Allegheny Mutual Casualty Co. v. State
INDEX NO.: B.2.g.
CITE: (4th Dist. 2/27/85), Ind. App., 474 N.E.2d 1051
SUBJECT: Bail - forfeiture of bail bond
HOLDING: Tr. Ct. did not abuse its discretion in determining surety failed to demonstrate "mistake, surprise or excusable neglect" under TR 60(B)(1) which would equitably entitle it to relief from judgment of forfeiture. Here, surety challenges adequacy of legal notice re hearing on state's petition to revoke bond, which resulted in order of forfeiture. See Ind. Code 35-4-5-8; TR 5(B). Ct. clerk's affidavit is competent to establish notice was mailed to surety. AAA Bonding Co. (surety's agent) also received notice. Following forfeiture order, Ct. sent notice by certified mail to AAA & surety. See Ind. Code 35-4-5-12(a). Statute allows bondsman & surety 180 days to produce D or explain D's non-appearance (illness, death, incarceration). AAA signed return receipt, but notice to surety was returned, undeliverable. TR 5(B)(2) required surety to provide Tr. Ct. with current address. Tr. Ct's. have no duty to ferret out party's current address. Held, forfeiture affirmed.

RELATED CASES: Turner v. Clary, App., 606 N.E.2d 878 (because posting of bailing bond creates bailment in which depositor has interest, judgment of forfeiture of cash bail bond must be entered before clerk could transfer money to State Auditor); Allied Fidelity Ins. Co., App., 494 N.E.2d 985 (company failed to produce Ds or show whereabouts within 180-day statutory period; facts that, after expiration of 180 days, Tr. Ct. stayed entry of judgment & company showed Ds were in federal custody have no effect).

TITLE: Frontier Insurance Company v. State
INDEX NO.: B.2.g.
CITE: (4th Dist., 6-10-02), Ind. App., 769 N.E.2d 654
SUBJECT: Bond forfeiture - proper notice must be given to both bail agent & surety
HOLDING: Tr. Ct. erred in its judgment of bond forfeiture & imposition of late surrender fees because it failed to send required notice to bond agent & surety at addresses listed in bond. Ind. Code 27-10-2-12 states that when D fails to appear, the Ct. shall order bail agent & surety to surrender D to Ct. immediately & mail notices of order to both bail agent & surety at each of addresses indicated in bonds. Here, Ct. sent bail agent's order to surety's address & surety's order to wrong address. State argued that this constituted substantial compliance with notice requirements of statute. However, it cannot be assumed that either party received or opened notices because they were not properly sent to addresses clearly listed in bond. Ct. found that even if substantial compliance with statute would satisfy notice requirements of bond forfeiture statute, there was not adequate compliance in this case. Held, judgment reversed.

B. PRETRIAL PROCEEDINGS

B.2. Bail (Ind. Code 35-33-8)

B.2.h. Murder (Ind. Code 35-1-22-6; Ind. Code 35-33-8-2)

TITLE: Doroszko v. State
INDEX NO.: B.2.h.
CITE: 154 N.E.3d 874 (Ind. Ct. App. 2020) (10/02/2020_
SUBJECT: Denial of request for bail in murder case affirmed
HOLDING: In murder prosecution stemming from a fatal drug deal, trial court did not abuse its discretion in denying Defendant's request for release on bail. A defendant charged with murder can be held without bail "when the proof is evident, or the presumption strong." Ind. Const. art. I § 17; Ind. Code § 35-33-8-2. Here, Defendant armed himself and arranged for marijuana deal to be carried out in a well-lit location, showing his awareness of the inherent dangers and potential for violence associated with drug dealing. Evidence at bail hearing also showed that Defendant shot victim to prevent him from stealing the marijuana. Thus, it was reasonable for the trial court to find by a preponderance of the evidence that there was an immediate and causal connection to the contemporaneous crime being committed and the confrontation that led to victim's death. in so holding, Court rejected Defendant's reliance on Gammons v. State, 148 N.E.3d 301 (Ind. 2020), for the proposition that the State was obligated to prove beyond a reasonable doubt at the bail hearing that Defendant did not act in self-defense.

RELATED CASES: Hall, 166 N.E.3d 406 (Ind. Ct. App. 2021) (denial of petition for release on bail affirmed where D's actions as a security guard who shot a woman as she drove away after an altercation were not a proportionate response to the situation, and State also proved by preponderance of the evidence that D did not act in sudden heat).

TITLE: Fry v. State
INDEX NO.: B.2.h.
CITE: (6/25/2013), 990 N.E.2d 429 (Ind. 2013)
SUBJECT: State bears burden of proof in bail hearing on murder and treason
HOLDING: When a D charged with murder or treason seeks bail and the state seeks to deny it, the state bears the burden of proving by a preponderance of the evidence that the proof is evident or the presumption strong. Ind. Const., Art. I, Sec. 17, provides that "[o]ffenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident or the presumption strong." For 150 years, Indiana case law has placed the burden of proof on the D to show that the proof is not evident or the presumption strong. In 1981, the Indiana General Assembly codified this case law into Ind. Code 35-33-8-2. At trial, D sought bail, and also sought a declaration that this statutory provision is unconstitutional. The Tr. Ct. ordered the state to present evidence that the proof was evident or the presumption strong, and later found that the state had met its burden. The Court here notes that the right to bail is deeply valued but not unqualified, and notes that 39 states provide a qualified right to bail in their constitutions, many using language similar to Art. I, Sec. 17. These states are divided on how to allocate the burden of proof. As noted above, for 150 years, Indiana case law has put the burden on the D. The Court notes, however, that the early cases were decided in the context of grand jury indictments challenged in state habeas corpus proceedings, which may have colored them. The Court looks at the language of Art. I, Sec. 17 and determines that murder and treason cases in which the proof is evident or the presumption strong are exceptions to the presumptive right to bail. The Court reasons that the party seeking to apply that exception -- the state -- should bear the burden of proving it. Further, it notes that "[b]y placing the burden on the D accused of murder or treason in a bail proceeding, we are in effect requiring him, while hampered by incarceration, to disprove the State's case pre-trial in order to earn the right to be unhampered by incarceration as he prepares to disprove the State's case at trial." The Court finds no justification for this. The Court next looks to cases from other states to help determine the appropriate standard of proof, arriving finally at a standard of "preponderance of the evidence," holding also that the state must present competent evidence to meet its burden. Turning to the facts in D's case, the Court finds that the Tr. Ct. did not abuse its discretion in finding that the state had met its burden of proving that the proof was evident or the presumption strong. Dickson, C.J., concurs separately, writing that he believes that the language of Art. I, Sec. 17 itself puts the burden on the state. Massa, J., dissents, arguing that the 150 year-old line of case law adhered to an originalist interpretation of the state constitution. Rucker, J., dissents, arguing that the Court need not have reached the issue, and thus need not have *overruled* 150 years of precedent, because the Tr. Ct. placed the burden on the state and found that the state had carried its burden, and the record supports this finding.

RELATED CASES: Satterfield, 30 N.E.3d 1271 (Ind. Ct. App. 2015) (D charged with murder had right to present evidence related to his affirmative defense at bail hearing; see full review, this section).

TITLE: Satterfield v. State
INDEX NO.: B.2.h.
CITE: (5/12/2015), 30 N.E.3d 1271 (Ind. Ct. App. 2015)
SUBJECT: Right to present evidence of affirmative defense at bail hearing for murder
HOLDING: Reviewing Tr. Ct.'s denial of bail, Court ruled D had the right to present evidence of his affirmative defense at bail hearing. Murder is not bailable "when the proof is evident, or the presumption is strong." Ind. Const. art. I, § 17. The State bears the burden of proving that a D more likely than not committed murder. Fry v. State, 990 N.E.2d 429, 448 (Ind. 2013), and to that end, shall present competent evidence at the bail hearing. In order to preserve the presumption of innocence and to fully retain the constitutional due process rights, a D must be awarded the opportunity to present evidence and witnesses on his or her behalf in an endeavor to rebut the State's burden that he or she "more likely than not committed the crime of murder (or treason)." See id. at 448. At the bail hearing, while the Tr. Ct. allowed D to present evidence regarding his affirmative defense, the trial refused to attribute any weight to this evidence and thus abused its discretion. Held, judgment reversed and remanded for new bail hearing.

RELATED CASES: Doroszko, 154 N.E.3d 874 (Ind. Ct. App. 2020) (rejecting argument that State must present sufficient evidence at bail hearing to defeat D's claim of self-defense).

B. PRETRIAL PROCEEDINGS

B.3. Omnibus date (Ind. Code 35-36-8-1)

TITLE: Sappenfield v. State
INDEX NO.: B.3.
CITE: (3d Dist. 4/18/84) Ind. App., 462 N.E.2d 241
SUBJECT: Omnibus date - time for filing motion to dismiss
HOLDING: Interlocutory appeal. Tr. Ct. did not abuse its discretion by denying D's motion to produce transcript of entire grand jury (G.J.) proceedings to support second motion to dismiss (founded upon mere suspicion of defective G.J. proceedings) where motion to dismiss was filed 171 days after time required by statute. Ind. Code 35-34-1-4 requires motion to dismiss for defective G.J. proceedings be filed 20 days before omnibus date in felony cases. Here, Tr. Ct. set omnibus date for 4/25/83 & ordered prosecution to disclose to D a transcript of G.J. minutes containing testimony of persons whom prosecutor "may call as witnesses" at trial. D filed first motion to dismiss for defective G.J. proceedings 11 days before Omnibus date. D's motion to dismiss was heard at omnibus hearing (held 6/27/83 after several continuances moved by D) & denied 7/27/83. On 6/30/83, D filed motion to produce transcript of entire G.J. proceedings. On 9/29/83, D filed his second motion to dismiss. D's second motion was not filed within 20 days of omnibus date. Ct. notes that once omnibus date is set, it cannot be altered, even though continuances move actual date of omnibus hearing. Ind. Code 35-36-8-1. Summary dismissal is proper where motion to dismiss is filed after deadline. Held, no error.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

TITLE: Gosnell v. State
INDEX NO.: B.5.
CITE: (9/29/82) Ind., 439 N.E.2d 1153
SUBJECT: Speedy trial - guilty plea waives issue
HOLDING: D waived speedy trial by pleading guilty. A plea of guilty made knowingly, intelligently & voluntarily constitutes a waiver of the right to trial. Brimhall, 279 N.E.2d 557. Right to expeditious trial cannot exist or be enforced apart from a right to trial, thus any claim of a denial of speedy trial is waived by a guilty plea. Mathis, 406 N.E.2d 1182. Here, Ct. determines D's guilty plea was entered knowingly, intelligently & voluntarily, thus speedy trial claim is waived. Ct. points out D failed to object at arraignment to delay of more than one year between indictment (5/7/69) & arraignment (5/27/70). Held, no error in denial of PCR.

RELATED CASES: Branham, App., 813 N.E.2d 809

TITLE: New York v. Hill
INDEX NO.: B.5.
CITE: 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000)
SUBJECT: Role of counsel, waiver, speedy trial, IAD
HOLDING: Defense counsel's agreement to a trial date outside the time period required by Article III of the Interstate Agreement on Detainers waived the D's speedy trial rights under the IAD. More broadly, this case suggests that the D's right to a speedy trial in general is among those rights which may be waived by action of counsel without a personal, informed waiver by the D.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.a. Pre-indictment delay

TITLE: Barnett v. State
INDEX NO.: B.5.a.
CITE: (2nd Dist., 05-29-07), Ind. App., 867 N.E.2d 184
SUBJECT: Pre-indictment delay- due process violation
HOLDING: Tr. Ct. erred in denying D's Motion to Dismiss based on a twelve-year-delay in bringing charges. Undue delay in filing charges that cause prejudice to the D may constitute a due process violation. To be granted relief, D must demonstrate: (1) he suffered actual & substantial prejudice to his right to a fair trial, & (2) the State had no justification for the delay. Here, in 1993, D, an inmate, got into a physical altercation with another inmate, who died from his injuries. After an initial investigation which was given to the prosecutor within two months after the incident, no further investigation occurred. However, charges were not filed against D until July 2005. It was undisputed that D stabbed the victim, & the only issue was whether D acted in self-defense. While there is no direct evidence that the delay was intentional, there is no evidence that the delay was justified. Further, D was prejudiced by the delay because many of the witnesses were missing or deceased by trial. To require that D show more specific prejudice than this would place an impossible burden on the D. More prejudice can only be demonstrated by showing what the testimony of those witnesses would have been. It is precisely the lack of this opportunity that prejudices the D. Further, D's ability to cross examine many of the available witnesses was inhibited by the impact of the passage of time on their memories. Thus, D was clearly prejudiced by the State's unexplained & unjustified delay -- whether intentional or negligent--in bringing charges. Held, judgment reversed.

RELATED CASES: Hill, 92 N.E.3d 1105 (Ind. Ct. App. 2018) (D did not meet his burden to demonstrate he suffered actual and substantial prejudice to his right to a fair trial from the State's 36-year delay in charging him with murder, felony murder and robbery), Schiro, App., 888 N.E.2d 828 (in contrast to Barnett, did not suffer prejudice to his right to fair trial and 25-year pre-indictment delay was justified).

TITLE: Higgason v. State
INDEX NO.: B.5.a.
CITE: (5/19/2023), Ind. Ct. App., 210 N.E.3d 868
SUBJECT: No due process violation from 23-year delay in filing murder charges
HOLDING: The Court of Appeals found that the State's 23-year delay in filing criminal charges against Defendant for a 1998 triple murder was justifiable and not done to gain a tactical advantage. The State needed additional evidence to charge Defendant, which could not be gathered at the time of the crime. The parties did not dispute that DNA testing capabilities in 1998 were not what they are today. Ten years after the crime, investigators were able to test the DNA under one victim's fingernail, and the results indicated Defendant could not be excluded as a contributor. In 2020, after DNA testing had again become more refined, the DNA under the fingernails was tested and showed Defendant was a contributor. DNA results were new evidence unavailable in 1998, and that evidence corroborated earlier statements regarding Defendant's involvement in the triple murder. Because the State had a justifiable explanation for its delay and the delay was not to gain a tactical advantage, no due process violation occurred to justify dismissing the charges. Held: judgment affirmed.

TITLE: Johnson v. State
INDEX NO.: B.5.a.
CITE: (1st Dist., 6-28-04), Ind. App., 810 N.E.2d 772
SUBJECT: Pre-indictment delay - due process claim rejected
HOLDING: On interlocutory appeal, Ct. rejected D's claim that he was constitutionally denied due process by being charged with Class A felony burglary thirteen years after the alleged offense. Several years after the alleged burglary occurred, an ex-wife told police that her ex-husband was involved in a burglary and murder in 1989. A detective investigated open murders in that year but could not match it to any cases, as while the burglary resulted in an elderly man being severely beaten and dying several months later it was not considered a murder investigation. The ex-husband was later arrested and provided information on an "old robbery" that implicated D. While no statute of limitations exists for a Class A felony, D argued that the passage of time impaired his ability to prepare a defense as important witnesses had died, a problem compounded by the State's poor investigation by not preserving important evidence when the burglary occurred. Ct. found D failed to show "actual prejudice" by the delay. D provided nothing more than speculation as to how the deceased witnesses would help him and failed to show the State deliberately delayed proceedings or that the State received any advantage over him in terms of trial preparation. Even if D did show actual prejudice, his due process claim would fail because he failed to show the delay was without justification. Police were not negligent in pursuing the ex-wife's tip because they showed they could not corroborate it. Held, denial of motion to dismiss affirmed.

RELATED CASES: Williams, ___ N.E.3d ____ (Ind. Ct. App. 2022) (D not prejudiced by 35-year delay in filing of rape and criminal deviate conduct charges); Reed, 86 N.E.3d 175 (Ind. Ct. App. 2017) (no due process violation from 14-year pre-indictment delay), Ackerman, 51 N.E.3d 171 (Ind. 2016) (D failed to demonstrate that his right to due process was violated based upon the 36-year delay in prosecuting his murder case); Harris, App., 824 N.E.2d 432 (Ct. rejected claim that 159-day delay in filing a delinquency petition affected D's due process rights & invalidated his waiver to criminal Ct.); Allen, App., 813 N.E.2d 349 (D was not prejudiced by pre-indictment delay in bringing charges against him).

TITLE: Shoulders v. State
INDEX NO.: B.5.a.
CITE: (5/4/84), Ind., 462 N.E.2d 1034
SUBJECT: Pre-indictment delay prison murder; administrative segregation
HOLDING: D's constitutional rights were not abridged where D was placed in administrative segregation 11/3/68 (for fatal stabbing of prisoner on same day), indicted on 12/4/68 & arraigned on 12/9/68. Here, D contends his rights to interview witnesses & to counsel were abridged. Discipline by correction officials is not de facto arrest. See US v. Clardy, (CA9 1976) 540 F.2d 439. Because D was not pretrial detainee, speedy trial rights were not effective until indictment. Held, no error.

RELATED CASES: Plowman, App., 604 N.E.2d 1219 (30 month delay between time offenses occurred & time of D's arrest did not violate due process or speedy trial rights under U.S. & Ind. Constitutions, because D did not make sufficient showing of prejudice & delay was not unjustified); US v. Gouveia, (1984) U.S., 104 S. Ct. 2292, 81 L.Ed. 2d 146; Patterson, 495 N.E.2d 714 (Const L 265; Crim L 577.16(8); Ind. Code 35-41-4-2(a) provides prosecution for murder may be commenced at any time; Ct. finds D fails to prove that 20-year delay in her prosecution resulted in prejudice/denial of due process); Koke, App., 498 N.E.2d 1326 (timeliness of prosecution must be raised in motion to dismiss prior to conclusion of trial or issue is waived (Ind. Code 35-34-1-4(a)(8) & (b)); although D waived issue, Ct. addresses merits & holds D failed to demonstrate both actual prejudice & lack of justification for delay in charging him, *citing* Lusher, App., 390 N.E.2d 702).

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.b. Post-indictment delay

TITLE: Daher v. State
INDEX NO.: B.5.b.
CITE: (1991), Ind. App., 572 N.E.2d 1304
SUBJECT: Interstate Agreement on Detainers - procedural protections
HOLDING: Inmate who was subject of proceeding under Interstate Agreement on Detainers ("IAD") received all procedural protections to which he was entitled where inmate was informed of demand for his surrender, crime with which he was charged, his right to have attorney, & his right to have hearing. IAD applies only to inmates who have been convicted & are serving sentence in prison in sending state & not to inmates who are imprisoned awaiting trial. Inmates transferred pursuant to IAD were to be afforded same procedural protections afforded to inmates extradited under Uniform Extradition Act, or any procedural protections afforded to inmates extradited under state law. Cyler v. Adams, 449 U.S. 433 (1981); see Ramirez, 455 N.E.2d 609 (Ind. 1983). Here, D contends that because State did not comply with verification & other substantive provisions of Extradition Statute, State's request for extradition should have been denied. However, Ct. holds that Cyler does not require states seeking inmates to "extradite" individuals sought under IAD. Thus, D received procedural protection to which he was entitle under Detainer Statute.

RELATED CASES: Thompson, App., 687 N.E.2d 225 (IAD does not apply to probation violations, even where violation is based on commission of crime); State ex.rel. Kindred, 525 N.E.2d 339 (IAD does not apply to D in federal custody awaiting probation violation hearing); Dorsey, 490 N.E.2d 260, *overruled* in part on other grounds by Wright v. State, 658 N.E.2d 563 (Ind. 1995) (IAD does not apply to D held for trial & serving sentence while in jail in Michigan); Carchman v. Nash, 473 U.S. 716 (IAD does not apply to probation violations).

TITLE: Doggett v. U.S.
INDEX NO.: B.5.b.
CITE: 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)
SUBJECT: Speedy trial - post-indictment delay
HOLDING: Presumptive prejudice to D's ability to defend against criminal charges, resulting from delay of 8.5 years between indictment & arrest, when considered together with fact that delay was extraordinarily long, it was due to government's negligence, & that D asserted right to speedy trial promptly after learning of charges, requires dismissal of indictment under Sixth Amendment right to speedy trial. District Court & Ct. App. rejected D's speedy trial claim, applying four-factor balancing test announced in Barker v. Wingo, (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101; although the lower courts found that the length of delay, the government's negligence in causing delay, & D's prompt assertion of speedy trial rights weighed against government, D's speedy trial claim failed for lack of prejudice caused by delay. Majority here accepts lower court findings on first three Barker factors. Main issue as identified by majority, was whether D was prejudiced & considers issue of prejudice. Barker identified three sorts of possible prejudice: oppressive pretrial incarceration, anxiety due to pending charge, & possibility that defense will be impaired by fading memories & loss of exculpatory evidence. Government argued that third form of prejudice is not speedy trial concern, but rather due process issue, but majority disagrees. Excessive delay presumptively compromises reliability of trial in ways that cannot, & therefore need not, be proved. When delay resulting from inexcusable governmental neglect so far exceeds threshold necessary to state speedy trial claim, & when presumption of prejudice, albeit it unspecified, is neither extenuated nor persuasively rebutted, D is entitled to relief. O'Connor, J., DISSENTS, arguing that any harm to D is purely speculative. Thomas, Rehnquist, & Scalia, JJ., DISSENT, agreeing with government that this third type of prejudice identified by Barker is not speedy trial concern.

NOTE: Cf. Kristek v. State (1989), Ind., 535 N.E.2d 144

TITLE: State v. Greenwood
INDEX NO.: B.5.b.
CITE: (5-21-96), Ind., 665 N.E.2d 579
SUBJECT: Interstate Agreement on Detainers (IAD) - prosecution barred after erroneous discharge
HOLDING: Although D's pro se demand for speedy trial did not comply with requirements of IAD, and Tr. Ct. erred in dismissing charges, anti-shuffling provision of IAD barred subsequent prosecution. 180-day period within which D must be brought to trial under IAD commences when request for final disposition made pursuant to Ind. Code 35-33-10-4 has been delivered to prosecuting attorney and Ct. having jurisdiction. Scrivener v. State, 441 N.E.2d 954 (Ind. 1982). To be made "pursuant to" provisions of IAD, statute requires that D deliver his notice to custodial officials so they can forward notice along with appropriate certifications to prosecuting authorities. Steelman v. State, 486 N.E.2d 523 (Ind. 1985). Here, D failed to provide his notice to custodial authorities, thus his speedy trial demand was insufficient to trigger running of 180- day time period under IAD. Even if D's notice had been sufficient, he waived right to speedy trial when his attorney moved for trial date outside 180-day period and D failed to object. Because Tr. Ct. dismissed charges with prejudice and ordered D to be returned to Illinois, "anti-shuffling" provision of IAD protected D from subsequent prosecution. Plain language of Ind. Code 35-33-10-4, Art. 3(d), requires dismissal with prejudice if prisoner is returned to original place of imprisonment prior to trial. Held, transfer granted, judgment dismissing charges affirmed.

TITLE: Strunk v. United States
INDEX NO.: B.5.b.
CITE: 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973)
SUBJECT: Remedy for violation of Sixth Amendment right to speedy trial
HOLDING: Absolute discharge is only remedy for violations of constitutional right to speedy trial.

Here, Court of Appeals held that when no question is raised about sufficiency of evidence showing D's guilt and no claim of prejudice is presented, proper remedy is to remand case to district court with direction to enter order instructing Attorney General to credit D with period of time elapsing between return of indictment and date of arraignment. Although dismissal of indictment for denial of speedy trial is unsatisfactorily severe remedy, unlike denial of other Sixth Amendment rights such as failure to afford public trial, impartial jury and compulsory service, speedy trial violation cannot be cured by providing new trial. In addition, speedy trial guarantee recognizes many problems which are associated with long delay before trial. Thus, Supreme Court reversed Court of Appeals and held that offset to sentence, equal to delay in being brought to trial, was inadequate remedy. Held, conviction reversed and case remanded.

TITLE: Vaden v. State
INDEX NO.: B.5.b.
CITE: (5th Dist., 5-26-99), Ind. App., 712 N.E.2d 522
SUBJECT: Interstate Agreement on Detainers (IAD) - tolling provision; prisoner's unavailability
HOLDING: IAD's 180-day time limit for bringing prisoner to trial after he requested disposition of outstanding charges was tolled while D was unavailable for trial. D was unavailable for sixty-one (61) days because his request for disposition of detainer against him in Kentucky caused him to be released to that jurisdiction. Upon D's return to federal custody in Indiana, Tr. Ct. set jury trial within 180-day period. However, Tr. Ct. continued trial to date outside 180-day period due to Ct. congestion. IAD provides that when computing 180 days imposed by Article 3, running of time periods shall be tolled whenever & for as long as prisoner is unable to stand trial, as determined by Ct. Ind. Code 35-33-10-4(Article 6). Whether D intended to be tried in Indiana first does not control issue of whether statutory period was tolled during his period of unavailability. D should not be able to start 180-day period in any number of jurisdictions, & then watch them "ring out" one by one while he is held in first jurisdiction that was able to set trial date. Held, denial of motion to dismiss affirmed.

TITLE: Vermont v. Brillon
INDEX NO: B.5.b.
CITE: (03-09-09), 556 U.S. 81 (2009)
SUBJECT: Speedy trial - delays caused by assigned counsel attributable to D
HOLDING: The Vermont Supreme Court erred in finding that a three-year delay between charges and trial violated the Sixth Amendment. Some of the facts a court should weigh when determining whether there has been a speedy trial violation are the length of delay, the reason for the delay, the D's assertion of his right, and prejudice to the D. When considering the reason for a delay, assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the Ds they represent. Because the attorney is the D's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the D's counsel is also charged against the D. Assigned counsel are generally not state actors for purposes of a speedy-trial claim. The general rule attributing to the D delay caused by assigned counsel is not absolute. Delay resulting from a systemic breakdown in the public defender system could be charged to the State. Moreover, time gaps resulting from the Tr. Ct.'s failure to appoint replacement counsel with dispatch may be attributable to the State.

Here, it took three years to bring D to trial after being charged. During this time, at least six different attorneys were appointed to represent D. The Vermont Supreme Court found the delay during the representation by the first two public defenders was attributable to D who "fired" the first attorney and threatened to kill the second. However, the Vermont Supreme Court found that most of the delay after the first two attorneys was caused by the subsequent public defenders failing to move the case forward. The Vermont Supreme Court made a fundamental error in attributing to the State delays caused by the failure of several assigned counsel to move the case forward and in failing adequately to take into account the role of D's disruptive behavior in the overall balance. The period of each counsel's representation should not have been treated discretely. Absent D's deliberate efforts to force the withdrawal of his first two public defenders, no speedy-trial issue would have arisen. Thus, the effect of the earlier events should have been factored into the court's analysis of subsequent delay. Moreover, the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in this case. Held, judgment of Vermont Supreme Court reversed; Breyer and Stevens, JJ., dissenting on basis that cert. was granted improvidently because the Vermont Supreme Court's decision could be read attributing the delays to the defender general's office for not properly assigning counsel rather than to counsel for failing to move the case forward.

The Court also held that delay caused by problems in a public defender system could be charged to the State. "The general rule attributing to the D delay caused by assigned counsel is not absolute. Delay resulting from a systemic "breakdown in the public defender system" could be charged to the State. Cf. Polk County, 454 U.S., at 324-325, 102 S. Ct. 445, 70 L. Ed. 2d 509. But the Vermont Supreme Court made no determination, and nothing in the record suggests, that institutional problems caused any part of the delay in Brillon's case.

RELATED CASES: Boyer v. Louisiana, 133 S. Ct. 1702 (U.S. Sup. Ct. 2013) ("delay resulting from a systemic breakdown in the public defender system could be charged to the State." Vermont v. Brillon, 556 U.S. 81, 94 (2009). Dismissal, here, is "especially regrettable" because this case illustrates "larger, systemic problems . . . in Louisiana's indigent defense system.").

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.b.1. Constitutional requirements (6th Amend; Ind. Const. Art. I,12)

TITLE: Betterman v. Montana
INDEX NO.: B.5.b.1.
CITE: (5/19/2016), 136 S. Ct. 1609 (U.S. S. Ct. 2015)
SUBJECT: Speedy Trial Clause Does Not Apply After Conviction or Plea Agreement
HOLDING: The 6th Amendment's Speedy Trial Clause does not apply to the 14-month delay between petitioner's guilty plea and sentencing. Criminal Proceedings unfold in three distinct phases. First, there is the time between investigation and arrest or charging. Statutes of Limitations govern this period. The second period begins with an arrest or formal charging. During this period, the individual is presumed innocent, and is protected by the 6th Amendment's Speedy Trial Clause from lengthy incarceration before being tried, during which he is subject to the anxiety associated with public accusation, and his ability to mount a defense may be affected by fading memories and the loss of witnesses. The Speedy Trial Clause does not apply to the consequences of post-conviction delay. Due process "serves as a backstop against exorbitant delay" at this stage. Because the petitioner raised only a 6th Amendment Speedy Trial claim and not a Due Process claim, the Court expresses no opinion on whether the 14-month delay violates due process.

TITLE: Crawford v. State
INDEX NO.: B.5.b.1.
CITE: (6-28-96), Ind., 669 N.E.2d 141
SUBJECT: No speedy trial violation
HOLDING: D's constitutional right to speedy trial & due process rights were not violated by State's failure to bring him to trial until almost 30 years after murder occurred. Speedy trial rights did not attach until State filed charging information almost 4 years before trial. Applying analysis in Barker v. Wingo, 92 S.Ct. 2182 (1972), Ct. held that: 1) reasons for delay in trying D were either directly attributable to his own inaction or to ordinary & deliberate procedures for criminal prosecutions, & 2) any prejudice that D suffered was overcome by State's evidence. Held, conviction affirmed; DeBruler, J., dissenting on other grounds.

RELATED CASES: Johnson, 83 N.E.3d 81 (Ind. Ct. App. 2017) (1,579 day delay between D's arrest and his arson trial did not violate his constitutional right to speedy trial), Sagalovsky, App., 836 N.E.2d 260 (Tr. Ct. erred in finding that 15-month delay between arrest & filing OWI charges violated D's Sixth Amendment right to speedy trial); Hampton, App., 754 N.E.2d 1037 (113-day delay is not presumptively prejudicial to trigger Barker analysis); Danks, App., 733 N.E.2d 474 (D failed to meet his burden of demonstrating actual, particularized, specific prejudice to his defense caused by 6 year delay attributable to State); Lockert, App., 711 N.E.2d 88 (D's right to speedy trial under Indiana & U.S. Constitutions was not violated by twenty-five year delay); Sturgeon, App., 683 N.E.2d 612 (D's constitutional right to speedy trial under both state & federal constitutions was not violated by State's delay in obtaining blood testing).

TITLE: Dabney v. State
INDEX NO.: B.5.b.1.
CITE: 953 a.2d 159 (Del. 2008)
SUBJECT: State's delay in obtaining DNA analysis violated right to speedy trial
HOLDING: Delaware Supreme Court held a delay in bringing a D to trial that resulted in his spending more than a year in pretrial detention was sufficiently prejudicial to violate D's Sixth Amendment right to speedy trial. Court analyzed case under the four-factor balancing test established in Barker v. Wingo, 407 U.S. 514 (1972). Court determined most of the delay was attributable to the State's inability to timely obtain a DNA analysis. Prosecutor's efforts to obtain test results led to what Court characterized as "a convoluted, almost Gilbert and Sullivan-like charade." Court concluded that delay was unnecessary and held that D established that he suffered prejudice as a result, saying it did not need to address D's specific arguments about the impairment of his defense. Court explained that pretrial incarceration is "inherently prejudicial," making it more difficult for a D to prepare for trial. It also noted that the State did not even really need DNA evidence under the circumstances of this case. It said that "the state's preference to have DNA analysis available when it may have been unnecessary for all but one of the pending charges, did not outweigh the prejudice to a D imprisoned for over a year because he lacked the wherewithal to post bail."

TITLE: Douglas v. State
INDEX NO.: B.5.b.1.
CITE: (1987), Ind. App., 517 N.E.2d 116
SUBJECT: Delay between charge and arrest
HOLDING: D's Sixth Amendment speedy trial rights were violated. Delays in bringing D to trial that are in excess of limitations period for offense in question are presumptively prejudicial. State can rebut presumption by showing no prejudice to D caused by delay. Toussie v. U.S., 397 U.S. 112 (1970). Here, presumption of prejudice created because delay between filing information and arrest was beyond statute of limitations. State failed to overcome presumption of prejudice because D could have produced additional witnesses to support alibi defense had trial been held earlier. Held, conviction reversed.

RELATED CASES: Douglas, App., 517 N.E.2d 114 (State successfully overcame presumption that D was prejudiced by delay between filing of information and arrest by showing that even without lapse of time he would not have been able to produce any witness or establish alibi).

TITLE: Fisher v. State
INDEX NO.: B.5.b.1.
CITE: (08-30-10), 933 N.E.2d 526 (Ind. Ct. App. 2010)
SUBJECT: Constitutional right to speedy trial violation
HOLDING: On interlocutory review, Court reversed denial of motion to discharge and ordered Tr. Ct. on remand to dismiss class A felony dealing cocaine charges, which were filed in 2001. Even though D was in federal custody on unrelated charges, State failed to meet its affirmative duty under 6th Amendment and article I, section 12 of Indiana Constitution to pursue prosecution of D.

In July, 2006, D filed a Notice of Availability for Prosecution and an objection to the delay in prosecution. State objected to D's later motion for transport order for pre-trial conference because it claimed any transport order would violate Interstate Agreement on Detainers ("IAD"). D appealed the December 15, 2009, denial of his second motion to discharge. Court did not analyze issue under Criminal Rule 4(c) because that rule "does not apply when a person is in a foreign jurisdiction." Howard v. State, 755 N.E.2d 242, 245 (Ind. Ct. App. 2001). Instead, it applied the IAD, which does not require State to file a detainer within a certain period. Thus, because the State did not file a detainer, the IAD was not triggered. Thus, Court confined analysis to D's right to speedy trial under the federal and statute constitutions. State acknowledged it had affirmative duty to bring D to trial, but Court said review under four-part balancing test from Barker v. Wingo, 407 U.S. 514 (1972) was still necessary. Under the test, Court balances: 1) the length of delay, 2) reason for delay, 3) whether D asserted right to speedy trial; and 4) any prejudice resulting to D. Danks v. State, 733 N.E.2d 474 (Ind. Ct. App. 2000), *trans. denied* (*citing* Barker). This test is triggered where the delay exceeds one year.

Length of delay weighed against the State as did reason for delay, which was State's blanket policy of waiting for a D to complete sentence in foreign jurisdiction before bringing a D to trial here. The State's affirmative duty to diligently prosecute Ds trumps the reasons underlying the State's policy. Right to speedy trial is a "fundamental principle of constitutional law," and the IAD and other statutory provisions were enacted to help the State prosecute Ds serving sentences in foreign jurisdictions in an "expeditious and orderly manner." Delay here is unacceptable and Court refused to condone State's "egregious persistence" in failing to prosecute D. As to third factor, parties stipulated that D "repeatedly and diligently attempted to bring this matter to trial." Finally, because these three factors weigh heavily in D's favor, Court presumed prejudice instead of determining whether D demonstrated actual prejudice. Held, denial of motion to discharge reversed and Tr. Ct. ordered to dismiss underlying action against D.

RELATED CASES: Spalding, 992 N.E.2d 881 (Ind. Ct. App. 2013) (Court disagreed with McCloud (below) to the extent it holds that Criminal Rule 4 applies whenever the Interstate Agreement on Detainers does not); McCloud, 959 N.E.2d 879 (Ind. Ct. App. 2011) (when the State has failed to file a detainer against a D in federal custody, IAD does not apply; where D was already charged in Indiana prior to being sent to federal prison, CR 4 and Sixth Amendment applied).

TITLE: Harrell v. State
INDEX NO.: B.5.b.1.
CITE: (1st Dist., 06-02-93), Ind. App., 614 N.E.2d 959
SUBJECT: Delay between charge & arrest too long
HOLDING: When information was filed against D in October 1986, but D was not arrested until February 1992, constitutional right to speedy trial was violated by delay. In interlocutory appeal Ct. discussed claim in light of both Doggett v. U.S., (1992), 112 S.Ct. 2686, & Barker v. Wingo, (1972), 407 U.S. 514. Sixth Amendment speedy trial right does not come into play until D in some way becomes "accused," & D assumed this role when information was filed against him in October 1986. Once D becomes accused, Barker test (see Lahr card) comes into play & conduct of both prosecution & D are weighed. Ct. found D met original threshold that interval between accusation & trial had crossed into area of being presumptively prejudicial, Doggett, *supra*, triggering further inquiry.

State claimed it was unable to serve warrant because D had moved around & was absent from state for considerable periods of time, but Ct. found D had returned on several occasions, planned to continue to return, & did not know of charges against him until his arrest. While record did not show State was aware of D's presence, it also did not show State had attempted with reasonable diligence to serve warrant. Because ultimate responsibility to bring D to trial rests with State, government was more to blame for delay than D. Ct. also noted that D asserted his right shortly after arrest, & State did not contest balancing of this factor in his favor.

Ct. found only relevant prejudice presented was impairment of defense. During deposition of alleged victim, she displayed apparent & substantial lack of clarity in memory about alleged incidents. Because evidence in case would be largely based on credibility of alleged victim versus D, Ct. concluded D was likely prejudiced by lapse of time because of difficulty in cross-examining & impeaching alleged victim. Overall, Ct. found absence of reasonable diligence by State, coupled with demonstrated lack of clarity in alleged victim's memory due to delay, demonstrated sufficient prejudice. Ct. noted, however, preference for making such rulings subsequent to trial rather than during pretrial stage, & concluded that to prevail at pretrial stage, D must show demonstrable prejudice caused by delay is unlikely to be overcome by events at trial. Held, reversed & D ordered discharged, Baker, J., DISSENTING on grant of interlocutory appeal.

TITLE: Hornsby v. State

INDEX NO.: B.5.b.1.

CITE: (1/31/23), Ind. Ct. App., 202 N.E.3d 1329

SUBJECT: Delay in bringing Defendant to trial did not rise to constitutional speedy trial violation where Defendant could not show prejudice.

HOLDING: Defendant and the victim were juniors in High School when Defendant began repeatedly making unwanted contact with the victim at school and at her work. She repeatedly asked him to stop but he persisted. At one point the assistant principal told Defendant to stop contacting the victim as did the victim's father. After a handgun was found in Defendant's truck on school property, he was charged with a level 5 felony carrying a handgun without a license on or within 500 feet of a school. Defendant repeatedly called the victim from jail, but she did not answer his calls. The victim obtained a protective order against Defendant and subsequently Defendant was charged with level 6 stalking. Defendant filed a pro se motion for speedy trial which was granted and a pro se motion to dismiss which was denied. Later with the aid of counsel, Defendant filed a second motion to dismiss which was also denied. He was subsequently convicted at a trial and sentenced to two years in the Department of Correction. On appeal, Defendant argued that his Sixth Amendment right to a speedy trial had been violated. The State had filed stalking charges and then dismissed them, and Defendant had also been charged with invasion of privacy. Defendant argued that the same conduct was involved in all three charges and that in total it took 414 days to bring him to trial. The Court of Appeals analyzed his claims under the Barker v. Wingo, 407 U.S. 514 (1972) factors, finding that the length and reasons for the delay weighed only slightly against the government, Defendant's assertion of his speedy trial right was neutral, and that he failed to demonstrate any actual prejudice from the delay, and therefore his constitutional speedy trial right was not infringed.

TITLE: Kristek v. State
INDEX NO.: B.5.b.1.
CITE: (3d Dist. 3/13/89), Ind. App., 535 N.E.2d 144
SUBJECT: Speedy trial - 6th Amend. requirements
HOLDING: D's 6th Amend. speedy trial rights were violated. D was charged on 12/15/80 with robbery alleged to have occurred 12/2/80. Following arrest on 9/7/88, D filed motion to dismiss averring that he could not recall events of 12/2/80, or identify witnesses, reports or statements. Tr. Ct. denied motion. In determining whether 6th Amend. right to speedy trial has been violated, Ct. must consider: 1) length of delay, 2) assertion of right by D, 3) reasons for delay, & 4) prejudice to defense. Barker v. Wingo, (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101. Ordinarily, burden to establish prejudice rests with accused. Wade, 387 N.E.2d 1309. However, when delay exceeds applicable statute of limitations, even though limitations period itself is tolled by filing of information, rebuttable presumption of prejudice arises & burden shifts to state to go forward with evidence. Scott, App., 461 N.E.2d 141. D was arrested nearly 3 years beyond limitations period, & state offered no evidence to rebut presumption of prejudice. Looking to other Barker factors, Ct. of Appeals finds: 1) length of delay was substantial, 2) D asserted speedy trial right as soon as he became aware of charge following arrest, & 3) state offered no evidence as to reason for delay. Held, reversed.

RELATED CASES: Gilmore, 655 N.E.2d 1225 (no 6th Amend. violation from 2.5 year delay in bringing D to trial, where no assertion of speedy trial right was made, record did not indicate any official, bad faith delay by State or any benefit gained by State from delay, & D failed to show specifically how alleged delay prejudiced him); Randall, 474 N.E.2d 76 (Crim L 577.10(9); held, D waived 6th Amend. speedy trial rights by failing to raise them until day of trial. See Webb, 453 N.E.2d 180).

TITLE: Lahr v. State
INDEX NO.: B.5.b.1.
CITE: (2nd Dist., 06-09-93), Ind. App., 615 N.E.2d 150
SUBJECT: Time for retrial after remand
HOLDING: There was no unreasonable delay in D's retrial after appeal. Time limitations of CR 4(C) do not apply in retrial situations, Nelson, (1989), 542 N.E.2d 1336, & D in that situation must only be tried within "reasonable" time based on his constitutional speedy trial rights, Fryback, (1980), 400 N.E.2d 1128; Driver, (1992), Ind. App., 594 N.E.2d 488, *trans. denied*. Relevant period is that which elapses from certification of appellate decision to time of retrial. In D's case, period was little over 18 months. In determining whether period was reasonable, Ct. relied primarily on Barker v. Wingo, (1972), 407 U.S. 514, & O'Neill, (1992), App., 597 N.E.2d 379, *trans. denied*. In Barker, S. Ct. held length of presumptively prejudicial delay is dependent on peculiar circumstances of case. Reasonable delay for retrial is considerably less than for initial trial because issues & evidence have already been explored, & Ct. found no question that 18-month delay here was sufficient to trigger Barker inquiry. Under Barker test, factors to consider are: length of delay; reasons for delay; timeliness & vigor of D's assertion of speedy trial rights; & any prejudice to D from delay. In D's case, over 8 months of 18-month delay were attributable to D, with 4 months attributable to State, & rest attributable to Tr. Ct. Ct. found no deliberate attempt by State to delay trial & no evidence that Ct.'s delay could be attributed to anything worse than negligence & concluded that reasons for delay did not weigh in D's favor. Also, D's assertion of speedy trial rights was not particularly vigorous or timely, because he did not assert them until his objection to trial setting & request for discharge. General presumption is that mere passage of time is not sufficient to show prejudice unless it is so extended that legitimacy of presumption is questionable. Otherwise, D must show prejudice, & Ct. determined he was unable to do this. D complained he was prejudiced because memory of one of his witnesses may have been eroded by lapse of time, & his levels of anxiety & concern had been unnecessarily & exponentially increased by delay. Ct. dismissed first claim because witness was not unable to answer any questions due to lack of memory. Additionally, given mere 10 months of delay not attributable to D & fact he was not incarcerated during period, concerns about his anxiety were not sufficient to find delay unreasonable. Therefore, he was not denied constitutional right to speedy trial.

NOTE: In footnote, Ct. noted following delays had been considered presumptively prejudicial: one year, Doggett v. U.S. (1992), 112 S.Ct. 2686; 8 months, Collins (1975), App., 321 N.E.2d 868, Flores v. State (1990) Miss., 574 So.2d 1314; 10 months, Smith v. Mabry, (8th Cir., 1977), 564 F.2d 249, *cert. denied*. Delays of 3 months, U.S. v. Stoker, (10th Cir. 1975), 522 F.2d 576, & 5 months, People v. Ward, (1978), 85 Mich. App. 473, 271 N.W.2d 280, Stewart, (1976), App., 354 N.E.2d 749, have been found not prejudicial.

TITLE: Logan v. State
INDEX NO: B.5.b.1.
CITE: (9/24/2014), 16 N.E.3d 953 (Ind. 2014)
SUBJECT: Denial of constitutional right to speedy trial - protracted court congestion
HOLDING: Despite Tr. Ct.'s technical compliance with Criminal Rule 4(C), D'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. Appellate review of Rule 4 challenges is "separate and distinct" from review of claimed violations of speedy trial rights secured by 6th Amendment of U.S. Constitution and Article 1, Section 12 of Indiana Constitution. Austin v. State, 997 N.E.2d 1027, 1037 n. 7 (Ind. 2013).

Here, faced with another custodial D's Rule 4(B) speedy trial motion and D's Rule 4(C) motion, Tr. Ct. determined that the Rule 4(B) motion, with its 70-day deadline, took precedence. Though it led to a further delay of 154 days, 109 of which D spent incarcerated, Tr. Ct.'s decision to continue D's trial date due to court congestion complied with the court congestion exception that Rule 4(C) contemplates and thus was not clearly erroneous.

However, applying four-factor speedy trial analysis of Barker v. Wingo, 407 U.S. 514 (1972), Court concluded that D's "substantial" three-and-one-half-year delay between filing charge against him and his trial was "considerable, unfortunate, and inexcusable," and thus violated his constitutional right to speedy trial. D very nearly served the length of his six-year sentence before his trial even began, and trial was continued seven times due to court congestion (to which D persistently and emphatically complained). Although a congested court calendar weighs less heavily against the State, it still must be viewed as the responsibility of the government and an impediment to a D's constitutional right to a speedy trial. D experienced personal prejudice as a result of his oppressive pretrial incarceration--particular prejudice is not essential to every speedy trial claim. Doggett v. United States, 505 U.S. 647, 655 (1992). Held, transfer granted, Court of Appeals' memorandum opinion vacated, conviction vacated.

TITLE: McClellan v. State
INDEX NO.: B.5.b.1.
CITE: (4/1/2014), 6 N.E.3d 1001 (Ind. Ct. App. 2014)
SUBJECT: Remand for failure to apply four-factor speedy trial balancing test
HOLDING: On interlocutory appeal from denial of D's motion to dismiss for violation of his speedy trial rights under both the Sixth Amendment and Article 1, Section 12 of the Indiana Constitution, Court remanded for new hearing with instructions to use the four-factor balancing test established by Barker v. Wingo, 407 U.S. 514 (1972). The length of time between D being formally accused of OWI and when he was first brought in for his initial hearing was two years and five months, which is presumptively prejudicial. The delay was due to Tr. Ct. issuing summons and warrants to D at an outdated address. Because State had actual notice of D's address as he was on home detention through the same court in the same county, the reason for the delay is attributable to the State. The assertion of his right to speedy trial neither weighs for or against D, since it was not until the hearing on the motion to dismiss that he presented his claim. On the fourth factor - prejudice to the D - Court found the State never had the opportunity to rebut the presumption of prejudice in this case. If the State is able to rebut the presumption of prejudice, this factor may then weigh against D in the analysis. Held, remanded for new hearing to determine whether D's motion to dismiss should be granted.

TITLE: Smith v. Hooey
INDEX NO.: B.5.b.1.
CITE: 393 U.S. 374; 21 L.Ed.2d 607 (1969)
SUBJECT: Constitutional requirement - speedy trial request by prisoner held in another jurisdiction
HOLDING: As constitutional matter, states bringing charges against prisoner held by other sovereignties must make diligent, good faith effort to bring prisoner to trial when prisoner requests speedy trial. Speedy Trial Clause of Sixth Amendment is meant not only to prevent undue and oppressive incarceration prior to trial, but also to minimize anxiety and concern accompanying public accusation and to limit possibilities that long delay will impair ability of accused to defend himself. U.S. v. Ewell, 383 U.S. 116 (1966). Here, prisoner being held in federal penitentiary at Leavenworth, Kansas was indicted in Harris County, Texas for theft. For six years, prisoner sent letters to Texas court requesting speedy trial and, eventually, verified motion to dismiss charges for want of prosecution. No action taken by Texas court, and prisoner brought mandamus proceeding, which Texas Supreme Court denied. Because above purposes of Speedy Trial Clause were both aggravated and compounded by accused being imprisoned by another jurisdiction, prisoner was entitled to speedy trial in Texas. Held, order of Texas Supreme Court set aside and case remanded.

RELATED CASES: Pallet, 381 N.E.2d 452 (Ind. Code § 35-33-10-4 is intended to secure constitutional guarantees of right to speedy trial for prisoners held in one state who have criminal charges outstanding against them in another state).

TITLE: Springer v. State
INDEX NO.: B.5.b.1.
CITE: (1978), Ind. App., 372 N.E.2d 466
SUBJECT: Constitutional right to speedy trial - standard under Indiana Constitution
HOLDING: Sixth Amendment standard regarding D's right to speedy trial is applicable to Indiana constitutional guarantee. Constitutional requirement for State to use diligent, good faith effort to bring D who is incarcerated in another state to trial requires examination of myriad factual considerations including, but not limited to those set forth in Barker v. Wingo, 407 U.S. 514 (1972), which are length of delay, reason for delay, D's assertion of his rights and prejudice to D. Here, although almost four years elapsed between issuance of warrant for D's arrest and date of trial, State had no means of determining D's whereabouts until D filed speedy trial motion because D was incarcerated in California under alias. After State determined D's whereabouts, D caused more delay by filing series of continuances requiring Indiana to prove good cause for extradition. However, approximately nine months of delay was due to negligence of State. Yet, this delay did not affect integrity of fact-finding process. Thus, in light of minimal prejudice, if any, suffered by D, not unreasonably long unexcused delay and negligent, as opposed to deliberate, conduct on part of State, Tr. Ct. properly denied D's motion for discharge.

TITLE: United States v. Loud Hawk
INDEX NO.: B.5.b.1.
CITE: 474 U.S. 302,106 S. Ct. 648 (1986)
SUBJECT: Constitutional right to speedy trial – "actual restraint"; delay from interlocutory appeal
HOLDING: Time during which indictment was dismissed and Ds were free of all restrictions on their liberty was excludable from length of delay considered under Speedy Trial Clause of Sixth Amendment. Where no indictment is outstanding, it is only actual restraints imposed by arrest and holding to answer to criminal charge that engages protection of Speedy Trial Clause. U.S. v. MacDonald, 102 S. Ct. 1497 (1982). Here, although Government's desire to prosecute Ds was matter of public record, Ds were ordered to appear at evidentiary hearing held on remand during first appeal and Ds found it necessary to retain counsel while case was technically dismissed, Ds were neither incarcerated nor subject to bail and further judicial proceedings would have been necessary to subject them to any actual restraints. Thus, Ds were not under "actual restraint" as required to invoke Speedy Trial Clause.

In addition, delay attributable to interlocutory appeals brought by Government and Ds when Ds were subject to indictment or restraint did not weigh effectively towards Ds' claims under Speedy Trial Clause. When determining whether appellate time consumed with review of pretrial motions should weigh towards Ds' speedy trial claim, Ct. considers length of delay, reason for delay, Ds' assertion of right and prejudice to Ds. Barker v. Wingo, 407 U.S. 514 (1972). Here, although 90-month delay in instant case was presumptively prejudicial, Ds filled District Ct.'s docket with repetitive and unsuccessful motions, Ds' appeal was lacking in merit and Government's position in each appeal was strong. Thus, delays caused by Government's and Ds' interlocutory appeals did not sufficiently weigh in support of speedy trial claim and therefore did not warrant dismissal. Held, conviction reversed; Marshall, J., joined by Brennan, J., Blackmun, J., Stevens, J., dissenting.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.b.2. Statutory Requirements

TITLE: Lee v. State
INDEX NO.: B.5.b.2.
CITE: (1991), Ind. App., 569 N.E.2d 717
SUBJECT: Speedy trial -computing time
HOLDING: D is "brought to trial" within meaning of speedy trial rule when jury is selected and sworn. Ds claimed that State failed to comply with Crim. R. 4(C) because their trial did not conclude within one year of their arrest and charging. However, because of nature of trials and witness testimony, requirement of concluding trial within one year would be highly impracticable and extremely taxing on already over-burdened Tr. Ct's. Held, no violation of speedy trial rule when jury sworn within year of arrest or filing of charge.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c. CR 4

TITLE: Conn v. State
INDEX NO.: B.5.c.
CITE: (1st Dist., 07-28-05), Ind. App., 831 N.E.2d 828
SUBJECT: Interstate Agreement on Detainers (IAD) - denial of D's right to be present for continuance hearing
HOLDING: A state bringing charges against a prisoner in custody in another state begins the IAD process by filing a detainer; after a detainer is filed, the inmate may file a request for final disposition, & the inmate must be brought to trial within 180 days. New York v. Hill, 528 U.S. 110 (2000). Ind. Code 35-33-10-4 Art. III (a) provides that for good cause shown in open Ct., the prisoner or his counsel being present, the Ct. having jurisdiction of the matter may grant any necessary or reasonable continuance. The IAD requires reversal of conviction & dismissal when continuances beyond 180-day period are not conducted in presence of D or his attorney. United States v. Mauro, 436 U.S. 340, 352 (1978). Here, Tr. Ct. properly ordered an indefinite continuance when defense counsel did not appear for trial. D, pro se, maintained his request to be tried within IAD's 180-day period. When Tr. Ct. later set D's trial date, it did not inform D of this setting until a week before trial & D once again maintained his right to IAD trial deadline. Tr. Ct. did not follow through with its assurance to D that parties would reconvene once counsel could be located, which deprived D of his right to be present when reasonableness or necessity of length of his continuance was determined. Birdwell v. Skeen, 983 F.2d 1332 (5th Cir. 1993).

Indiana's codification of IAD does not require a D to establish prejudice for dismissal, but Ct. noted that regardless, prejudice was amply demonstrated in this case. It is possible that it was reasonable or necessary for Tr. Ct. to schedule D's trial 102 days beyond IAD's 180-day limitation, but D was denied opportunity to query Tr. Ct. as to why his trial could not be set in less than 102 days. Thus, IAD requires his convictions to be reversed. Ct. disagreed with dissenting opinion which claimed that length of an IAD continuance is not subject to good-cause & open-Ct. requirements of IAD. D's presence during setting of a continuance is an independent IAD requirement, & D's inability to learn of Tr. Ct.'s reason for length of his continuance at time of its issuance precludes an honest review of whether there was good cause to extend D's trial102 days beyond his IAD deadline. Once attorney was located, Tr. Ct. was required to expediently set a trial date in D or attorney's presence. Held, convictions reversed; Crone, J., dissenting.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c.1. CR 4(A) (6 months)

TITLE: Ballentine v. State
INDEX NO.: B.5.c.1.
CITE: (8/2/85), Ind., 480 N.E.2d 957
SUBJECT: CR 4(A) - D incarcerated in state not party to interstate Agreement on Detainers (AOD)
HOLDING: Ct. rejects D's contention that 180-day time period of CR 4(A) & AOD requires dismissal of charge. Here, D was held in the state of MS, which is not a party to AOD, when charge (10/28/80) & detainers were mistakenly filed (12/5/80 & 8/25/81). D filed request for speedy trial on 1/18/82 & moved to dismiss charge on 7/26/82. D was returned to IN on 12/7/82 for trial on 5/31/83. Per se time limits of CR 4 do not apply to persons incarcerated in other states. Smith, 368 N.E.2d 1154. Ct. applies four-factor test of Barker v. Wingo, (1972), 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101. Length of delay triggers inquiry. Reason for delay was "confusion, perhaps negligence" in proceeding under AOD, but was not purposeful. D clearly asserted right, but his actions "appeared" to seek dismissal, not immediate trial. Ct. finds D suffered no prejudice, rejecting D's argument that trustee status, work release eligibility & possibility of concurrent sentences were affected & constituted prejudice. Held, conviction affirmed.

RELATED CASES: Sweeney, 704 N.E.2d 86 (inapplicability of CR4 to Ds in foreign jurisdictions should not extend to Ds who are brought into Ind. under writs or other forms of temporary custody); Springer, App. 372 N.E.2d 466 (usual remedy for D held in Indiana seeking speedy trial on charges from other jurisdictions is AOD).

TITLE: State ex rel. Bramley v. Tipton Circuit Court

INDEX NO.: B.5.c.1.

CITE: (08-26-05), Ind., 835 N.E.2d 479

SUBJECT: Criminal Rule 4(A) - no waiver of right to release if D fails to object to trial setting outside six-month period

HOLDING: Right to be tried within a specified time period or discharge - which is protected by both Criminal Rule 4(B) (seventy-day rule) & 4(C) (one-year rule) - is different than the right to be released on one's own recognizance pending trial once D has been detained for more than six months without a trial. While scheduling of a trial date beyond the time limits in Criminal Rule 4(B) & 4(C) may be inconsistent with those rules & result in "acquiescence" when the D does not object at first opportunity, there is nothing about scheduling of a trial for a date beyond the six-month period in Criminal Rule 4(A) that is inconsistent with a D's assertion of his right to release on his own recognizance once the six months pass. Although language in Mills v. State, 512 N.E.2d 846 (Ind. 1987) & Bowens v. State, 481 N.E.2d 1289 (Ind. 1985), suggested a D waives his right to release by not timely objecting when a trial is scheduled for a date outside the six-month period, such language appears to be dicta because Criminal Rule 4(A) issue was raised after conviction & became moot. Court also noted that, despite plain language in Criminal Rule 4(A), delay attributable to D's motion for continuance may be charged against State if D moved for continuance because of State's failure to respond to discovery requests. Here, after subtracting delays resulting from D's own acts or motions, 227 days remained, which exceeded six-month period of CR4 (A). D was therefore entitled to release on his own recognizance. Held, relator's application for permanent writ requiring granting of release under CR 4 (A) granted; Boehm, J., concurring in result.

TITLE: Drake v. State
INDEX NO.: B.5.c.1.
CITE: (1990), Ind., 555 N.E.2d 1278
SUBJECT: CR 4(A) - effect of violation
HOLDING: 19-day delay in releasing D on his own recognizance after being detained over six months did not impair D's ability to prepare his defense with counsel. D did not specify in what way he was impaired from cooperating with counsel. Any error in denying a request for an end to incarceration pursuant to CR 4(A) does not establish a right to discharge under CR 4(B). Keeby, 511 N.E.2d 1005. Held, judgment affirmed.

RELATED CASES: Mills, 512 N.E.2d 846 (Ct's refusal to release D did not prejudice his ability to secure witness and to compel testimony at trial).

TITLE: Joyner v. State
INDEX NO.: B.5.c.1.
CITE: (3-31-97), Ind., 678 N.E.2d 386
SUBJECT: Criminal Rule 4(A) - No "special circumstances" exception
HOLDING: Indiana Criminal Rule 4(A) applies to D held in jail on charge without trial for more than six months & requires that incarcerated D be released on his own recognizance from end of six-month period until his trial. Violation of six-month deadline requires release from custody, not complete discharge from criminal liability. Here, Tr. Ct. erroneously believed that violation of rule was excused under "special circumstances of case." Tr. Ct. may not avoid Criminal Rule 4(A) by finding its application unreasonable under special circumstances presented by particular case. Held, conviction reversed & remanded on other grounds.

RELATED CASES: Bramley, 835 N.E.2d 479 (after subtracting delays resulting from D's own acts or motions, 227 days remained which exceeded six-month period of CR4(A); D was entitled to release on his own recognizance).

TITLE: Owens v. State
INDEX NO.: B.5.c.1.
CITE: (4/30/21), Ind. Ct. App., 168 N.E.3d 1036
SUBJECT: Denial of Defendant's motion for release under Criminal Rule 4(A) affirmed
HOLDING: Trial court properly denied Defendant's Criminal Rule 4(A) motion for release from jail, where less than six months was attributable to the Criminal Rule 4(A) period. Defendant was arrested on April 12, 2019 and could not be detained pending trial for more than six months from that date "except where a continuance was had on his motion, or the delay was caused by his act[.]" Crim. R. 4(A). Because Defendant moved to continue his scheduled jury trial on June 25, 2019 to depose State witnesses, the time limitation contained in Criminal Rule 4 was "extended by the amount of the resulting period of such delay caused thereby." Crim. R. 4(F). Defendant acknowledged that some delay following his continuance motion would be attributable to him, but argued that only the time between his continuance motion (June 25, 2019) to the date that the State requested the trial court to reschedule the trial (January 14, 2020), which totals 203 days, should be attributable to him, while the remaining 125 days from the State's trial scheduling request (January 14, 2020) to the new trial date (May 18, 2020) should be counted toward the six-month limitation of Criminal Rule 4(A). Court disagreed, noting that when a defendant requests a continuance, the elapsed period between his motion for a continuance and the new trial date is generally chargeable to the defendant. Stephenson v. State, 742 N.E.2d 463, 488 (Ind. 2001). Court declined to address the applicability of the Indiana Supreme Court's emergency COVID-19 orders, noting the issue was not before the Court. Held, judgment affirmed.

TITLE: Woodson v. State
INDEX NO.: B.5.c.1.
CITE: (8/6/84), Ind., 466 N.E.2d 432
SUBJECT: CR 4(A) - extension of time
HOLDING: Tr. Ct. did not err in denying D's motion for discharge under CR 4(A) (six months) where good cause existed (absent witness) for extending time requirements of CR 4(A). Fortson, 379 N.E.2d 147; Gross, 278 N.E.2d 583. Here, state moved for continuance of D's robbery trial because employee-witness was hospitalized with back injury. Delay was due to absence of key witness through no fault of state. Held, no error.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c.2. CR 4(B) (70 days - early trial)

TITLE: Anderson v. State
INDEX NO.: B.5.c.2.
CITE: (1/26/2021), 160 N.E.3d 1102 (Ind. Ct. App. 2021)
SUBJECT: Pro se CR 4(B) motion for early trial after counsel appointed - D speaks to court through counsel
HOLDING: Per Curiam. Court granted transfer of Court of Appeals' memorandum opinion to clarify that once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel. When a defendant files a pro se motion after counsel has been appointed to represent him, such as Defendant's pro se request for an early trial under Indiana Criminal Rule 4(B), the trial court is not required to consider that request. See Underwood v. State, 722 N.E.2d 828, 832 (Ind. 2000). Before counsel's appointment, a trial court must consider a defendant's pro se motion, like a request for an early trial. But after counsel's appointment, this consideration is left to the trial court's discretion.

Here, counsel was appointed for Defendant at the initial hearing. Shortly thereafter, Defendant mailed the trial court a document requesting a speedy trial. At a subsequent hearing, the trial court explained that Defendant's "request [was] not an actual Speedy Trial request," because it was filed after counsel had been appointed. Though Defendant's counsel was not present at this hearing, the trial court advised Defendant that he could discuss with his attorney whether seeking a speedy trial would be beneficial and that his "attorney actually makes the formal request." Because counsel had been appointed for Defendant, the trial court was not required to consider his pro se motion and therefore acted within its discretion by disregarding it. Held, transfer granted, Court of Appeals' memorandum decision summarily affirmed, judgment affirmed in part and remanded in part on other grounds.

RELATED CASES: Smith, 210 N.E.3d 312 (Ind. Ct. App. 2020) (because D never filed a motion to discharge after the 70th day after his initial speedy trial request, he waived the Criminal Rule 4(B) issue on appeal; Tr.Ct. was not required to respond to D's pro se motion to dismiss filed three days later because he filed the motion while he was represented by counsel and D's attorney had waived his speedy trial request at an earlier hearing).

TITLE: Arion v. State
INDEX NO.: B.5.c.2.
CITE: (6/22/2016), 56 N.E.3d 71 (Ind. Ct. App. 2015)
SUBJECT: Failure to return arrest warrant does not excuse delay
HOLDING: Where trial was not set for over a year after incarcerated D filed a speedy trial motion with his arrest warrant attached, the Tr. Ct. erred in denying D's motion for discharge under C.R. 4(B) and (C). D was incarcerated in DOC on unrelated charges when he was served with an arrest warrant on charges of burglary, sexual battery, and criminal confinement. The officer who served this warrant did not return it to the Tr. Ct. Three days after being served, D filed a pro se motion for speedy trial under C.R. 4(B). He did not serve the State but included a request that the Tr. Ct. file a copy to the prosecutor's office. Ninety-four days later, he filed a motion for discharge under C.R. 4(B). The Tr. Ct. denied the motion, holding that because the arrest warrant had not been returned as served, D was not being held on these charges. D then filed a pro se motion to reconsider with the warrant attached, and served a copy on the State as well. The Tr. Ct. summarily denied the motion that same day. After more than a year had passed, D sent a letter to the county sheriff with a copy of the warrant attached in an effort to prove that it had been served on him. The sheriff department forwarded the letter to the Tr. Ct., which issued a transport order and set an initial hearing. At the initial hearing, the Tr. Ct. set the trial date four months later, to which D objected. The Tr. Ct. issued an order acknowledging that D's letter showed that the warrant had been served, but noting that it still had not received its return. Defense counsel filed a motion for discharge under C.R.4(B) and (C) and the 6th Amendment. The Tr. Ct. denied the motion, finding that it had not been aware of his arrest and had not seen the arrest warrant attached to his letter. The Tr. Ct. held that arrest did not occur until it had actual knowledge of the arrest. It further held that while trial was scheduled more than 70 days after the date of the letter, at the initial hearing D had objected on grounds of C.R. 4(C) rather than 4(B), and that D had not been prejudiced by the delay. On interlocutory appeal, Court wrote that the right to speedy trial protects not only D's interests, but society's. Society's representatives, the courts and the prosecutors, have an affirmative duty to bring D to trial, and must act diligently and in good faith. The fact that D was incarcerated on other charges at the time of his arrest is irrelevant, as the U.S. Supreme Court has recognized that such Ds still retain an interest in being tried promptly on the new charges. Smith v. Hooey, 393 U.S. 374 (1969). Indiana C.R. 4 seeks to ensure that the State protects an individual's constitutional right to speedy trial. Through C.R. 4(B) and (C), a D must be tried within one year of arrest, unless the D specifically moves for a speedy trial, in which case he must be tried within 70 days of the motion. The rule's exceptions do not apply here. The State argues that the C.R.4 clock does not begin to run until the Tr. Ct. receives return of the arrest warrant, which did not happen here. Court held that failing to inform the Tr. Ct. of a D's arrest is error, and cannot be used to deny a D his speedy trial rights. Neither can the State or the Tr. Ct. claim that they were not aware of D's whereabouts. Here, D himself made the Tr. Ct. aware of his location, his arrest, and his desire for a speedy trial. A Tr. Ct. has a duty to read motions before ruling on them. Cases involving a D being held in another county on pending charges are not apposite because here no other county had an interest in prosecuting the D before he could be tried on these charges. Reluctance to discharge a D accused of serious charges is understandable, but the seriousness of the charges is legally irrelevant to speedy trial analysis. If C.R. 4 is to continue serving to protect a D's speedy trial rights, it cannot be relaxed "whenever the disappointment occasioned by discharge is particularly great." The speedy trial clock began to run when D filed his motion to reconsider with a copy of his arrest warrant attached, and under both C.R. 4(B) and (C) he must be discharged.

TITLE: Austin v. State
INDEX NO.: B.5.c.2.
CITE: (11/15/2013), 997 N.E.2d 1027 (Ind. 2013)
SUBJECT: CR 4 - court congestion; standard of review
HOLDING: Tr. Ct. did not abuse its discretion by denying D's Motion for Discharge under CR 4(B). Where the issue is a question of law applied to undisputed facts, the standard of review -like for all questions of law- is de novo. Where a Tr. Ct. makes a factual finding of congestion or emergency under C.R. 4 based on disputed facts, the standard of review is the clearly erroneous standard. The issue in the instant case is whether the Tr. Ct.'s decision to continue D's trial beyond the 70-day period is clearly erroneous. When a D has requested a speedy trial, the trial judge should set the D's trial for the first setting not already occupied by a superseding speedy trial request or exceptional civil matter, or, if need be create a new trial setting if time allows for the availability of a courtroom, witnesses, jury pool, and other necessary resources. Here, upon D's request for a speedy trial, the Tr. Ct. set his trial within the 70-day period. However, the Tr. Ct., at the request of the State, then continued the trial outside the 70-day period due to congestions with another speedy trial. D objected to the continuance and after the 70-day period moved for discharge arguing that there was a day on the court's calendar during the 70-day period in which D could have been tried. Tr. Ct. denied the motion claiming there was no available courtroom or jury that day, and it was too short of notice on which to have subpoenaed witnesses. This decision to continue the trial beyond the 70-day period was not clearly erroneous. Held, judgment affirmed.

RELATED CASES: King, 61 N.E.3d 1275 (Ind. Ct. App. 2016) (giving another defendant's murder trial priority over D's trial did not leave Court with a definite and firm conviction that a mistake was made).

TITLE: Barnett v. State
INDEX NO.: B.5.c.2.
CITE: (2nd Dist., 07-25-94), Ind. App., 637 N.E.2d 826
SUBJECT: Plea not accepted by Ct. still waives speedy trial right
HOLDING: Where D pled guilty prior to expiration of 70-day speedy trial period under CR 4(B), D's right to speedy trial was waived, even though Tr. Ct. subsequently refused plea agreement. Ct. rejected D's argument that although speedy trial clock was suspended while plea was under advisement, it should have resumed when plea was rejected. Ct. instead found that once D entered plea, new motion was required to invoke speedy trial right. In so doing, Ct. relied primarily on Mickens v. State, Ind., 439 N.E.2d 591, & held that D's guilty plea constitutes abandonment of any previously asserted CR 4(B) request, regardless of whether Tr. Ct. ultimately accepts or rejects plea. Held, conviction affirmed.

RELATED CASES: Lawson, 498 N.E.2d 1212 (when D objects to speedy trial violation before pleading guilty, D has choice between pursuing speedy trial challenge or disposing of case on its merits). Payne, App., 658 N.E.2d 635 (when D agreed to plead guilty, he abandoned his motion for early trial; D was not entitled to discharge because he was tried within 70 days of making his new speedy trial request).

TITLE: Bartley v. State

INDEX NO.: B.5.c.2.

CITE: (1st Dist., 12-12-03), Ind. App., 800 N.E.2d 193

SUBJECT: Denial of Crim.R. 4(B) motion to dismiss affirmed - premature filing & release on recognizance

HOLDING: Tr. Ct. properly denied D's Motion to Dismiss under Criminal Rule 4(B), because motion was prematurely filed & State moved to release D on his own recognizance prior to 70- day speedy trial period elapsing. On October 3, 2002, D filed his motion for speedy trial under Crim. R. 4(B) & Tr. Ct. set trial for December 2, 2002. Record did not indicate why trial did not take place on December 2, & was also unclear when D's motion to dismiss was filed (December 10 or 12), but Ct. concluded that in either case the motion would have been filed prematurely on the 68th or 70th day. When a Crim. Rule 4 motion is made prematurely, it is properly denied. Stephenson v. State, 742 N.E.2d 463 (Ind. 2001). Further, the Crim. R. 4(B) problem was removed by the State's ex parte motion to release D on his own recognizance & the Tr. Ct.'s granting of that motion on the 70th day, December 12, 2002. The S.Ct. has stated that "[t]he purpose served by Crim. R. 4(B) is to prevent a D from being detained in jail for more than 70 days after requesting an early trial." Williams v. State, 631 N.E.2d 485, 486 (Ind. 1994). Once released, the D's rights are governed by the one-year limitation of Crim. Rule 4(C). Held, judgment affirmed.

TITLE: Black v. State
INDEX NO.: B.5.c.2.
CITE: (4/22/2014), 7 N.E.3d 333 (Ind. Ct. App. 2014)
SUBJECT: Pro se CR 4(B) motion for early trial after counsel appointed - D speaks to court through counsel
HOLDING: Where D's pro se motion for early trial was made after counsel was appointed at his initial hearing, Tr. Ct. was not required to respond to it. See Jenkins v. State, 809 N.E.2d 361 (Ind. Ct. App. 2004) (once counsel is appointed, D speaks to court only through counsel). And because a public defender had been appointed, that decision was a matter of strategy allocated to defense counsel. Broome v. State, 694 N.E.2d 280 (Ind. 1998).

Based on the record presented, D did not establish that defense counsel's failure to file an early trial motion fell below an objective standard of reasonableness. D's incarceration in the DOC impacted counsel's ability to communicate with D and to prepare a defense. Held, judgment affirmed.

RELATED CASES: Anderson, 160 N.E.3d 1102 (Ind. 2021) (*clarifying* that once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel); Flowers, 154 N.E.3d 854 (Ind. Ct. App. 2020) (Tr. Ct. did not abuse its discretion by taking no action on D's pro se pleadings and in granting State's motion for continuance because defense counsel did not object to the motion and stated that significant investigation was needed to prepare for trial); RC to the first Iltzch summary (i.e., court of appeals summary) at E.6.h (distinguishing Iltzch, Ct. found no abuse of discretion in ordering D to pay $5,000 in restitution to the victim's family for his funeral expenses).

TITLE: Blake v. State
INDEX NO.: B.5.c.2.
CITE: (09-28-21), 176 N.E.3d 989, (Ind. Ct. App. 2021)
SUBJECT: Reasonable to find COVID-19 pandemic constituted an emergency under Criminal Rule 4
HOLDING: On interlocutory appeal, the Court of Appeals found Defendant waived his argument alleging a speedy trial violation because, in his motion for discharge, Defendant had maintained the COVID-19 pandemic did not constitute an emergency under Criminal Rule 4. The Court held Defendant was not entitled to discharge under Crim. R. 4(B)(1). On November 20, 2020, the trial court continued Defendant's jury trial, noting the current conditions within Morgan County concerning Covid-19 infections and the positivity rate coupled with the case's complexity. The trial court's finding that an emergency existed was reasonable in light of the circumstances relating to the Covid-19 pandemic that existed at the time.

TITLE: Bloate v. United States

INDEX NO.: B.5.c.2.

CITE: (03-08-10), 130 S.Ct. 1345, (U.S. 2010)

SUBJECT: Delays to allow defense to prepare pretrial motions aren't automatically excluded under Speedy Trial Act

HOLDING: The federal Speedy Trial Act, 18 U.S.C. § 3161, *et seq*., requires that D be tried within 70 days of indictment or Ds' first appearance in court, whichever is later. In calculating the 70-day period, § 3161(h)(1)(D) automatically excludes "delay resulting from other proceedings concerning the D, including but not limited to...delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Court held that trial delays granted to give Ds time to prepare pretrial motions are not automatically excluded from the 70-day time limit. Reading the statute differently, most circuit courts had held that time to prepare motions is excluded so long as the trial judge specifically granted time for that purpose.

However, Supreme Court held that subsection (h)(1)'s automatic exclusion for motion-related delays applies only to the period between the filing and the disposition of a motion. Pre-filing delays may be excluded only if the district judge justifies a continuance with case-specific findings that a delay would serve the interests of justice. Thus, a court may still exclude preparation time under § 3161(h)(7) by granting a continuance for that purpose based on sufficient recorded findings. Held, Eighth Circuit Court of Appeals' opinion at 534 F.3d 893 reversed and remanded. Ginsburg, J., CONCURRING, stressed that the government on remand may make its case that the indictment should not be dismissed; Alito, J., joined by Breyer, J., DISSENTING, maintained that the majority's interpretation of the act could lead to the "strange result" that a D "may be entitled to dismissal of the charges against him because his attorney persuaded a Magistrate Judge to give the defense additional time to prepare pretrial motions and thus delayed the commencement of his trial."

TITLE: Bradford v. State
INDEX NO.: B.5.c.2.
CITE: (9/21/83), Ind., 453 N.E.2d 250
SUBJECT: CR 4(B) - congestion of Ct. Calendar
HOLDING: Tr. Ct. did not err in *sua sponte* continuing trial beyond 70-day limit upon a finding that the Ct. Calendar was congested. Although CR 4(B)(1) provides that prosecutor shall file such a motion, the rule does not prevent judge from *sua sponte* continuing trial when congested nature of calendar precludes trial date within early time frame. Jordan, 435 N.E.2d 257; Loyd, 398 N.E.2d 1260; Gill, 368 N.E.2d 1159; Harris, 269 N.E.2d 537. Held, no error.

RELATED CASES: Austin, 980 N.E. 2d 429 (Ind. Ct. App. 2012) (D's trial was moved to accommodate another incarcerated criminal D whose case was older than D's; moreover, continuance of civil trial scheduled for the last day in D's 70-day period would not have accommodated D's trial on the 70th day because Tr. Ct. was not prepared to hear jury trial on that date and State could not subpoena witnesses on short notice); Sholar, 626 N.E.2d 547 (App.) (continuance due to congested calendar and necessity of attending annual judicial conference).

TITLE: Brown v. State
INDEX NO.: B.5.c.2.
CITE: (3rd Dist., 04-26-05), Ind. App., 825 N.E.2d 978
SUBJECT: Speedy trial clock starts running when request filed, not on service of arrest warrant
HOLDING: Tr. Ct. erred in denying D's Motion to Discharge on speedy trial grounds pursuant to Ind. Crim. Rule 4(B). Charges were filed against D who was being held in another county on unrelated charges & Tr. Ct. issued an arrest warrant. Prior to arrest warrant being served, D gained knowledge of the proceedings & filed a *pro se* speedy trial motion. The warrant was never served on D prior to his being transferred to the DOC, & it was served more than a year after his speedy trial request. Several months later & prior to trial, D moved to dismiss pursuant to CR 4(B). At the trial level, State conceded that charges should be dismissed if the CR 4(B) time began running from the date D filed his speedy trial request. However, State argued the speedy trial request was filed prematurely because D had not yet officially been arrested on the charges.

Ct. App. disagreed & held that D's motion to discharge should have been granted. Although D was incarcerated on independent charges, Ct. noted restraint on liberty is not the only policy underlying CR 4(B), as other factors such as the anxiety & humiliation accompanying public accusation & the ability to present a defense while exculpatory evidence is fresh exist. Poore v. State, 685 N.E.2d 36 (Ind. 1997). Such considerations are unrelated to whether the accused is incarcerated on other grounds at the time of a speedy trial request. Ct. noted a line of cases holding that CR 4(B) is available to a D "within the exclusive custody of the State of Indiana." While D may not have taken positive steps beyond filing his motion to protect his right to a speedy trial, his failure to mount a more aggressive campaign hardly vitiates his right to a speedy trial. Ct. noted the "onus is on the State" to expedite prosecution. Held, judgment reversed & remanded to grant D's motion to discharge, vacating his 50-year sentence.

RELATED CASES: Robinson, 918 N.E.2d 629 (Ind. Ct. App. 2009) (sheriff's failure to transport D to Tr. Ct. for his initial hearing did not fall within one of the exceptions to C.R. 4(B) so to excuse State's failure to bring him to trial within 70 days).

TITLE: Burkes v. State
INDEX NO.: B.5.c.2.
CITE: (3rd Dist., 07-26-93), Ind. App., 617 N.E.2d 972
SUBJECT: Speedy trial motion - dismissal of additional charges filed
HOLDING: When D filed motion for speedy trial under CR 4(B) as to original charge filed, but not on 5 additional charges, he was not entitled to dismissal of additional charges when not tried until 5 months later. On 2/22/92, D was charged with battery on police officer. On 3/9/92, D filed speedy trial motion under CR 4(B). Trial was set for 5/14/92, but on 5/13/1992, State filed additional informations charging D with RLE, DOC, false informing, battery on another police officer, & battery on wife. D objected to filing of additional charges & to any continuance based on their filing, & State objected to severance of charges. Ct. denied D's objections & did not sever charges, instead rescheduling trial for 10/22/92. On 5/18/92, D filed motion for discharge, which was granted as to original battery on officer charge. On 7/8/92, D filed motion for discharge on remaining charges, but motion was denied & he was tried & convicted on 10/22/92.

Ct. found D was not entitled to discharge on all charges pursuant to CR 4(B), & relied in large part on Butts, App., 545 N.E.2d 1120. In Butts 3 charges were filed against D on 4/9/86 & on 5/28/86 additional charge was filed. After one year from April 9, Butts filed for discharge on all charges, & Ct. found new charge was separate & distinct. Therefore, time began to run on fourth charge when it was filed, not when original charges were filed. Ct. found here, as in Butts, charges filed on May 13 were separate & distinct from original charge & D did not specifically move for speedy trial as to new charges. Ct. rejected attempted use of Crosby, App., 597 N.E.2d 984, where late amendment of charges & untimely discovery compliance mandated discharge & dismissal. Tr. Ct. was correct in discharging D on first filed charge, and also correct in denying discharge on subsequently filed counts.

RELATED CASES: Butts, App, 545 N.E.2d 1120 (when information is amended to add another charge which is separate and distinct from original charges, CR 4(C) time period for additional charge begins to run from date of amendment, rather than from filing date of original charges).

TITLE: Clark v. State
INDEX NO: B.5.c.2.
CITE: (12-29-95), 659 N.E.2d 548 (Ind. 1995)
SUBJECT: Speedy trial - congestion of Ct. calendar
HOLDING: Upon appellate review, Tr. Ct.'s finding of Ct. congestion will be presumed valid & need not be contemporaneously explained or documented by Tr. Ct. However, D may challenge finding, either at time of his Motion for Discharge or upon Motion to Correct Error, by demonstrating that, at time Tr. Ct. made decision to postpone trial, finding of "congestion" was factually or legally inaccurate. Here, Ct. found that Tr. Ct.'s declaration of congestion was clearly erroneous & that D's Motion for Discharge should have been granted. D presented evidence that at time Tr. Ct. postponed trial & entered order finding congestion, no conflicting jury trial was scheduled & no jurors had been summoned. In response, State attempted to show existence of congestion but did not establish whether any of these trials were themselves entitled to priority setting under Criminal Rule 4. Upon incarcerated D's request for speedy trial, Criminal Rule 4(B) requires particularized priority treatment. In so holding, Ct. noted that it is essential for Tr. Ct's. to develop & implement trial scheduling systems which comport with requirements of CR 4 & which grant relief when its speedy trial requirements are violated. Held, transfer granted, Ct. App. decision at 641 N.E.2d 75 reversed & remanded with instructions to grant D's Motion for Discharge; DeBruler, J., dissenting.

RELATED CASES: Logan, 16 N.E.3d 953 (Ind. 2014) ("particularized priority treatment" requirement set forth in Clark does not mean that Tr. Ct. must always prioritize a Rule 4(B) deadline over a Rule 4(C) deadline should the two conflict; nor does it imply that Tr. Ct. must only prioritize a Rule 4(B) case when a Rule 4(C) deadline is not imminent; it merely requires Tr. Ct., when setting his or her calendar, to make certain that a D who has filed a Rule 4(B) motion is tried within 70 calendar days); Dean, App., 901 N.E.2d 648 (because D did not object to setting of trial dates, any claim of violation of Criminal Rule 4 resulting from challenged congestion orders was waived); Wilkins, App., 901 N.E.2d 10 (D failed to demonstrate that Tr. Ct. erred in delaying his trial due to court congestion); Truax, App., 856 N.E.2d 116; Collins, App., 730 N.E.2d 181 (Ct.'s calendar was clearly congested at time defense counsel made her inquiry to determine whether she needed to prepare for D's trial scheduled for following week); Lowrimore, 728 N.E.2d 860 (as long as constitutional speedy trial standards are met, CR 4 values must yield to exigencies created by death penalty charge if two cannot be reconciled); Bowers, App., 717 N.E.2d 242 (finding of congestion is not clearly erroneous simply because D in trial that is heard made speedy trial request before D in trial continued); Vaillancourt, App., 695 N.E.2d 606 (because D presented no evidence of lack of Ct. congestion, congestion was presumed valid reason for delay).

TITLE: Crosby v. State
INDEX NO.: B.5.c.2.
CITE: (1st Dist. 08/19/92), Ind. App., 597 N.E.2d 984
SUBJECT: Speedy trial violation because of State's late discovery/amendment
HOLDING: D filed speedy trial request under CR 4(B), but eventually had to request continuance because of state's failure to timely provide discovery & extremely late amendment of charges. Tr. Ct. agreed continuance should be charged to State & not D, but eventually postponed trial to outside 70-day period due to congested calendar. It was error not to grant D's motion for discharge, because calendar was not congested when originally set for trial, & delay was due to State's actions.

NOTE: This decision discusses some of discovery & amendment abuses of State, & recognizes untenable position this places Ds in. It contains extensive analysis & should provide some good arguments & language for these kinds of delays.

RELATED CASES: Baber, App., 834 N.E.2d 146, *sum. aff'd* 842 N.E.2d 343 (D was not prejudiced by last minute amendment to charging information because it involved the same day, same victim, & same event); Kirby, App., 774 N.E.2d 523 (delay of D's trial did not result from State's failure to provide D with discovery; moreover, D could have been prepared for trial without continuance); Jackson, Ind., 663 N.E.2d 766(because nothing in record indicated that delay could be attributed to D or to congested Ct. calendar, CR 4(B) required that D be discharged).

TITLE: Cundiff v. State
INDEX NO.: B.5.c.2.
CITE: (05-31-12), 967 N.E.2d 1026 (Ind. 2012)
SUBJECT: CR 4(B) - D must be held on pending charges
HOLDING: Resolving a split in the court of appeals, Indiana Supreme Court held that CR 4(B) is available to a D only when the D is held on the pending charges for which he requests a speedy trial. The availability of Rule 4(B) is not affected if the D is also incarcerated on other grounds. Here, D was charged with OWI for which he was released on bond. A few months later, D was arrested for a probation revocation. Once reincarcerated, D filed for a speedy trial in his OWI case. He was not tried within seventy days and moved for discharge, which Tr. Ct. denied. Because D was not being held on the OWI case but rather only on the probation revocation case, CR 4(B) was not available to him. Thus, Tr. Ct. did not err by denying D's motion for discharge. Held, transfer from Court of Appeals' opinion at 950 N.E.2d 1279 granted and judgment affirmed.

RELATED CASES: Bryant, 984 N.E.2d 240 (Ind. Ct. App. 2013) (Ct. acknowledged D's argument that State will have no incentive to try a D quickly if it knows he can be released in one case because D will still remain incarcerated for the unrelated case; however, Ct. cannot reject the clear holding in Cundiff).

TITLE: Fink v. State
INDEX NO.: B.5.c.2.
CITE: (4th Dist. 12/10/84), Ind. App., 471 N.E.2d 1161
SUBJECT: CR 4(B) - D must object to trial date set outside 70-day period at earliest opportunity
HOLDING: On rehearing, original opinion at 469 N.E.2d 466. Where Tr. Ct. set omnibus hearing on 12/15/82 for 2/16/83, D was adequately apprised that state would not be prepared to try him in compliance with his CR 4(B) motion. 70-day period expired on 1/12/83; Tr. Ct. on that date set trial for 4/18/83. D contends impossibility of bringing him to trial within 70-day period obviated his duty to make timely objection. Ct. distinguishes Pillars, App., 390 N.E.2d 679, based on procedural history. D could have objected as early as 12/15/82, when he saw omnibus was set beyond 70-day period. D has duty to notify Tr. Ct. & prosecution at earliest opportunity re expiration of period. Martin, 419 N.E.2d 256. See Sumner, 453 N.E.2d 203 (failure to object to pretrial conference set beyond 70-day period); Wernke, 348 N.E.2d 644 (acquiescence in setting arraignment beyond one-year deadline for CR 4(C)). Held, no CR 4(B) error.

RELATED CASES: Jacobs, App, 454 N.E.2d 894 (three-day delay between setting of trial date and motion for discharge is too late for consideration of motion); Eguia, App, 468 N.E.2d 559 (indefinite continuance requested by D and tardiness in asserting speedy trial right shows acquiescence). James, App., 622 N.E.2d 1303 (Although when considering one year period to bring to trial under Crim.R. 4(C), failure to object to trial setting outside one year only waives rights up to & including original late setting, in context of Crim. R. 4(B), acquiescence constitutes total abandonment of motion).

TITLE: Fletcher v. State

INDEX NO.: B.5.c.2.

CITE: (01-18-12), 959 N.E.2d 922 (Ind. Ct. App. 2012)

SUBJECT: CR 4(B) - discharge where pro se motion for speedy trial filed between appointment & appearance

HOLDING: A D's pro se request for a speedy trial within the 70-day time limit of Ind. Crim. Rule 4(B), made after the court appointed counsel but before counsel entered an appearance, and which was not rejected or stricken by the Tr. Ct., was effective to invoke his speedy trial rights. Because appointed counsel effectively affirmed D's request for a speedy trial, objected to any continuance of the trial date, and filed a motion for discharge the day after the original trial date, Tr. Ct. should have granted his motion for discharge. In so holding, Court distinguished Underwood v. State, 722 N.E.2d 828 (Ind. 2000), where appointed counsel's appearance was entered before the pro se request for a speedy trial, and Jenkins v. State, 809 N.E.2d 361 (Ind. Ct. App. 2004), where Tr. Ct. expressly rejected Jenkins' pro se motion for speedy trial because he was represented by counsel when he filed it. Held, denial of motion for discharge reversed; Friedlander, J., dissenting, believes that following Underwood, appointment of counsel, not counsel's entry of an appearance, is the relevant time for purposes of determining whether a D may file a pro se motion for speedy trial.

RELATED CASES: Allen, 994 N.E.2d 316 (Ind. Ct. App. 2013) (although D requested a speedy trial pro se, his counsel later withdrew the request and obtained a continuance; D speaks to the court through his counsel).

TITLE: Hornaday v. State
INDEX NO.: B.5.c.2.
CITE: (2nd Dist., 08-22-94), Ind. App., 639 N.E.2d 303
SUBJECT: CR 4(B) - effect of dismissal & refiling charges
HOLDING: Seventy-day period to bring D to trial under CR 4(B) is only tolled during period charges are dismissed when identical charges are refiled, but violation of CR4(B) does not divest Tr. Ct. of jurisdiction. D was arrested & charged with robbery. Charges were dismissed within 70-day period of CR 4(B), over D's objection. Seven months later, State obtained grand jury indictment charging D with robbery stemming from same incident. D filed another motion requesting speedy trial, and D's motion to dismiss for speedy trial violation was denied. During trial, D elected to plead guilty. Noting existence of conflicting decisions, Ct. held that new 70-day period does not commence when State dismisses & subsequently refiles charge, following Tharp, Ind. App., 406 N.E.2d 1242, and Fink, Ind. App., 469 N.E.2d 466, and rejecting Shields, Ind. App., 456 N.E.2d 1033. However, speedy trial time does not continue to run after State dismisses charges, even where D remains in custody on other charges. Upon refiling, D receives any time remaining from original 70-day period that existed at time initial charges were dismissed. Here, Ct. found waiver because D failed to object to scheduling of trial beyond speedy trial deadline & because D's motion to dismiss was premature. Ct. also addressed arguments relating to absence of jurisdiction to accept guilty plea & concluded that speedy trial right under Ind. Constitution is procedural requirement that does not preclude exercise of jurisdiction when violated. Even if D's speedy trial rights had been violated, Tr. Ct. would not have been deprived of power to accept guilty plea. Lastly, Ct. noted that even if D had been deprived of speedy trial right & timely filed for dismissal, he waived any error by pleading guilty. Held, judgment affirmed.

TITLE: Howland v. State
INDEX NO.: B.5.c.2.
CITE: (12/27/82), Ind., 442 N.E.2d 1081
SUBJECT: CR 4(B) - waiver of motion
HOLDING: Failure to renew speedy trial request after seeking continuance waives CR 4(B) right. Parks, 389 N.E.2d 286; Cody, 290 N.E.2d 38. Here, D failed to renew CR 4(B) motion after seeking continuance. D eventually pled guilty. In PCR petition, D contends plea was not entered knowingly & voluntarily since he did not realize that by pleading guilty, he was waiving right to claim violation of CR 4 rights. Ct. finds no merit to contention & determines D had no CR 4(B) right to protect anyway. Held, no error.

RELATED CASES: Wright, 593 N.E.2d 1192, *cert. denied* 113 S. Ct. 605 (if D causes delay, he must file motion requesting immediate commencement of trial in order to invoke his rights under rule); Miller, 563 N.E.2d 578 (D can refile for speedy trial contemporaneously with motion for continuance); Jacobs, App, 454 N.E.2d 894 (general objections to continuance, which do not invoke speedy trial rule, will not protect speedy trial rights; failure to specify that objection is on constitutional as well as CR 4 grounds will not preserve constitutional issue for appeal). Vance, 620 N.E.2d 687 (Where D requested stay of proceedings & preparation of interlocutory appeal after denial of motion to dismiss due to speedy trial violation, Ct. was justified in delaying next trial setting & charging delay to D. Discusses multiple speedy trial requests under CR 4(B), & also holds Tr. Ct. can strike pro se motion of D in favor of actions of counsel); Dixon, 437 N.E.2d 1318 (where D requested indefinite continuance to file writ of mandate & to pursue proceedings pending before Disciplinary Commission (against appointed trial counsel), delay was chargeable to D & constituted withdrawal of CR 4(B) motion; D should have filed second speedy.

TITLE: McGowan v. State
INDEX NO.: B.5.c.2.
CITE: (09/23/92), Ind., 599 N.E.2d 589
SUBJECT: Early trial motion - CR 4(B)
HOLDING: Although rules do not require motion for early trial to be in writing, where Tr. Ct. so ordered, time began to run for CR 4(B) when written, not oral motion was made; reversing McGowan App., 592 N.E.2d 1243. At arraignment, D made oral motion for early trial, and magistrate instructed him that he must make motion in writing. Twenty-one days later written motion was filed pursuant to Ct.'s instruction. S. Ct. found that CR 4(B) does not require written motion, but noted that Ind. Tr. R. 7(B) provides that "[u]nless made during a hearing, or trial or otherwise ordered by the Ct., an application to the Ct. for an order shall be made by written motion." Ct. held that D's motion could have been made orally at arraignment, but that because magistrate ordered it to be in writing, written motion was required. Because subsequent motion for early trial supplants earlier motion, 70-day time period began to run from date of written motion, and D's motion for discharge, filed only 53 days after filing of written motion, was properly denied. Ct. also found Tr. Ct. had discretion to determine that change in defense counsel at D's request warranted postponement of trial, even though D did not request continuance, and specifically stated that he did not wish to waive right to speedy trial by changing counsel. Held, Ct. of Appeals decision reversed, and conviction affirmed, DeBruler and Dickson, JJ. DISSENTING on unspecified grounds.

RELATED CASES: Smith, 943 N.E.2d 421 (Ind. Ct. App. 2011) (although Tr. Ct. told D that it wanted the speedy trial motion in writing, Tr. Ct. told D he would give him a new trial date and, considering proceedings as a whole, did not require D to personally submit a written motion).

TITLE: Minneman v. State
INDEX NO.: B.5.c.2.
CITE: (11/12/82), Ind., 441 N.E.2d 673
SUBJECT: CR 4(B) - actions consistent with motion
HOLDING: Where motions filed by D were pending at time CR 4(B) motion was filed & where such motions delayed setting of a trial date, Tr. Ct. properly *overruled* D's motion to dismiss. Here, D filed motions to compel discovery & to suppress on 10/29/79. CR 4(B) motion filed 10/30/79. Hearing on suppression motion began on 11/26/79 & was continued until 1/3/80. On 1/3/80 the hearing was continued at D's request. Hearing completed 1/22/80; suppression motion denied 1/23/80. On 3/4/80, Tr. Ct. set trial for 6/16/80. D objects to setting of trial date 3/8/80. D moves to dismiss cause for denial of speedy trial 5/1/80; motion denied 6/4/80. Ct. finds D's pretrial motion to suppress (filed 10/29/80) delayed setting of trial; motion was inconsistent with speedy trial motion filed one day later. See Serrano, 360 N.E.2d 1257 (where record devoid of any indication during 70-day period that D is seeking speedy trial, Tr. Ct. may conclude D's speedy trial motion is not bonafide. Held, no error. DISSENT by Prentice argues "pendency of [motion to suppress] is not a circumstance from which we can conclude D did not really want a speedy trial." Prentice finds majority's reliance on dicta in Serrano misplaced. Further, "D who moves for early trial is not required to elect between his early trial rights & his right to file pretrial motions, dilatory or otherwise." Majority should have followed CR 4(F) in determining whether D was denied speedy trial.

RELATED CASES: Finnegan, 201 N.E.3d 1186 (D's subsequent fast and speedy trial motion abandoned all previous requests for speedy trial); Jackson, App., 857 N.E.2d 378 (where D files change of venue & speedy trial motion, 70-day period begins anew when venued county receives transcripts even when D does not file second speedy trial motion in venued county; see full review, this section); Rutledge, 426 N.E.2d 638 (D filed motion for early trial and later filed motion for “fast and speedy trial;” second motion operated as abandonment of first); Stone, 531 N.E.2d 191 (D’s fighting extradition and requesting continuance were inconsistent with speedy trial motion under CR 4(B)); Johnston, 578 N.E.2d 656 (D’s speedy trial request in Whitley County did not carry over when charges were dismissed in that county and D was prosecuted in Allen County). Taylor, 468 N.E.2d 1378 (Crim. L 577.10(3)).

TITLE: Mork v. State
INDEX NO.: B.5.c.2.
CITE: (2nd Dist., 08-28-09), 912 N.E.2d 408 (Ind. Ct. App. 2009)
SUBJECT: Application of CR 4(B) to Ds held on multiple charges
HOLDING: To be entitled to protection afforded under Criminal Rule 4 for a D who requests a speedy trial on one charge while being held in jail on another, incarceration on the present offense must be *a* reason that the D is in jail. See Poore v. State, 685 N.E.2d 36 (Ind. 1997). In Poore, Court recognized that incarceration due to pending charge at issue need not be the *only* reason the D is in jail at the time the speedy trial is requested under Rule 4(B). Here, D requested a speedy trial, and Tr. Ct. released him on his own recognizance twenty-nine days later. At time D requested a speedy trial, he was incarcerated for an unrelated offense. Generally, once released from custody, a D receives no further benefit from Criminal Rule 4(B). Williams v. State, 631 N.E.2d 485 (Ind. 1994). Thus, Tr. Ct. did not err by denying D's motion for discharge under Criminal Rule 4(B). Held, judgment affirmed.

NOTE: This case may create a split with Laslie v. State, 381 N.E.2d 529 (Ind. Ct. App. 1978); Hanaday, 639 N.E.2d 303 (Ind. Ct. App. 1994).

TITLE: Pasha v. State
INDEX NO.: B.5.c.2.
CITE: (6/14/88) Ind., 524 N.E.2d 310
SUBJECT: CR 4(B) - D's duties
HOLDING: Pro se D who requested speedy trial pursuant to CR 4(B) acquiesced to Tr. Ct.'s setting of trial date beyond 70-day period. When Tr. Ct. set trial date, D responded, "That's not within the time of my constitutional right, your Honor." D then went on to ask that arrangements be made for him to use library to "have [his] motion timely." When it was determined that D could use jail library, Tr. Ct. asked whether he would be prepared for trial "at that time," & D said yes. At later hearing on D's motion to suppress, D indicated that he knew trial date & that he did not want counsel. When, prior to expiration of time set by CR 4(B), Tr. Ct. sets trial date beyond that period, D who is or should be aware of untimeliness has obligation to object at earliest opportunity. Randall, 455 N.E.2d 916; Little, 415 N.E.2d 44. Tr. Ct. must be given opportunity to reset trial within proper period. Id. D must object on basis of CR 4(B). Here, when D said that trial date would be beyond constitutional time, he was apparently referring to CR 4(B). However, he did not pursue it as an objection, but instead made arrangements to use library. At later hearing, D acknowledged trial date without objection. CR 4 requires that D maintain position consistent with speedy trial request. Mickens, 439 N.E.2d 591. Here, D conceded to trial date & took position consistent with preparing for trial. He proceeded to trial without objection until motion for discharge was filed after 70-day period had expired. Held, motion for discharge properly denied.

RELATED CASES: Dukes, App., 661 N.E.2d 1263 (filing early trial motion does not constitute objection to trial date).

TITLE: Paul v. State
INDEX NO.: B.5.c.2.
CITE: (1st Dist., 12-09-03), Ind. App., 799 N.E.2d 1194
SUBJECT: Speedy trial - emergency; discovery & newly elected prosecutor
HOLDING: Tr. Ct. properly found emergency situation as Crim. Rule 4(B)(1) exception to D's speedy trial request. Crim. Rule 4(B)(1) permits Tr. Ct's., on rare occasions, to continue trials outside of seventy-day period due to emergency exigent circumstances without running afoul of rule's discharge mandate. State charged D with murder on November 6, 2002, with trial set that same day for January 13, 2003. On November 26, 2002, D filed his Crim. R. 4(B) speedy trial request & on December 17, 2002, he filed his motion for discovery. On January 9, 2003, State responded to discovery request & the next day D filed an Objection to Trial & Motion for Discharge arguing that insufficient discovery was provided & State's production four days prior to trial gave D insufficient time to prepare. Tr. Ct. issued an order declaring that an emergency existed due to the election of a new prosecutor, with the old prosecutor only having nine days to respond to the discovery prior to leaving office. New prosecutor responded to discovery request within seven working days of the filing.

Ct. held that specific circumstances of this case justified Tr. Ct.'s emergency finding, as the prosecutor provided discovery shortly after taking office & did so within the time limits of Ind. Trial Rule 34. Further, while D filed his speedy trial request early in case, he waited 48 days to file a discovery request for a murder trial to begin within 70 days. Ct. distinguished Crosby v. State, 597 N.E.2d 984 (Ind. Ct. App.1992), noting that communication breakdown in that case was not a "one-time experience, having systematically occurred" in that Tr. Ct. Crosby & other cases involved situations where State was found to have either violated discovery orders or been negligent in providing discovery. Ct. found that danger of prosecutors delaying providing discovery to detriment of Ds' speedy trial rights is not likely to occur under this holding, but rather, holding otherwise would likely encourage Ds to delay filing discovery in order to receive successful discharge motions. Held, denial of motion for discharge affirmed.

TITLE: Phelps v. State
INDEX NO.: B.5.c.2.
CITE: (2nd Dist. 1/19/89), Ind. App., 532 N.E.2d 619
SUBJECT: Computing delay - waiver
HOLDING: Failure to object to untimely trial date set prior to expiration of CR 4(B) 70-day time period, constitutes waiver of CR 4(B) rights. Smith, 477 N.E.2d 857. D's motions for continuance delaying trial to date not beyond 70-day time limit extend the time for bringing D to trial. Here D filed CR 4(B) motion on 4/1, moved for continuance on 5/14 until 6/9. On 6/9, prosecution dismissed charges, & refiled charges, (apparently to avoid effect of CR 4). On 6/11, at Initial Hearing on refiled charges, trial is set for 8/4. On 7/8, D moves to dismiss under CR 4. 70-day period began running on date motion was filed, 4/1, & would have expired on 6/10, but for continuance granted to D, which extended time for bringing D to trial by length of continuance. Brown, 417 N.E.2d 333; State ex rel. Cox v. Superior Ct. of Madison County, 445 N.E.2d 1367; Vaughan, App., 470 N.E.2d 374.

[**Note:** some Ct's. have construed continuance as waiver of CR 4(B) rights.] Period was due to expire 7/1. D should have objected at 6/11 Initial Hearing to 8/4 trial date, delaying objection until after 7/1 waived CR 4(B) rights. Smith, *supra*. Affirmed.

RELATED CASES: Hampton, App., 754 N.E.2d 1037 (issue waived because not objected to at time trial was set & because no motion to dismiss was filed before trial commenced); Johnston, App, 578 N.E.2d 656 (failure to object to setting of trial date beyond 70 days waives right under any motion that has been filed); Sumner, 453 N.E.2d 203 (failure to object to setting of pre-trial conference beyond the 70-day period waives CR 4(B) rights, because it is construed as acquiescing in late trial date).

TITLE: Poe v. State
INDEX NO.: B.5.c.2.
CITE: (2/22/83), Ind., 445 N.E.2d 94
SUBJECT: CR 4(B) - appointment of counsel
HOLDING: Appointment of counsel to D on 69th day of incarceration did not deny him opportunity to invoke CR 4(B). Here, D requested pauper counsel 5/20/81. Tr. Ct. appointed attorney to determine D's equity in real estate & told D decision whether to appoint pauper counsel would be made after attorney reported to judge. Pauper counsel appointed 7/28/81. D analogizes Roberts, App., 358 N.E.2d 181 (D, held in custody for 50 days before being charged or brought before Ct., ordered discharged; it is implicit in CR 4(B) that accused be given opportunity to request speedy trial). Ct. notes D filed pro se CR 4(B) motion on 6/30/81 & trial was held 9/2/81. Ct. does not find error in delay of appointment of counsel. Decision to appoint pauper counsel lies with Tr. Ct. (Thompson, 267 N.E.2d 49) & ought not be hastily or superficially made (Moore, 401 N.E.2d 676). Held, no error.

RELATED CASES: Fletcher, 959 N.E.2d 922 (Ind. Ct. App. 2012) (D entitled to discharge where pro se motion for speedy trial was filed between appointment of counsel & appearance; see full review, this section).

TITLE: Poore v. State
INDEX NO.: B.5.c.2.
CITE: (8-29-97), Ind., 685 N.E.2d 36
SUBJECT: CR 4(B) applicable to habitual offender (HO) determination
HOLDING: Tr. Ct. erred in setting date of D's retrial on HO count more than 70 days after D requested speedy trial. Time limits for speedy trial provided for in CR 4(B) apply to retrial of HO enhancement. Analyzing language of CR 4(B), Ct. held that phrase "held in jail on an indictment or affidavit" applies to D being held upon HO charge as set forth in indictment or information, & word "trial" includes HO hearing within meaning of CR 4(B). Ct. reasoned that although HO determination relates to sentencing & is technically not separate offense, it is pending criminal proceeding that has several hallmarks of trial. In addition, policies behind speedy trial rule support holding that all incarcerated Ds are entitled to application of CR 4(B). Gill, 368 N.E.2d 1159. Here, D was not retried as to his HO count within seventy days of his motion for speedy trial. Because none of CR 4's exceptions excuse this delay, only remedy is discharge. Held, transfer granted, Ct. of Appeals' decision at 660 N.E.2d 591 vacated & cause remanded for further proceedings; Sullivan, J., dissenting.

TITLE: Raber v. State
INDEX NO.: B.5.c.2.
CITE: (1st Dist., 10-20-93), Ind. App., 622 N.E.2d 541
SUBJECT: Congested Ct. Calendar - insufficient record
HOLDING: Record was insufficient to determine appropriateness of Tr. Ct.'s continuance of trial due to congested calendar. D was arrested & charged on 3/17/1989. After multiple delays & trial settings (discussed in opinion), trial was set for 7/1/1991, but Tr. Ct. *sua sponte* continued trial due to congested court calender, and after further delays, trial occurred on 3/9/1992. D filed written motion for discharge after trial, but motion was properly denied because it was too late. Ct. examined record, however, & determined that D did timely assert right to discharge by raising issue orally number of times between July 1, 1991, & trial date. D was without counsel at time. Crim. R. 4(C) requires only that pro se Ds raise speedy trial issue in way that alerts Ct. that issue is raised & ruling is required. Ct. found question was whether Tr. Ct. abused discretion in continuing case due to congested calendar. Because Tr. Ct. speaks only through its record, & record indicated only that congested calendar prevented trial from taking place on July 1, it was insufficient to determine factual basis for order. Ct. stressed importance of complete docket entries to justify postponement of criminal jury trials & refused to assume Tr. Ct. acted in conformance with mandate of Crim. R. 4. Ct. therefore retained jurisdiction over appeal, & remanded case back to Tr. Ct. with instructions to make written findings articulating factual basis for continuance.

RELATED CASES: But see Clark, Ind., 659 N.E.2d 548 (upon appellate review, Tr. Ct.'s finding of Ct. congestion will be presumed valid & need not be contemporaneously explained or documented by Tr. Ct.).

TITLE: Roper v. State
INDEX NO.: B.5.c.2.
CITE: (6/9/2017), 79 N.E.3d 907 (Ind. Ct. App. 2017)
SUBJECT: D waived CR 4(B) request by conduct inconsistent with seeking speedy trial
HOLDING: D waived his Criminal Rule 4(B) request for speedy trial he requested at his initial hearing, when he subsequently made no effort to object or otherwise bring any violation of that speedy trial request to trial court's attention until after he was convicted. When a defendant has a speedy trial motion pending, he cannot sit idly on his hands. Hahn v. State, 67 N.E.3d 1071 (Ind. Ct. App. 2016). Here, D waffled about whether he was going to retain counsel at his initial hearing, at his bail review hearing and at pretrial conference held days before the time limit would expire on his speedy trial request. D did not object to the resetting of that hearing to a date past his speedy-trial deadline. Furthermore, at the hearing following the expiration of the 70-day deadline, D signed a written Motion for Continuance that indicated a waiver of his right to speedy trial under Criminal Rule 4. In footnote, Court expressed "concern" that trial court neither addressed the merits of D's speedy trial motion when he made it at his initial hearing nor ruled on State's motion to set D's case for trial. Regardless, D's conduct was inconsistent with a desire to have his case tried in a speedy manner, and acted, in conjunction with his other actions, as a waiver of his Criminal Rule 4(B) request. Held, denial of D's motion for discharge affirmed.

TITLE: Schepers v. State

INDEX NO.: B.5.c.2.

CITE: (12/18/2012), 980 N.E.2d 883 (Ind. Ct. App. 2012)

SUBJECT: CR 4(B) motion to dismiss properly denied; D represented by counsel at time of pro se motion

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss for failure to try him within 70 days of his pro se demand for early trial pursuant to Criminal Rule 4(B)(1), because D was represented by counsel at the time of the request. When counsel is appointed, a criminal D speaks to the court through his or her attorney. Jenkins v. State, 809 N.E.2d 361 (Ind. Ct. App. 2004); but see Fletcher v. State, 959 N.E.2d 922 (Ind. Ct. App. 2012)(disagreeing with Jenkins to extent that it implies that appointment of counsel and not the appearance of counsel is the relevant time for purposes of determining whether a D may file a pro se motion for speedy trial).

Here, public defender entered his appearance and was still representing D at the time the pro se request for speedy trial was filed. D did not clearly and unequivocally assert his right to self-representation, so Tr. Ct. properly denied the motion to dismiss on that basis. Moreover, D's subsequent public defender agreed to a trial date outside the 70-day limit. Held, judgment affirmed.

TITLE: Smith v. State
INDEX NO.: B.5.c.2.
CITE: (02-28-11), 943 N.E.2d 421 (Ind. Ct. App. 2011)
SUBJECT: CR 4(B) - pro se D sufficiently objected to trial date
HOLDING: Tr. Ct. abused its discretion by denying D's motion to dismiss pursuant to Criminal Rule 4(B). Although Criminal Rule 4(B) does not require speedy trial motions to be made in writing, Indiana Trial Rule 7(B) authorizes a court to order such. Moreover, a D must object at the earliest opportunity when his trial is set beyond time limitations of Crim. R. 4. If an objection is not timely made, the D is deemed to have acquiesced to the later trial date.

Here, at D's initial hearing, Tr. Ct. set D's trial for over 70 days, and D requested a fast and speedy trial. Although the court noted the oral request and told D he would get him a new date, the court told D to tell his attorney once he hires one about the request and to file a formal motion. At the first hearing D was still pro se and again requested a speedy trial because the court had not changed the original trial date. Again, Tr. Ct. noted the oral request and told D he needed to file a formal motion. At the next hearing, D's public defender failed to appear. D again told the Tr. Ct., "I've been requesting a fast and speedy trial since my initial appearance in front of the magistrate and . . . I have been getting the run around." The court reaffirmed his request and referred the order to the public defender for consideration. When D hired private counsel, counsel filed a motion to dismiss. Tr. Ct. found D did nothing to delay but waived the issue by not objecting to the trial date. But, at every hearing held prior to the filing of the motion to dismiss, D informed the Tr. Ct. that he wanted a speedy trial. Although D did not say the words "I object to the trial setting," it was clear that he was not acquiescing to the original trial setting. Moreover, viewing the process as a whole although the court desired to have a written motion from an attorney, the court agreed that D should receive a new trial date and did not require D to personally submit a written motion. Because neither attorney took any action inconsistent with D's oral motions for speedy trial, Tr. Ct. erred by not dismissing the charges. Held, judgment reversed and convictions vacated.

TITLE: Smith v. State
INDEX NO.: B.5.c.2.
CITE: (1/16/87), Ind., 502 N.E.2d 485
SUBJECT: CR 4(B) - state's motion for continuance pursuant to CR 4(D)
HOLDING: D was not denied right to speedy trial where state's CR 4 (D) motion for continuance was granted & D was brought to trial 76 days after filing of motion. Here, state's expert psychiatric witness was unavailable to testify on trial date. D contends grounds asserted in state's motion for continuance were insufficient to meet requirements of CR 4(D) because state failed to demonstrate reasonable effort to produce expert testimony & to show that expert testimony (i.e., another expert) was in fact unavailable. Ct. finds state complied with directives of CR 4(D). Held, no error. Dickson CONCURS IN RESULT.

RELATED CASES: Mickens, 439 N.E.2d 591 (Tr. Ct. had discretion to set trial beyond 70-day limit; State showed that witness was unavailable because he required surgery).

TITLE: State v. Jackson
INDEX NO.: B.5.c.2.
CITE: (5th Cir. 11-22-06), Ind. App., 857 N.E.2d 378
SUBJECT: CR 4(B) - 70 days begin anew when venued Ct. receives papers
HOLDING: Tr. Ct. properly granted co-Ds' Motions to Dismiss for violation of CR 4(B). The delay caused by a change of venue is attributable to the D. However, the seventy-day time period begins anew when the Ct. to which the venue is changed receives the transcript & original papers & assumes jurisdiction. Here, the co-Ds filed motions for change of venue & motions for speedy trial. One D also filed a notice of defense of mental disease or defect. Tr. Ct. granted the change of venue motions, & on October 20, 2005, the clerk of Jennings Circuit Ct. issued a certification of venue, stating that she had received the transcript of the case. However, the Jennings Circuit Ct. judge & prosecutor were never notified of the filing of the documents. Thus, after seventy-days of no action on the case, CR 4(B) was violated. Further, fact that one of co-Ds filed a notice of disease or defect did not delay proceedings being Ct. never acted on notice & appointed experts. Held, judgment affirmed.

TITLE: State v. Kent
INDEX NO.: B.5.c.2.
CITE: (1st Dist., 10-27-98), Ind. App., 700 N.E.2d 1187
SUBJECT: D not entitled to discharge under Crim. R. 4(B)
HOLDING: Tr. Ct. erred when it discharged D & dismissed child solicitation charge against him pursuant to Crim. R. 4(B). On 1/13/97, Tr. Ct. ordered that D be released on his own recognizance for child molesting charge. Although D was serving time on unrelated conviction when State filed amended charge of child solicitation, he was released on 4/15/97. D was not jailed on pending charge when he filed his motion to dismiss on 4/27/97, & thus could not make valid Crim. R. 4(B) motion for discharge. Further, D was not arrested on refiled charge. Only D who is imprisoned on pending charge may make Crim. R. 4(B) motion. Hornaday, App., 639 N.E.2d 303. Fact that D may have been in jail for unrelated conviction has no bearing on this case because he was not in jail at the time he filed his Crim. R. 4(B) motion. Further, record of D's initial hearing showed that he was not being held in jail on "indictment or an affidavit," as required by Crim. R. 4(B); rather, D had been sentenced to six months in jail on unrelated conviction. Held, judgment reversed & remanded.

RELATED CASES: Mork, 912 N.E.2d 408 (Ind. Ct. App. 2009) (to be entitled to protection afforded under Criminal Rule 4 for a D who requests a speedy trial on one charge while being held in jail on another, incarceration on the present offense must be *a* reason that the D is in jail; see full review, this section).

TITLE: State v. Love
INDEX NO.: B.5.c.2.
CITE: (1991), Ind. App., 576 N.E.2d 623
SUBJECT: CR 4(B) - unreasonable delay
HOLDING: Generally, D is charged with any delay resulting from defense request for continuance, including action taken unilaterally by D's attorney. Andrews, 441 N.E.2d 194. Here, first defense attorney resigned, and second attorney was granted continuance. Second attorney's motion to withdraw granted because D expressed an "extreme lack of confidence" in attorney, and continuance was given for next attorney to prepare. Both continuances were emergency continuances to allow recently appointed counsel preparation time and were reasonable measure to protect D's interest in effective counsel. Neither continuance was chargeable to D or State under CR 4 and, State still had time to try D within seventy-day period. However, even excluding time during continuances, State failed to bring D to trial within seventy-day period. Held, judgment affirmed.

RELATED CASES: Jenkins, App., 809 N.E.2d 361 (Ct. rejected argument that by filing pro se prior to his new attorney entering an appearance he had asserted his constitutional right to represent himself or to proceed with hybrid representation; time counsel was appointed controlled rather than when counsel entered his appearance).

TITLE: State v. Roth
INDEX NO.: B.5.c.2.
CITE: (2nd Dist. 02/10/92), Ind. App., 585 N.E.2d 717
SUBJECT: Speedy trial (CR 4(B)) after mistrial
HOLDING: Where D makes speedy trial motion under CR 4(B) following mistrial/retrial, he is entitled to dismissal if not brought to trial within 70 days. After reversal on appeal, retrial resulted in mistrial, & D orally moved for speedy trial pursuant to CR 4(B). Tr. Ct. granted request but did not set trial date. Four days later, state requested trial date within 70 days, but no trial was set. Seventy-six days later, D moved for dismissal for failure to be brought to trial within 70 days & Tr. Ct. granted motion for discharge & dismissal. Application of CR 4(A) [release from incarceration after 6 months without trial], & CR 4(C) [discharge if not tried after one year], do not apply in context of mistrial/retrial, & D only needs to be tried within reasonable time, Nelson, 542 N.E.2d 1336, State ex rel. Brumfield v. Perry Circuit Ct., 426 N.E.2d 692. In context of CR 4(B) [70-day speedy trial request], however, S.Ct. has held that after mistrial, D must make renewed request for speedy trial, Young, 482 N.E.2d 246. Ct. concluded, therefore, that time limits which begin to run before D's initial trial don't continue to operate after mistrial is declared, but that when D makes new speedy trial request after mistrial, 70 day limit comes back into operation. Held, Tr. Ct.'s dismissal affirmed.

TITLE: Upshaw v. State

INDEX NO.: B.5.c.2.

CITE: (09-22-10), 934 N.E.2d 178 (Ind. Ct. App. 2010)

SUBJECT: CR 4(B) - 70-day time period does not automatically renew when re-arrested for new charges after release on OR

HOLDING: Tr. Ct. did not err in denying D's Motion to Dismiss, which alleged that for purposes of Criminal Rule 4(B), detention for new, unrelated charge should be added to numbers of days incarcerated for original charges related to alleged drug and driving offenses. "[T]he purpose of Rule 4(B) is to prevent a D from being detained in jail *for more than* 70 days after requesting an early trial . . . ." Bartley v. State, 800 N.E.2d 193, 196 (Ind. Ct. App. 2003) (emphasis in original) for the deadline to apply, incarceration on the present offense must be the reason that a D is in jail.

Here, two days before deadline, State sought continuance because key witnesses were unavailable. On seventieth day, Tr. Ct. released D on his own recognizance and reset trial date. Less than three weeks later, State asked court to revoke D's bond because he was arrested in an unrelated matter. Tr. Ct. revoked the bond. On November 11, 2009, D renewed his speedy trial motion. Tr. Ct. granted the request, finding that the new speedy trial deadline was January 11, 2010, and set the trial for December 28, 2009. On December 1, 2009, D moved to dismiss his case, claiming the speedy trial deadline had passed. Tr. Ct. denied the motion, ruling that D's "release status was revoked due to . . . new and additional charges."

There is no logical reason to find that the Rule 4(B) clock on the initial, pending charges starts again because D was arrested on a new, unrelated charge. Because D was released from jail before the seventy-day period had expired, the objective of Criminal Rule 4(B) was met.

Court noted disagreement about standard of review for Criminal Rule 4 appeals. Cf. Mork v. State, 912 N.E.2d 408, 410 (Ind. Ct. App. 2009) (applying de novo standard) with Bowman v. State, 884 N.E.2d 917, 919 (Ind. Ct. App. 2008) (abuse of discretion standard), and Paul v. State, 799 N.E.2d 1194, 1197 (Ind. Ct. App. 2003) (clearly erroneous standard). Court did not resolve this dispute because it affirmed Tr. Ct. without regard to correct standard of review. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Williams v. State
INDEX NO.: B.5.c.2.
CITE: (04-18-94), Ind., 631 N.E.2d 485
SUBJECT: CR 4(B) doesn't apply if D released from jail
HOLDING: Where D filed speedy trial request pursuant to CR 4(B), & was not brought to trial within 70 days but was released from pre-trial detention, there was no denial of speedy trial right because CR 4(B) no longer applies if D is released from confinement. On date trial was originally set, Ct. continued trial over D's objection, & ordered D released on OR. Trial ultimately occurred within one year of filing of charges. Ct. found purpose served by CR 4(B) is to prevent Ds from being detained in jail for more than 70 days after requesting early trial, & non-incarcerated Ds' right to speedy trial is controlled only by CR 4(C). Once released from custody, D can no longer benefit from CR 4(B), Dubinion, App. 600 N.E.2d 136. Held, judgment affirmed, DeBruler, J., dissenting on this issue, arguing that value of CR 4(B) should be available to all who are in jail facing criminal charge, who file motion while in jail & maintain position consistent with motion, regardless of whether they are subsequently released.

RELATED CASES: Bartley, App., 800 N.E.2d 193 (State removed CR 4(B) problem by releasing D on 70th day; see full review, this section).

TITLE: Young v. State
INDEX NO.: B.5.c.2.
CITE: (9/5/85), Ind., 482 N.E.2d 246
SUBJECT: Speedy trial (ST) - must be renewed after hung jury
HOLDING: D was not denied his right to ST where first trial resulted in mistrial & D was held in jail past 6 months until, on third try, he was convicted. Here, D moved for ST, but did not renew motion after mistrial, as he is required to do. Johnson, 355 N.E.2d 240. CR 4 does not anticipate mistrials. Rule requires D be brought to trial, but not necessarily convicted, within certain time. Only time limitation on retrial following hung jury is "reasonable time." State ex rel. Brumfield v. Perry Circuit Ct., 426 N.E.2d 692. D was charged on 8/5/77. On 10/11/77, he moved for ST & was tried 11/10/77. Retrials ended 1/31/78 & 6/15/78 respectively. Ct. finds time was reasonable. Held, no error.

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c.3. CR 4(C) (1 year)

TITLE: Allen v. State
INDEX NO.: B.5.c.3
CITE: (4/28/2016), 51 N.E.3d 1202 (Ind. 2016)
SUBJECT: Speedy trial violation - failure to take action after D's non-appearance due to incarceration and failure to transport
HOLDING: Tr. Ct. abused its discretion in denying D's Criminal Rule 4(C) motion for discharge. D was charged with OWI in December of 2011. At an October, 2012 pre-trial conference, D told the Tr. Ct. he had been sentenced to 10 years in DOC in an unrelated matter, and bench trial was set for January 23, 2014, which was still within the limitations of Rule 4(C) because of delays attributable to D. Although State and defense counsel were present and ready for trial on January 23, 2014, D was absent due to his incarceration in the DOC. This placed both Tr. Ct., which is responsible for management of its docket, and prosecutor, which has an interest in avoiding discharge under Criminal Rule 4, on notice that a new trial date was necessary, including the necessity of transporting D from prison for trial. However, neither the State nor Tr. Ct. took any action for 518 days. Thus, even if D's non-appearance for trial is deemed to have initiated a delay attributable to him for Rule 4(C) purposes, such delay extended only for a reasonable period of time within which the court could take action to reschedule a trial date and secure transportation of incarcerated D for trial. The reasonable period certainly did not extend for more than 306 days, as would have been required for D's trial to comply with Rule 4(C). Regardless of whether delay for failing to arrange for D's transportation from DOC is attributed to State or to D under Rule 4(C), D was entitled to discharge because he was not brought to trial within the period required by Rule 4(C). Held, transfer granted, Court of Appeals' opinion at 45 N.E.3d 59 vacated, denial of motion for discharge reversed and remanded to Tr. Ct. to grant motion pursuant to Rule 4(C).

TITLE: Andrews v. State
INDEX NO.: B.5.c.3.
CITE: (11/3/82), Ind., 441 N.E.2d 194
SUBJECT: CR 4(C) - when time begins to run
HOLDING: Time under CR 4(C) begins to run from date charge is filed against D, or from date of arrest on that charge, whichever is later. Here, D was arrested on 3/8/78. Murder charge was filed 6/16/78. Court finds time under CR 4(C) began to run on 6/16/78. When delays attributable to D and to congestion of court calendar are subtracted from date of trial (11/14/80), court finds D was not held beyond a year, as required under CR 4(C) for discharge. Held, no error in denial of discharge.

RELATED CASES: Harper, 135 N.E.3d 962 (Ind. Ct. App. 2019) (D was not held on the case until his arrest warrant was served in August, rejecting his argument the clock should have started running in June when he was incarcerated for his parole violation); Griffith, 59 N.E.3d 947 (Ind. 2016) (C.R. 4(C) clock began ticking when Indiana arrested D on current charges, not when Kentucky arrested him on unrelated charges); Solomon, App., 588 N.E.2d 1271 (D entitled to discharge for failure to try within 1 year. No duty to object to trial setting, when setting occurs outside of 1-year time period); Maxie, 481 N.E.2d 1307 (court refuses to modify holding in Landrum, 428 N.E.2d 1228 by accepting definition of arrest formulated in Nutt, App., 451 N.E.2d 342 for purposes of credit time statute; held, time begins to run from date of D's arrest, not from date detainer is filed); Hinds, App., 469 N.E.2d 31 (Crim L 577.9; for CR 4(C) purposes, "arrest" occurs when D, incarcerated in another county, is ordered returned by court in which charges are pending, not when arrest warrant is served, *citing* Landrum).

TITLE: Arion v. State
INDEX NO.: B.5.c.3.
CITE: (6/22/2016), 56 N.E.3d 71 (Ind. Ct. App. 2015)
SUBJECT: Failure to return arrest warrant does not excuse delay
HOLDING: Where trial was not set for over a year after incarcerated D filed a speedy trial motion with his arrest warrant attached, the Tr. Ct. erred in denying D's motion for discharge under C.R. 4(B) and (C). D was incarcerated in DOC on unrelated charges when he was served with an arrest warrant on charges of burglary, sexual battery, and criminal confinement. The officer who served this warrant did not return it to the Tr. Ct. Three days after being served, D filed a pro se motion for speedy trial under C.R. 4(B). He did not serve the State but included a request that the Tr. Ct. file a copy to the prosecutor's office. Ninety-four days later, he filed a motion for discharge under C.R. 4(B). The Tr. Ct. denied the motion, holding that because the arrest warrant had not been returned as served, D was not being held on these charges. D then filed a pro se motion to reconsider with the warrant attached, and served a copy on the State as well. The Tr. Ct. summarily denied the motion that same day. After more than a year had passed, D sent a letter to the county sheriff with a copy of the warrant attached in an effort to prove that it had been served on him. The sheriff department forwarded the letter to the Tr. Ct., which issued a transport order and set an initial hearing. At the initial hearing, the Tr. Ct. set the trial date four months later, to which D objected. The Tr. Ct. issued an order acknowledging that D's letter showed that the warrant had been served, but noting that it still had not received its return. Defense counsel filed a motion for discharge under C.R.4(B) and (C) and the 6th Amendment. The Tr. Ct. denied the motion, finding that it had not been aware of his arrest and had not seen the arrest warrant attached to his letter. The Tr. Ct. held that arrest did not occur until it had actual knowledge of the arrest. It further held that while trial was scheduled more than 70 days after the date of the letter, at the initial hearing D had objected on grounds of C.R. 4(C) rather than 4(B), and that D had not been prejudiced by the delay. On interlocutory appeal, Court wrote that the right to speedy trial protects not only D's interests, but society's. Society's representatives, the courts and the prosecutors, have an affirmative duty to bring D to trial, and must act diligently and in good faith. The fact that D was incarcerated on other charges at the time of his arrest is irrelevant, as the U.S. Supreme Court has recognized that such Ds still retain an interest in being tried promptly on the new charges. Smith v. Hooey, 393 U.S. 374 (1969). Indiana C.R. 4 seeks to ensure that the State protects an individual's constitutional right to speedy trial. Through C.R. 4(B) and (C), a D must be tried within one year of arrest, unless the D specifically moves for a speedy trial, in which case he must be tried within 70 days of the motion. The rule's exceptions do not apply here. The State argues that the C.R.4 clock does not begin to run until the Tr. Ct. receives return of the arrest warrant, which did not happen here. Court held that failing to inform the Tr. Ct. of a D's arrest is error, and cannot be used to deny a D his speedy trial rights. Neither can the State or the Tr. Ct. claim that they were not aware of D's whereabouts. Here, D himself made the Tr. Ct. aware of his location, his arrest, and his desire for a speedy trial. A Tr. Ct. has a duty to read motions before ruling on them. Cases involving a D being held in another county on pending charges are not apposite because here no other county had an interest in prosecuting the D before he could be tried on these charges. Reluctance to discharge a D accused of serious charges is understandable, but the seriousness of the charges is legally irrelevant to speedy trial analysis. If C.R. 4 is to continue serving to protect a D's speedy trial rights, it cannot be relaxed "whenever the disappointment occasioned by discharge is particularly great." The speedy trial clock began to run when D filed his motion to reconsider with a copy of his arrest warrant attached, and under both C.R. 4(B) and (C) he must be discharged.

TITLE: Battering v. State

INDEX NO.: B.5.c.3.

CITE: (08/05/2020), 150 N.E.3d 597 (Ind. 2020)

SUBJECT: State seeking interlocutory appeal must seek stay of proceeding to toll Criminal Rule 4(C)'s one year

HOLDING: When the State pursues an interlocutory appeal and the trial-court proceedings get stayed as a result, the deadline is extended accordingly. Pelley v. State, 901 N.E.2d 494 (Ind. 2009). Here, trial court abused its discretion in denying Defendant's motion for discharge of his child molesting and child solicitation counts because the State waited too long to bring a stay of the proceedings for interlocutory appeal in order to toll Indiana Criminal Rule 4(C)'s one-year limitation. The State filed an interlocutory appeal after Defendant successfully suppressed certain evidence. Rather than request a stay of the proceedings—a motion that almost certainly would have been granted—the State specifically asked for only a continuance during the pendency of its appeal. After Defendant moved for discharge under Criminal Rule 4(C), the State belatedly asked for and received a stay of the proceedings. Defendant renewed his motion for discharge and the trial court denied his request. Reviewing the plain language of Indiana Rule of Appellate Procedure 14 in conjunction with Criminal Rule 4(C), Indiana Supreme Court held that Rule 4(C)'s clock continued to tick until the State formally moved for a stay of the proceedings. Because this time continued to count against Rule 4's one-year limitation in prosecuting the charged crimes and the State exceeded this limitation, the Court found that Defendant is entitled to discharge.

TITLE: Bondurant v. State
INDEX NO.: B.5.c.3.
CITE: (2nd Dist. 10/19/87), Ind. App., 514 N.E.2d 301
SUBJECT: CR 4(C) - Motion for discharge; D's duties
HOLDING: Tr. Ct. did not err in discharging D because of delay in bringing him to Tr. State moved for 1st continuance alleging Ct. congestion. Tr. Ct. later determined that this was not true cause of delay, properly charging delay to state. D acquiesced in 2d delay, which was chargeable to him. Ct. of appeals notes that, although this Tr. date was outside one-year period, D did not waive CR 4(C) rights by failing to object to it; D did not know at this time that initial delay was chargeable to state. Third delay occurred when Tr. Ct. continued case on own motion because discovery was incomplete. Record does not even disclose that D or counsel appeared on date of continuance. See Lyons, 431 N.E.2d 78. Delay was properly charged to state. Final delay resulted when Tr. judge withdrew from case, & new judge was selected before Tr. date but did not conduct Tr. on that date. Various days after this date was set, D filed "Motion to Dismiss & for Discharge" pursuant to CR 4(C). State argues this final delay was not chargeable to state because of exigent circumstances. Lyons, *supra*. However, there is no evidence Tr. judge could not have been prepared for original Tr. date. Nor is there evidence that state apprised judge of need to bring D to Tr. Final delay was properly charged to state. Finally, state argues D waived CR 4(C) rights by failing to object in timely fashion. D has duty to object at earliest opportunity only if he/she learns of untimely trial date before expiration of one-year period.

RELATED CASES: Martin, 784 N.E.2d 997 (Ind. App. 2013) (D entitled to CR 4(C) discharge where 182-day delay was caused by State's witness, who twice failed to appear at deposition even though counsel properly subpoenaed her); Todisco, 965 N.E.2d 753 (Ind. Ct. App. 2012); Baumgartner, App., 891 N.E.2d 1131 (D waived his right to speedy trial under CR 4(C) when he failed to object to trial date set outside one-year time limit); Havvard, App., 703 N.E.2d 1118 (D's duty to object "at earliest opportunity" does not necessarily mean "immediately;" see card at B.5.c.4); State ex rel. O'Donnell v. Cass Superior Court, 468 N.E.2d 209 (no waiver of CR 4(C) violation when D notified court of violation two days after court set trial date and three weeks before CR 4 period ran); State v. Rehborg, App, 396 N.E.2d 953 (no waiver of CR 4(C) where D not advised of trial setting until after period set by CR 4(C); in such situation, duty only to object prior to trial).

TITLE: Boyd v. State
INDEX NO.: B.5.c.3.
CITE: (10/11/83), Ind., 454 N.E.2d 401
SUBJECT: CR 4(C) - motion for discharge
HOLDING: D's speedy trial rights were not violated where delays chargeable to D caused D to be tried beyond one calendar year after his arrest & where D failed to file a motion for discharge, a prerequisite to discharge for violation of CR 4(C). Martin, App., 419 N.E.2d 256; Mayes, App., 318 N.E.2d 811. Held, no error.

RELATED CASES: Person, App, 619 N.E.2d 590 (D denied effective assistance of counsel by counsel's failure to move for discharge under CR 4(C), as one-year period had already passed and Tr. Ct. could not have set date within time allotted); Rhoton, App, 575 N.E.2d 1006 (D was not *denied* effective assistance of counsel by counsel's failure to object to court scheduling trial outside of one year period when time remained for scheduling within CR4(C) period).

TITLE: Bridwell v. State
INDEX NO.: B.5.c.3.
CITE: (12-29-95), Ind., 659 N.E.2d 552
SUBJECT: Speedy trial - finding of congestion not clearly erroneous
HOLDING: Although D's case was continued multiple times due to congested Ct. calendar, D was not denied his constitutional right to speedy trial & right to discharge under Indiana Criminal Rule 4(C). Determinative period in this case was 209-day delay due to Ct. congestion. On appeal, *citing* Raber v. State, (1993), Ind. App., 626 N.E.2d 506, D alleged that Tr. Ct. failed to keep sufficient docket record indicating why his trial could not be conducted on dates scheduled. To support appellate argument that Tr. Ct.'s multiple continuances constituted abuse of discretion, D provided Ct. App. with certified copies of chronological case summaries for cases appearing on Ct. calendar on days his case was scheduled to proceed to trial. However, at times D filed motions for discharge, he did not present any evidence to document his claims that findings of Ct. congestion were clearly erroneous. D must present evidence, either at time of motion for discharge or upon motion to correct error, demonstrating that finding of "congestion" is clearly erroneous. Clark v. State, (1995), Ind., 659 N.E.2d 548. Held, transfer granted, convictions affirmed; Ct. App. decision at 640 N.E.2d 437 summarily affirmed except to extent inconsistent with opinion; DeBruler, J., dissenting.

NOTE: See Clark, at B.5.c.2

TITLE: Caldwell v. State
INDEX NO.: B.5.c.3.
CITE: (03-22-10), 922 N.E.2d 1286 (Ind. Ct. App. 2010)
SUBJECT: Speedy trial - commencement of CR 4(C) time period
HOLDING: Tr. Ct. erred by denying D's motion for discharge under Criminal Rule 4 (C). The one-year time limitation to bring a D to trial under Criminal Rule (C) commences with the latter of two events, the date of D's arrest or the filing of the information. Here, D was arrested on July 4, 2007 for OWI, and was released on his own recognizance on July 6, 2007. On July 10, 2007, charges were filed against D and the court issued an arrest warrant. The clerk reduced the bond amount to personal recognizance, placed the warrant in the file, but did not send it to the sheriff for execution. D learned from a friend that his name was on the court docket, and voluntarily appeared at the initial hearing on February 13, 2009. D's address was the same as it was in 2007. The triggering date for Criminal Rule 4(C) was July 10, 2007, the date the information was filed. The Court rejected the State's argument that D's appearance at his initial hearing on February 13, 2009 was the triggering date of Criminal Rule 4(C). Under the State's argument, the State's delay in serving a second arrest subsequent to the filing of the formal charges would extend the commencement of the one-year period indefinitely and would undermine the very purpose that Criminal Rule 4(C) was designed to accomplish- the constitutional guarantee of a speedy trial. Because D was not tried within a year of the filing of his information on July 10, 2007, he was entitled to discharge. Held, judgment reversed.

TITLE: Carr v. State
INDEX NO.: B.5.c.3.
CITE: (09-29-10), 934 N.E.2d 1096 (Ind. 2010)
SUBJECT: CR 4(C) - fault of State is irrelevant
HOLDING: Tr. Ct. properly denied D's motion for discharge under Criminal Rule 4(C). When a Tr. Ct. grants a D's motion for continuance because of the State's failure to comply with the D's discovery requests, the resulting delay is not chargeable to the D. Isaacs v. State, 673 N.E.2d 757, 762 (Ind. 1996).

Here, D argued that his two motions to continue were based on the State's failure to comply with his discovery requests. However, the trial record shows otherwise. D withdrew at the trial level his request to have the first delay chargeable to the State, and at the hearing on the second motion, argued he had a scheduling conflict. Nonetheless, the Indiana Supreme Court *clarified* that employing the rhetoric of "delay chargeable to the State" should be avoided because it is an unfortunate misnomer, inexact, and potentially misleading. The Rule does not involve assessment or attribution of any fault or accountability on the part of the State, but generally imposes upon the justice system the obligation to bring a D to trial within a set time period, which is extended by the amount of delay caused by the D or under the exception for court calendar congestion or emergency. To resolve a motion for discharge made under Rule 4(C), it is necessary to identify only those delays attributable to the D and those attributable to court congestion or emergency. Held, transfer granted, memorandum Court of Appeals' opinion vacated, judgment that D was not entitled to discharge affirmed, but judgment of conviction reversed on other grounds.

NOTE: The Indiana Supreme Court calculated the delay caused by D's motions to continue from the vacated trial date to the newly scheduled trial date. In Curtis v. State, 948 N.E.2d 1143, Court held that the CR 4(c) clock resumes when the motion is resolved, not after the new trial date.

TITLE: Curtis v. State
INDEX NO.: B.5.c.3.
CITE: (06-14-11), 948 N.E.2d 1143 (Ind. 2011)
SUBJECT: D entitled to discharge for CR 4 (c) violation
HOLDING: Under Criminal Rule 4 (C), a D is charged with delay caused by his actions. But a motion to suppress is not automatically considered a delay attributable to the D under Rule 4 (c). Moreno v. State, 336 N.E.2d 675 (Ind. Ct. App. 1975). A pretrial motion's proximity to a set trial date weighs in favor of attributing a delay to a D. Here, time between filing of motion to suppress and Tr. Ct.'s ruling on motion was attributable to D. Although the motion was not a dilatory tactic, D filed it approximately three weeks before trial was set. Nevertheless, D was entitled to discharge because after State filed motion for competency evaluation, Tr. Ct. declined to rule and there was no action for six months. Nothing in the record reveals why. Court may not attribute delays in proceeding to trial to the D where the record is void regarding the reason for the delay. Alter v. State, 860 N.E.2d 874 (Ind. Ct. App. 2007). Although State contends it should not be "faulted" for filing a good-faith competency motion which Tr. Ct. declined to rule, focus of Criminal Rule 4 is not fault; it is to ensure early trials. Carr v. State, 934 N.E.2d 1096 (Ind. 2010). Held, transfer granted, Court of Appeals' opinion at 932 N.E.2d 204 vacated, judgment reversed and remanded with instructions to dismiss charging information.

TITLE: Diederich v. State
INDEX NO.: B.5.c.3.
CITE: (12-9-98), Ind. 702 N.E.2d 1074
SUBJECT: CR 4(C) - duty to object at earliest opportunity; use of first-class mail
HOLDING: D's use of first-class mail to object to trial setting outside of one-year speedy trial period was adequate to enforce his rights under Criminal Rule 4(C). Charges had been pending against D for nearly a year when Tr. Ct. set trial almost six months outside one-year period. Defense counsel mailed objection two working days later & moved for discharge. Criminal Rule 4 period expired two days after Ct. clerk filed D's objection. Tr. Ct. held that D's use of first-class mail when one-year period was so close to running out did not constitute objection at earliest opportunity, such as by fax machine, telephone, or hand delivery.

On transfer, S. Ct. reversed divided Ct. App. § opinion & held that D objected with dispatch & in manner adequate to enforce his speedy trial rights under Criminal Rule 4. Although there was very little time left to conduct trial at moment when D tendered his objection, real reason for shortness of time was not D's use of U.S. Mail but prosecutor's decision much earlier to let matter pend in another Ct. for 215 days before dismissing without prejudice. Held, transfer granted, memorandum decision of Ct. App. reversed; Tr. Ct. judgment reversed & D ordered discharged.

RELATED CASES: Black, 947 N.E.2d 503 (Ind. Ct. App. 2011) (by sitting idly by and not objecting while there was still time for the Tr. Ct. to reset the trial in compliance with CR 4(C), D waived his right to be tried within the one year).

TITLE: Dean v. State
INDEX NO.: B.5.c.3.
CITE: (4th Dist., 02-27-09), 901 N.E.2d 648 (Ind. Ct. App. 2009)
SUBJECT: Failure to object to setting of trial dates from challenged court congestion orders
HOLDING: Tr. Ct. did not err by denying D's motion for discharge under Criminal Rule 4(c), because he failed to object to trial settings resulting from Tr. Ct.'s congestion order. D established that Tr. Ct.'s three separate congestion orders were factually inaccurate, and thus established a prima facie case adequate for discharge because of the 388-day total delay attributable to the State. James v. State, 716 N.E.2d 935 (Ind. 1999). However, the February 12, 2007, congestion order set a trial date outside the one-year time limit, and D did not object to the setting of this trial date. Rather, D waited until four days before jury trial to file his motion for discharge. Requirement that a D object to a trial date set after a Criminal Rule 4 deadline and move for discharge facilitates compliance by Tr. Ct's with speedy trial requirement. Brown v. State, 725 N.E.2d 823 (Ind. 2000). Accordingly, if the time period provided by the rule has not expired and a trial date is set for a date beyond that period, a timely objection must be made. Id. While Clark v. State, 659 N.E.2d 548 (Ind. 1995), and Bridwell v. State, 659 N.E.2d 552 (Ind. 1995), do not directly place time constraints on a D's right to challenge a Tr. Ct.'s congestion order, Court found language in Brown controlling. Because D did not object to setting of trial dates, any claim of a violation of Criminal Rule 4 resulting from challenged congestion orders was waived. Held, judgment affirmed.

TITLE: Ewing v. State
INDEX NO.: B.5.c.3.
CITE: (03-10-94), Ind., 629 N.E.2d 1238
SUBJECT: Insufficient record to support continuance under CR 4(D)
HOLDING: Where there was no evidence in record to show reasonable efforts by State to procure unavailable witness, nor just cause to believe witness could be produced within 90 days, it was error for Tr. Ct. to grant State's motion for continuance under CR 4(D), & Ds were entitled to discharge; reversing decision at 613 N.E.2d 53. Ds requested joint trial & case was set for single bench trial 359 days after charges were filed. Five days before trial, State gave notice it would seek continuance due to unavailability of State witness, & trial was continued. Ds objected to continuance on grounds State failed to establish witnesses has been subpoenaed or listed as witnesses, & that granting continuance would violate rights under CR 4(C). Prior to beginning of continued trial Ds filed motion for dismissal & discharge, which was denied. Ct. rejected application of CR 4(D), which allows for 90 day extension of one-year time period when Ct. is satisfied that State's evidence is temporarily unavailable but can be had within 90 days, because to properly refuse discharge under CR 4(D), it is required that Tr. Ct. be satisfied concerning reasonable efforts & eventual availability of evidence. Such satisfaction can be shown by findings of fact & law, or evidence in record of factual basis for such determination. Here, Tr. Ct. issued no findings of fact & law regarding motion for dismissal & examination of record revealed no factual basis to support denial. There was no evidence of reasonable efforts by State to procure unavailable witness, nor of basis for just cause to believe witness could be produced within 90 days. Held, judgment reversed & discharge ordered, Givan, J., dissenting.

TITLE: Gamblin v. State
INDEX NO.: B.5.c.3.
CITE: (1st Dist., 03/26/91), Ind. App. 568 N.E.2d 1040
SUBJECT: CR 4(C) - premature motion for discharge as notice of need to bring to trial
HOLDING: Where D filed premature motion for discharge pursuant to CR 4(c) approximately 1 month prior to last trial setting, but motion was not ruled on until almost 2 months after he should have been brought to trial, the motion should have alerted Tr. Ct. to need to try D with all due haste, & fulfilled D's duty to alert Ct. to limits of CR 4. He was therefore entitled to discharge because he was not timely brought to trial.

RELATED CASES: Delph, App., 875 N.E.2d 416 (D responsible for delay after premature motion for discharge); Everroad, 570 N.E.2d 38 (D's motion for discharge filed 1 month before time would elapse to bring Ds to trial was premature, & Ct.'s denial of motion 3 days before time elapsed was proper. State originally had until 4/18/81 to bring Ds to trial. Ds filed motion for discharge on 3/19/81. On 3/27/81, Tr. Ct. set trial for 7/20/81, & on 4/15/81, denied Ds' motion. On 4/29/81, Ds objected to July trial setting.)

TITLE: Gibson v. State
INDEX NO.: B.5.c.3.
CITE: (4th Dist., 08-04-09), 910 N.E.2d 263 (Ind. Ct. App. 2009)
SUBJECT: CR 4 (C) - challenging factually inaccurate CCS entries
HOLDING: Tr. Ct. abused its discretion by failing to grant D's motion for discharge. Just as a D may challenge a docket entry claiming court congestion as factually or legally inaccurate, a D may also demonstrate a docket entry attributing a continuance to the D as factually or legally inaccurate. Here, D was charged with operating while intoxicated, and waived his right to counsel. Two CCS entries noted that D appeared for "bench/trial status" and "D is granted a continuance." However, at a hearing on his motion for discharge, D testified that, at the first bench/trial status hearing, he met a deputy prosecutor outside of the courtroom and was going to accept her plea offer. However, because D told the prosecutor he had a prior conviction in Arizona, the offer was revoked. At the second bench/trial status hearing, D appeared ready to accept the new plea offer if he could serve his time in Johnson County. However, the deputy prosecutor assigned to the case was not present and no present representative from the prosecutor's office could answer his question. At both hearings, D never entered the courtroom, spoke to the trial judge, or either in writing or orally, requested a continuance. Finally, at the last hearing, D asked for a contested bench trial. D's testimony proved that the CCS entries that he requested a continuance are factually inaccurate. Absent the inaccurate entries, there is no indication that D did anything to prevent the State from bringing him to trial. The fact that D did not ask for case to be set for trial during plea negotiations did not make the delay chargeable to him. To hold otherwise would be to place the burden on D to ensure he is brought to trial in a timely manner. Thus, because the State did not bring D to trial within one year, D was entitled to discharge. Held, judgment reversed.

TITLE: Greengrass v. State
INDEX NO.: B.5.c.3.
CITE: (8/31/89), Ind., 542 N.E.2d 995
SUBJECT: CR 4(C) - year runs from time of out-of-state arrest, not from completed
HOLDING: D's trial & conviction 6 years after initial out-of-state arrest violated CR 4(C) guaranteeing trial within one year. Robbery & attempted murder charges were filed against D 10/7/80, based on incident which allegedly occurred 9/27/80. D was arrested on that charge in NY 11/27/80, but Ind. failed to complete extradition proceedings. D was re-arrested in NJ, in 9 N.E.2d 86, & extradited to Ind. D filed motion to dismiss based on CR 4(C), which was denied, & D was convicted of robbery. On appeal, D argues Tr. Ct. erred in denying motion to dismiss. Ind. S. Ct. reasons that D's initial arrest in NY was on IN charges. State's choice not to complete extradition caused delay with which D cannot be charged. Held, remanded with instructions to set aside D's conviction & order him discharged from custody. DeBruler & Shepard, JJ. DISSENT, arguing that one-year limitation in CR 4(C) was not intended to include time used in extradition process.

RELATED CASES: Sickels, 960 N.E.2d 205 (Ind. Ct. App. 2012) (Unlike in Greengrass, State never refused to complete extradition proceedings once it learned of D's presence in Michigan, and thrice issued governor's warrants in an attempt to have D brought into Indiana); Blasko, 920 N.E.2d 790 (Ind. Ct. App. 2010) (distinguishing Greengrass, Ct. noted there was no evidence State refused to move forward on D's extradition from Florida or that State cancelled extradition order).

TITLE: Hoskins v. State
INDEX NO.: B.5.c.3.
CITE: (9/1/2001), 83 N.E.3d 124 (Ind. Ct. App. 2017)
SUBJECT: Delay caused by State's belated search of evidence not attributable to D
HOLDING: In consolidated appeal, Court held that Tr. Ct. erroneously denied Ds' motions for discharge, where State requested continuances to review cell phone evidence resulting in trial dates being set outside the one-year limit imposed by Criminal Rule 4(C). Law enforcement seized Hoskins' cell phones when he was arrested for dealing and possessing marijuana, but did not investigate their contents until he requested his phones be returned eight months later. Prosecutors then decided to search the phones, which resulted in a State's request for a continuance. Court held that the delay caused by the State's "extraordinarily belated search of evidence is in no way chargeable to Hoskins." The 395-day delay exceeds Rule 4(C)'s one-year limit, entitling Hoskins to discharge.

Similarly, law enforcement seized three cell phones when McLayea was arrested. In asking for a third continuance, the State said it needed time to search the cell phones. The deputy prosecutor told the court: "Generally so long as my case isn't really crappy, I don't get our phone analyzed, because our forensic unit is pretty overcrowded from homicide, rape cases, and things like that." Court concluded that, as with Hoskins, it would be unfair to charge D with the delay in the trial "that resulted from the way in which the State conducted its case." Held, judgment reversed and remanded.

TITLE: Howard v. State
INDEX NO.: B.5.c.3.
CITE: (9-19-01), Ind. App., 755 N.E.2d 242
SUBJECT: Speedy trial - interplay between CR 4(C) & Interstate Agreement on Detainers (IAD)
HOLDING: Criminal Rule 4(C) does not apply when D is incarcerated in foreign jurisdiction. Brown, 497 N.E.2d 1049. In cases involving speedy trial rights of Ds incarcerated in foreign jurisdictions, Ct. applies IAD rather than CR 4(C). Here, D was charged with battery but before trial was incarcerated in Kentucky. Thus, CR 4(C) was inapplicable for D's period of incarceration in Kentucky. Interstate Agreement on Detainers (Ind. Code 35-33-10-4) would normally apply; however, IAD requires that person be already convicted & serving time, which was not case here. Therefore, the 180-day period in which Ds must be brought to trial under IAD was never triggered. Further, CR 4(C) was not violated because D was brought to trial within 300 days of his return to Indiana. Held, conviction affirmed.

TITLE: Huffman v. State
INDEX NO.: B.5.c.3.
CITE: (1/21/87), Ind., 502 N.E.2d 906
SUBJECT: CR 4(C) - motion to continue requires ruling within one year
HOLDING: D was entitled to discharge pursuant to CR 4(C) where prosecutor moved for continuance due to Ct. congestion within one year, but Tr. Ct. did not rule on motion until after one year had run. Here, after D moved for discharge pursuant to CR 4(C), Tr. Ct. made a *nunc pro tunc* entry reflecting that prosecutor's motion was granted day it was filed, indicating congestion of Ct. calendar. Ct. distinguishes this case from others in which D's speedy trial argument has been rejected. D was arrested on 8/6/82. Trial was set for 6/16/83, but did not occur as scheduled & on 6/20/83, prosecutor filed written "request for trial setting & showing Ct.'s congestion," which was ruled upon on 9/29/83 [by *nunc pro tunc* entry back to 6/20/83]. On 8/25/83, D moved for discharge. Stated failed to file any motion for continuance pursuant to CR 4(A), (C) before 6/16 trial date. One-year period expired 8/7/83. Date of trial was finally set on 9/30/83. Ct. notes unpleasantness of ordering discharge where D has been proven guilty beyond a reasonable doubt, following "arduous jury trial." Held, conviction reversed; discharge ordered. DeBruler, joined by Shepard, CONCURS to clarify nature of *nunc pro tunc* entry & to note that no separate legal requirement exists that murder charges be given precedence over serious felony charges in ordering of trials. Givan, joined by Pivarnik, DISSENTS, arguing that Tr. Ct. is not required to take action on prosecutor's motion within one-year period.

TITLE: McCarthy v. State
INDEX NO.: B.5.c.3.
CITE: (9/1/2021), 176 N.E.3d 562 (Ind. Ct. App. 2021)
SUBJECT: Speedy trial clock did not begin to run while Defendant was held in another county because proceedings had not been started against him
HOLDING: In June 2017, Defendant robbed a tobacco store in Johnson County and stole a customer's car. He was apprehended by the Greenwood Police Department and transported to a Marion County Hospital for injuries, where he was taken into custody by the Indianapolis Police Department on an active warrant and incarcerated at the Marion County Jail. The following day, Defendant was charged with five felonies in Johnson County, but his arrest warrant was not served until Dec. 14, 2018. After two continuances requested by Defendant and withdrawal of defense counsel due to a breakdown in the attorney-client relationship, a trial date was set for September 22, 2020. Defendant filed a motion for discharge, which trial court denied, and an interlocutory appeal ensued.

Relying on State ex rel Kohlmeyer, 261 Ind. 244, 301 N.E.2d 518 (1973), the Court of Appeals held that for Criminal Rule 4(C) purposes, the speedy trial clock did not start ticking until Defendant was transferred to Johnson County in December 2018. The Court distinguished Rust v. State, 792 N.E.2d 616 (Ind. Ct. App. 2003), which involved a defendant charged in two counties. Unlike in Rust, Johnson County had not commenced proceedings against Defendant while he was incarcerated in Marion County, so the one-year Crim. R. 4(C) clock for Johnson County had not been running during this time. Applying the factors set out in Barker v. Wingo, 407 U.S. 514 (1972), the Court also rejected Defendant's constitutional speedy trial challenge. Although the initial 18-month delay between Defendant's charging and initial hearing weighed slightly against the State, the overall factors in the delays weighed more against the Defendant than the State.

TITLE: Pelley v. State
INDEX NO.: B.5.c.3.
CITE: (02-19-09), 901 N.E.2d 494 (Ind. 2009)
SUBJECT: Criminal Rule 4 - interlocutory appeal
HOLDING: Tr. Ct. did not err by denying D's Motion for Discharge. Criminal Rule 4(c) period does not include the time for State's interlocutory appeal when Tr. Ct. proceedings have been stayed. However, Tr. Ct. and Court of Appeals have discretion to deny a motion to stay if it appears that the State is seeking a stay for improper purposes, or if the appeal presents issues that are not critical to the case. The State should alert the appellate court when it pursues an interlocutory appeal not chargeable to the D so the appellate court can be sensitive to the D's interest in avoiding delay.

Here, D was charged with and arrested for the 1989 murders of his family on August 10, 2002. The State did not try D within the CR 4 (c) time period because of a discovery dispute between the Family & Children's Center and the State. Tr. Ct. quashed a State subpoena for the Pelley family counseling records held by the Family & Children's Center, in part, because none of the counseling records contained information relating directly to the fact or immediate circumstances of the murders even under an expansive interpretation of that phrase. The State pursued an interlocutory appeal of the order quashing the subpoena, and the Court of Appeals stayed the proceedings. D did not participate in the interlocutory appeal. Because the State did not admit the counseling records into evidence, the interlocutory appeal did not present an issue that was critical to the case. However, the time the proceedings were stayed in the Tr. Ct. did not count towards the Criminal Rule 4 (c) time period, and thus, there was no Criminal Rule 4 (c) violation. Held, transfer granted, Court of Appeals opinion at 883 N.E.2d 874 vacated, judgment affirmed.

TITLE: Pruett v. State
INDEX NO.: B.5.c.3.
CITE: (5th Dist., 07-29-93), Ind. App., 617 N.E.2d 980
SUBJECT: Speedy trial right under CR 4(c) not violated
HOLDING: D was not entitled to dismissal of charge of possession of controlled substance, because charge was based on facts different from those charged in earlier counts. On January 27, 1991, minor D was found in possession of alcohol, marijuana, & LSD. On January 30, 1991, information was filed on charges of possession of alcohol by minor & possession of marijuana, & on March 27, 1992, he pled guilty to both charges. On February 26, 1992, while original charges were still pending, he was charged with possession of marijuana & controlled substance (LSD). Marijuana charge was dismissed because of double jeopardy, but D was unsuccessful in arguing that LSD charge should be dismissed due to CR 4(C).

On interlocutory appeal Ct. rejected D's argument that because all charges were based on same possession events of January 27, 1991, speedy trial period began to run with filing of initial charges. In State v. Tharp, App., 406 N.E.2d 1242, Ct. held that after charge becomes time-barred by CR 4(C) & D has been discharged or is eligible for discharge, he cannot be subjected to related charge growing out of same transaction, incident, or set of facts, when charges could have been joined with initial charge. (See, also, Fink, App., 469 N.E.2d 466, & Gamblin, App., 568 N.E.2d 1040.) When State files subsequent charges based on facts separate & distinct from those charged in original information, however, Tharp doesn't apply, Coates, 534 N.E.2d 1087. Here, although all charges arose from same criminal episode, they were not so factually related as to fall within rule of Tharp, because each was based on possession of different substance.

RELATED CASES: Wingate, App., 900 N.E.2d 468 (prosecutor's dismissal of three charges and adding of two new charges on the 69th day after a CR 4(B) request did not violate CR 4 because the new charges were factually distinct from the dismissed charges, although State discovered the basis for the new charges through the investigation of the dismissed charges); Hawkins, app., 794 N.E.2d 1158 (RSP charge was based on facts separate & distinct from those in auto theft charge, thus Criminal Rule 4(C) was not violated).

TITLE: Ratliff v. State

INDEX NO.: B.5.c.3.

CITE: (09-04-19), Ind. Ct. App., 132 N.E.3d 41

SUBJECT: Delay attributed to D for failure to notify trial court in writing of his incarceration in another jurisdiction

HOLDING: Over three-year delay in bringing Defendant to trial because he was incarcerated in another jurisdiction was attributable to Defendant under Criminal Rule 4(C), where he did not notify trial court in writing of his whereabouts. There was evidence in the record that at a hearing, an unidentified person verbally stated in court that Defendant was incarcerated in another jurisdiction. Court of Appeals finds this is insufficient notice to trial court and that Defendant had a duty to notify the trial court, in writing, that he was held in another jurisdiction. Court held that Defendant was responsible for the delay and found no abuse of discretion in denying Defendant's motion to discharge. Defendant's failure to communicate in writing with the trial court that he was incarcerated in another jurisdiction was primarily responsible for the delay in his prosecution and he did not demonstrate prejudice from the delay. Thus, Defendant's rights were not violated under the Sixth Amendment right to a speedy trial or Criminal rule 4(C).

TITLE: Rust v. State
INDEX NO.: B.5.c.3.
CITE: (4th Dist., 8-5-03), Ind. App., 792 N.E.2d 616
SUBJECT: Speedy trial - incarceration in another county & effect of "Notice of Surrender"
HOLDING: Tr. Ct. erred in denying D's motion for discharge under Criminal Rule 4(C). D had been released on bond from County 1 when he was arrested on unrelated charges in County 2. D appeared in County 2 for his initial hearing but failed to appear for subsequent hearings in both counties, & warrants were issued. D filed a "Notice of Surrender" in County 2 while being held in County 1. After serving his sentence in County 1, & nearly a year after filing his "Notice of Surrender," D moved for discharge based on a Crim. R. 4(C) violation.

On interlocutory appeal, D argued that speedy trial clock for County 2 charge restarted after he filed Notice of Surrender, because he was available to be transported to County 2. When a D is incarcerated in one county when charges are filed in another county, "arrest" for purposes of Criminal Rule 4(C) does not occur until his return is ordered by the Ct., where second charges have been filed. Landrum v. State, 428 N.E.2d 1228 (Ind. 1981); Maxie v. State, 481 N.E.2d 1307 (Ind. 1985); State v. Helton, 625 N.E.2d 1277 (Ind. Ct. App. 1993). Ct. distinguished these cases, noting that D had already appeared & had been "arrested" in County 2 prior to his incarceration in County 1. Once Tr. Ct. & State received D's Notice of Surrender, State was obligated to proceed with case in a timely manner. The State could not simply wait until County 1 sentence was served before moving forward with County 2 charges. Held, denial of motion for discharge reversed.

RELATED CASES: McCarthy, 176 N.E.3d 562 (Ind. Ct. App. 2021) (unlike in Rust, Johnson County had not commenced proceedings against D while he was incarcerated in Marion County, so the one-year Crim. R. 4(C) clock for Johnson County had not been running during this time; see full review, this section); Fuller, 995 N.E.2d 661 (Ind. Ct. App. 2013) (Tr. Ct. properly denied C.R. 4 (C) motion to discharge because the Rule's one-year clock did not begin to run until Tr. Ct. and prosecutor obtained actual knowledge of D's whereabouts); McCloud, 959 N.E.2d 879 (Ind. Ct. App. 2011) (bondsman's filing of Petition to Release Surety stating that D was in federal custody did not put State on actual notice of D's whereabouts; the Petition misstated D's location of incarceration, and there is no evidence of direct notification to the State either by D or his attorney that he was in federal prison); Feuston, 953 N.E.2d 545 (Ind. Ct. App. 2011) (even if Jay County Jail was aware that D was incarcerated in Delaware County, knowledge of police or correctional officer should not be imputed to Tr. Ct. or prosecutor, because the court and prosecutor alone bear the responsibility of bringing D to trial in a timely manner); Werner, App., 818 N.E.2d 26 (a D whose case is midstream in one county & who is subsequently arrested on unrelated charges in another county must provide formal written notice of his incarceration to the Tr. Ct. & State to avoid tolling of Rule 4(C) clock).

TITLE: Schwartz v. State
INDEX NO.: B.5.c.3.
CITE: (2nd Dist., 3-30-99), Ind. App., 708 N.E.2d 34
SUBJECT: Speedy trial; counsel's failure to appear at PTC; - failure to set trial date
HOLDING: Tr. Ct. erred in denying D's motion for discharge under Ind. Crim. Rule 4(C). After computing delay attributable to D from filing of motion to suppress, Ct. noted that Tr. Ct. set trial date nine days after one-year period had expired. D has no duty to object to setting of belated trial when setting of date occurs after time expires such that Ct. cannot reset trial date within time allotted by Crim. Rule 4(C). All D needs to do then is move for discharge. Pearson, App., 619 N.E.2d 590. Here, D moved for discharge, but Tr. Ct. denied motion on grounds that D's failure to appear for pretrial conference resulted in delay attributable to D. Ct. held that delay was not attributable to D because record was completely silent on whether pretrial conference was ever held. Further, assuming pretrial conference was held & D did not appear, trial date could have been set in his absence. Bringing D to trial within year is affirmative duty of State. Held, judgment reversed, ordered discharge ordered.

RELATED CASES: Feuston, 953 N.E.2d 545 (Ind. Ct. App. 2011) (Ct's statements in Schwartz about setting a trial in D's absence are merely dicta; Tr. Ct. does not and should not have a duty to set a trial date in D's absence); Isaacs, App., 757 N.E.2d 166 (where D came into Ct. ten days late because he was mistaken about trial date & where he filed immediate motion for continuance for specific reason, time was not attributable to him for purposes of Criminal Rule 4(C). At most, D remained out of Ct.'s jurisdiction for only ten days & that is all that can be attributed to him).

TITLE: Spalding v. State

INDEX NO.: B.5.c.3.

CITE: (8/9/2013), 992 N.E.2d 881 (Ind. Ct. App. 2013)

SUBJECT: Speedy trial - CR 4 does not apply while D incarcerated outside Indiana or under exclusive control of State

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss and discharge. Criminal Rule 4 does not apply where a person is incarcerated in a foreign jurisdiction, unless the State brings a D into Indiana under a form of temporary custody but then voluntarily relinquishes control of that D to a foreign jurisdiction. Howard v. State, 755 N.E.2d 242 (Ind. Ct. App. 2001).

Here, Criminal Rule 4(C) did not apply while D was incarcerated out of state and incarcerated in Indiana under a federal hold. Although the State attempted to secure D's presence in Indiana with the writ, he was not returned to Indiana pursuant to a writ. Moreover, the three-month period that D was in Indiana on a federal hold, along with State's and Tr. Ct.'s lack of knowledge D had been transported, led Court to conclude that D was not in the jurisdiction under the exclusive control of Indiana during this time, thus Criminal Rule 4(C) did not apply. In so holding, Court disagreed with McCloud v. State, 959 N.E.2d 879 (Ind. Ct. App. 2011) to the extent it holds that Criminal Rule 4 applies whenever the Interstate Agreement on Detainers does not. Held, judgment affirmed.

RELATED CASES: Griffith, 59 N.E.3d 947 (Ind. 2016) (C.R. 4(C) clock began ticking when Indiana arrested D on current charges, not when Kentucky arrested him on unrelated charges).

TITLE: State ex rel. Hirt v. Marion Superior Ct.
INDEX NO.: B.5.c.3.
CITE: (7/22/83), Ind., 451 N.E.2d 308
SUBJECT: CR 4(C) - juveniles
HOLDING: Before the Ct. on petition for writ of mandamus. State ex rel. Hunter, 308 N.E.2d 695 holds time limit of CR 4(C) begins to run at time petition alleging delinquency is filed in a Ct. with juvenile jurisdiction. Here, DWI causing death charge was filed against D 6/23/80 in Marion Superior Ct. On 8/27/80, Ct. transferred cause to juvenile Ct. On 11/17/81, prosecutor filed petition in juvenile Ct. requesting authorization to file subsequent petition alleging D's delinquency. On 4/14/82, D filed motion to dismiss for violation of speedy trial. On 4/28/82, prosecutor filed delinquency petition (reckless homicide). Ct. holds D's 4/14/82 motion untimely, given delinquency petition was not filed until 4/28/82. Held, writ denied.

RELATED CASES: C.W. v. State, App., 643 N.E.2d 915 (juvenile's signing of informal adjustment contract & then failing to comply with its conditions was act causing delay properly attributed to D under Ind. Code 31-6-7-6(e), the Juvenile Code equivalent to CR 4(C)).

TITLE: State v. Helton
INDEX NO.: B.5.c.3.
CITE: (3rd Dist., 12-16-93), Ind. App., 625 N.E.2d 1277
SUBJECT: Computing one year from "arrest"
HOLDING: Tr. Ct. erred in discharging D under CR 4(C) because he was not "arrested" for purposes of rule until he was returned to other county for initial hearing. On July 31, 1991, charges were filed against D in Howard County, & on same date warrant was issued for his arrest. When Howard & Cass County police searched D's home on July 30, they found firearms stolen from Cass County gun store. D was being held in Cass County jail when charges from both counties were read to him. In November 1992, he was already incarcerated in DOC on Cass County case when Howard County ordered his transport for initial hearing on its charges. On January 19, 1993, D filed motion for discharge pursuant to CR4(C), & motion was granted, leading to State's appeal. CR 4(C) provides in part that "one year" of rule runs from date criminal charge is filed, or date of arrest on that charge, whichever is later. When D is incarcerated in other county on unrelated charges, "arrest" does not occur until his return is ordered by Ct. where second charges are filed, Maxie v. State, 481 N.E.2d 1307. Ct. rejected D's arguments that rule should not apply in his case because warrants were read to him at same time, he was not necessarily incarcerated on Cass County charges first, & Cass County charges weren't filed until after arrest in Cass County. Pertinent inquiry is where D is being held & whether incarceration is for purpose of unrelated charges. Because D was incarcerated in Cass County & unrelated charges were filed against him, Ct. held "arrest" on Howard County charges did not occur until he was returned for initial hearing in November 1992. Held, Tr. Ct.'s discharge order reversed.

TITLE: State v. Huber
INDEX NO.: B.5.c.3.
CITE: 843 N.E.2d 571 (Ind. App. 4th Dist., 03-10-06)
SUBJECT: Speedy trial - discharge under Crim. Rule 4(C); plea negotiations
HOLDING: Tr. Ct. properly dismissed case due to State's failure to bring D to trial within one year period prescribed by Crim. Rule 4(C). State conceded it should have been charged with 296 days of delay in bringing D to trial, but challenged period from February 24 to May 5, 2003, in which trial date had not been set. At February 24 hearing, D's counsel asked the Ct. to establish another status hearing in two to three months & stated, "then at that time we'll decide if we're either going to resolve the case without a trial or we will be asking for a trial date." State contended that statement should make this time attributable to the D because the statement possibly lulled the Tr. Ct. into delaying the setting of a trial date due to ongoing plea negotiations. Ct. relied on State v. Smith, 495 N.E.2d 539 (Ind. Ct. App. 1986), which noted "if the State was dissatisfied with the progress of the negotiations, it could have simply requested the Ct. to set a timely trial date & required Smith to obtain a continuance to pursue the negotiations." Further, Ct. quoted Tr. Ct. which noted State's argument "is especially hollow since it was [D], & not the State, who secured the first trial date . . ., & it was not [D] but the State that one the eve of trial sought a continuance[.]" Held, judgment affirmed.

RELATED CASES: Lindauer, (06-20-2018), 105 N.E.3d 211 (Ind. Ct. App. 2018) (D cannot habitually move to reset the preliminary hearing at which the trial date was to be set and then assert a meritorious claim that his right to trial within a year was violated; here, D charged with 9-month delay resulting from his multiple requests for continuances to pursue plea negotiations with State before trial date set); Leek, 878 N.E.2d 276 (App.) (11-month delay after D moved to enter guilty plea was attributable to State; CR4(C) requires State to be mindful of the one-year deadline when engaging in plea negotiations).

TITLE: State v. Larkin
INDEX NO.: B.5.c.3.
CITE: (6/27/2018), 100 N.E.3d 700 (Ind. 2018)
SUBJECT: Speedy trial - delays from interlocutory appeal and change of judge
HOLDING: In voluntary manslaughter prosecution, trial court abused its discretion in granting D motion for discharge, because the Crim. R. 4(C) deadline had not expired before D agreed to a trial date outside the deadline. Trial court and Court of Appeals erroneously counted days while trial court proceedings were stayed for the purpose of D's interlocutory appeal as well as days while obtaining a special judge at D's request. The trial court did not have jurisdiction until the interlocutory appeal was certified as final pursuant to Appellate Rule 65(E). Further, the Crim. R. 4(C) time begins to run anew when the new judge qualifies and assumes jurisdiction. State ex rel. Brown v. Hancock County Superior Court, 372 N.E.2d 169 (Ind. 1978). Held, transfer granted, Court of Appeals opinion at 77 N.E.3d 237 vacated, judgment reversed and remanded.

TITLE: State v. Myers
INDEX NO.: B.5.c.3.
CITE: (4/24/2018), 101 N.E.3d 259 (Ind. Ct. App. 2018)
SUBJECT: Speedy trial - failure to object to setting of trial outside Rule 4(C) time period
HOLDING: D acquiesced to trial date set beyond the one-year period and waived his right to be discharged under Criminal Rule 4(C) by failing to object before the period expired. See State v. Black, 947 N.E.2d 503 (Ind. Ct. App. 2011). During pretrial conference twenty days before the one-year period was to expire, Tr. Ct. asked either party about any Rule 4(C) issue and set D's trial for a date beyond the one-year period. D did not object because defense counsel "didn't know that there was a CR 4 issue." Almost 30 days later (seven days after the one-year period expired), D filed a motion for discharge. D did not alert Tr. Ct. in time to permit it to reset the trial for a date within the one-year period.

D *cited* Havvard v. State, 703 N.E.2d 1118, 1121 (Ind. Ct. App. 1999), which held, "[w]hen a D learns within the period provided by the rule that the case is set for trial at a time beyond the date permitted, the D must object to such a trial setting at the earliest opportunity." Court was not convinced that the use of the word "learns" in Havvard was meant as an invitation for a D to calculate the Rule 4(C) deadline at his convenience, as D contends. "This would eliminate the D's burden to object during the one-year period to a trial date that is set beyond the deadline...At the very least, D's attorney should have calculated the Rule 4(C) deadline soon after the pretrial conference... and objected with time still remaining in the one-year period." But by sitting idly by and failing to object to trial date, D acquiesced to that date. Held, grant of motion for discharge reversed and remanded for retrial within 20 days remaining of one-year period under Rule 4(C).

TITLE: State v. Stacy
INDEX NO.: B.5.c.3.
CITE: (7-25-01), Ind. App., 752 N.E.2d 220
SUBJECT: Speedy trial - time attributable to State when D makes motion
HOLDING: Case was discharged due to State's failure to bring D to trial within one year pursuant to Criminal Rule 4 (c). Where D makes motion, time attributable to State runs from judge's ruling on motion or from date motion is deemed denied, generally 30 days from hearing. In this case, it was proper to attribute to State time from which State filed Trial Rule 53.1(A) praecipe for withdrawal of jurisdiction & transfer to Indiana S. Ct. & time Tr. Ct. received S. Ct.'s order appointing a special judge. That time period was attributable to State because record revealed no special circumstances where time is tolled. Valid special circumstances have been found to be unavailability of qualified trial judge & serious illness in family of prosecutor. See Henderson v. State, 647 N.E.2d 7 (Ind. Ct. App. 1995); State v. Goble, 717 N.E.2d 1268 (Ind. Ct. App. 1999); & Loyd v. State, 398 N.E.2d 1260 (Ind. 1980). Held, discharge affirmed.

RELATED CASES: West, 976 N.E.2d 721 (Ind. Ct. App. 2012) (the year that D's motion to suppress was pending after briefing was complete was not attributable to D and entitled him to discharge; State could have filed a praecipe for withdrawal of submission and transfer to the Supreme Court for appointment of a special judge during that year, but did not); Delph, 875 N.E.2d 416 (App.) (delay attributable to D for motion to continue begins date motion was filed & not date of vacated trial).

TITLE: Sturgeon v. State
INDEX NO.: B.5.c.3.
CITE: (2nd Dist., 7-16-97), Ind. App., 683 N.E.2d 612
SUBJECT: Speedy trial - delay attributable to D who agreed to continuance
HOLDING: When D has either agreed to State-sought continuance or by his actions has acquiesced to continuance, then delay is chargeable to D. State ex rel. O'Donnell v. Cass Superior Ct., 468 N.E.2d 209 (Ind. 1984). Ct. rejected D's attempt to carve out exception to this general rule for situations, as here, in which State's negligence necessitated continuance. Tr. Ct. held State accountable for its negligence in obtaining blood testing after it determined that delay in obtaining evidence was result of not previously ensuring that actual testing had been commenced. Thus, all time after 4-23-96 was allocated to State. Ct. rejected D's argument that State's negligence caused entire delay following his arrest & incarceration, & that State should be charged with entire time period rather than only portion after 4-23-96. Although D may very well have been justified in agreeing to continuances in hopes of obtaining exculpatory evidence, his actions had effect of postponing his trial & one-year time period under Criminal Rule 4(C) was extended accordingly.

RELATED CASES: Delph, App., 875 N.E.2d 416 (by failing to object to setting of trial outside one year, D acquiesced to delay); Hillenburg, App., 777 N.E.2d 99 (D affirmatively sought continuances).

TITLE: Watson v. State

INDEX NO.: B.5.c.3.

CITE: 155 N.E.3d 609

SUBJECT: CR 4(C) inapplicable to retrial of habitual offender (HO) determinations - constitutional speedy trial violation found

HOLDING: One-year time limitation to bring a defendant to trial under Criminal Rule 4(C) does not apply to persons being held for habitual offender rehearings, Defendant's constitutional right to a speedy trial in this case was violated by the nearly six and a half years of delay. After securing post-conviction relief that vacated the 30-year habitual offender enhancement, retrial was continued on motions from Defendant, the State and the trial court, while two judicial recusals further delayed the proceedings. Defendant also wrote four letters to trial court demanding to be brought to trial when his first attorney was unresponsive to his inquiries and not filing documents with the court to expedite the process. The Court found that all four of the factors outlined in Barker v. Wingo, 407 U.S. 514 (1970), weighed in favor of finding a violation of Defendant's constitutional right to speedy trial. Six-plus years of delay to try Defendant on a habitual-offender allegation is uncommonly long; the government was responsible for a majority of that delay; Defendant appropriately asserted his right to a speedy trial and has shown prejudice resulting from the extraordinary delay. Held, transfer granted, Court of Appeals opinion at 135 N.E.3d 982 vacated, habitual offender enhancement vacated. **NOTE:** In a footnote, Court appears to send a strong signal that defendants should argue Article 1, Section 12 is more protective than the Sixth Amendment under Barker v. Wingo. The Court implied that the Indiana constitutional analysis for speedy trial claims is different from the federal analysis in that Article 1, Section 12 is a "directive" rather than a "right." Thus, a defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because "the speedy trial demand is effectively made for him."

TITLE: Wellman v. State

INDEX NO.: B.5.c.3.

CITE: (05-10-2023) 210 N.E.3d 811 (Ind. Ct. App.)

SUBJECT: Defense continuances based on State's failure to produce lab results were not attributable to Defendant; failure to bring Defendant to trial within one year resulted in discharge under CR4(C)

HOLDING: Defendant was charged with three alcohol-related driving offenses and requested numerous continuances because the State had not yet provided the lab results of a blood test to him. After 13 months, Defendant moved for discharge under Indiana Criminal Rule 4(C) and the trial court denied his motion, suggesting that waiting for the test results was a "trial strategy." The Court of Appeals noted that while under Criminal Rule 4(C) a defendant is generally chargeable with the delay from his own motion for a continuance, the Indiana Supreme Court has recognized an exception when the continuance is caused by the State's delay in providing discovery. Carr v. State, 934 N.E.2d 1096 (Ind. 2010). The Court of Appeals reversed, holding that the trial court's ruling effectively put Defendant in the untenable position of having to choose between his right to prepare a defense and his right to a speedy trial. Held, reversed, and remanded with instructions to grant the motion for discharge.

TITLE: Wheeler v. State
INDEX NO.: B.5.c.3.
CITE: (5th Dist., 2-26-96), Ind. App. 662 N.E.2d 192
SUBJECT: Speedy trial - delay attributable to D
HOLDING: When D requests indefinite continuance & later becomes dissatisfied that his trial has not been reset, he must take some affirmative action to notify Ct. that he now desires to go to trial to reinstate running of time period. Monero v. State, 336 N.E.2d 675 (Ind. Ct. App. 1975). Here, in his indefinite motion for continuance, D requested "additional time to discuss plea with Prosecutor's office," but never notified Tr. Ct. that he was ready to go to trial. Tr. Ct. granted continuance but failed to reset new trial date until four months later. As in Monero, Ct. held that four-month delay following D's motion for continuance was attributed to him. Although State violated D's right to speedy trial by failing to meet new deadline, D waived issue by failing to raise timely objection at hearing when Tr. Ct. rescheduled trial outside one-year period. Held, judgment affirmed.

RELATED CASES: Penwell, 875 N.E.2d 365 (App.) (Tr. Ct. erred in charging the delay resulting from a stay pending D's petition for certiorari to U.S. S.Ct. to the State; see full review at B.5.c.4); Miller, 783 N.E.2d 772 (App.), *overruled on other grounds*, 821 N.E.2d 367 (D acquiesced in delay of his trial by entering into plea agreement & withheld judgement); Ritchison, 708 N.E.2d 604 (App.) (where, during pretrial conference, defense counsel indicated that parties were in process of negotiating settlement & stated that trial date would not be necessary, defense counsel took affirmative action to stop running of speedy trial period); Spann, 681 N.E.2d 223 (in essence, D acquiesced to inevitable continuance of trial, & his own actions caused delay).

TITLE: Woods v. State
INDEX NO.: B.5.c.3.
CITE: (2d Dist. 07/21/92), Ind. App., 596 N.E.2d 919
SUBJECT: CR 4(C) - Failure to try within one year
HOLDING: Where trial set beyond one year was continued without docket entry explaining delay, subsequent entry explaining delay was due to congested Ct. calendar was not sufficient to remedy delay. D was charged on 8-21-86. On 7-1-87, Ct. set trial for 11-19-87, but case was continued without explanation & on 1-6-88, Ct. made docket entry stating November trial was postponed due to congested Ct. calendar & reset case for 3-21-88. On 1-11-88, D filed motion for discharge, which was denied, & D was not tried until 5-7-90. Although D acquiesced in trial setting outside one-year time period because of failure to object, when trial was again continued without contemporaneous entry explaining reason for delay, CR 4(C) was violated & D was entitled to discharge. D's initial acquiescence did not toll period in which to try D, & her failure to object to trial set 141 days after one-year period did not constitute delay of that amount chargeable to her. Held, reversed with instructions to discharge D.

RELATED CASES: Sheckles, 24 N.E.3d 978 (Ind. Ct. App. 2015) (acquiescence to a trial date beyond the one-year period of Rule 4(c) is among those delays that may be attributed to the D); Nance, App., 630 N.E.2d 218 (Because obligation for D to be tried within one year rests with State, Tr. Ct. erred in refusing his motion to dismiss. D has no obligation to remind Ct. of duty, nor to take any affirmative steps to see he is tried. Although prior to pre-trial conference D requested several continuances, because no trial date had been set, they were not chargeable to him as delays. Decision discussed number of issues in calculating delays); Wilson, App., 606 N.E.2d 1314 (No CR4(C) violation found due largely to D's failure to object to various settings outside one-year time to bring to trial. Case also involves State's dismissal of charges & immediate refiling with only 36 days left to try D, but propriety of action was not challenged or discussed.)

TITLE: Young v. State

INDEX NO.: B.5.c.3.

CITE: (3-28-02), Ind. App., 765 N.E.2d 673

SUBJECT: Speedy trial - no duty to object where one year has expired; silent record attributable to State

HOLDING: Tr. Ct. erred in denying D's motion for discharge pursuant to Criminal Rule 4(C). D was served with bench warrant in December 1999 but was not brought to trial until May 2001. D's trial was originally scheduled for April 2000 & was reset for June 2000. However, record is silent as to why trial did not take place in April 2000 & there is no evidence that D filed motion to continue. State relied on its motion to reset trial date, which stated that trial in April 2000 was not heard due to congested Ct. calendar. Ct. held that State's motion did not conform to any of requirements of Criminal Rule 4 because: 1) motion was not denominated as motion for continuance; 2) it was not made at least ten days prior to trial date, & 3) it did not contain statement that tardiness was not fault of prosecutor. Further, Tr. Ct. could not have properly continued trial for Ct. congestion because it failed to issue order. Written order is generally a prerequisite for tolling of Criminal Rule 4 timetable in criminal case that has been continued by Tr. Ct. taking note of Ct. congestion. Same thing happened to June 2000 trial date & D did not go to trial until May 2001. All of delay was attributable to State. Lastly, D's failure to object to setting of trial date outside one-year period was not fatal to his case because one-year period set out in Criminal Rule 4(C) had already expired. Held, judgment reversed. Robb, J., dissenting.

RELATED CASES: Alter, 860 N.E.2d 874 (App.) (where, as here, docket entries are absent or missing regarding reason for delay, the delay is not chargeable to the D; state did not seek continuance prior to trial date to any claimed congestion or emergency, & court will not consider explanations developed in hearing on D's motion for discharge).

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c.4. Computing delay

TITLE: Biggs v. State
INDEX NO.: B.5.c.4.
CITE: 546 N.E.2d 1271 (Ind. App. 1st Dist. 12/7/89)
SUBJECT: Computing delay - state's failure to comply with discovery requests
HOLDING: Ds' motion for continuance, requested in alternative & asking only that trial be delayed until state complies with Ds' discovery requests, will not result in charging delay to D. Ds' trial date was set 71 days beyond 1-year speedy trial period, & motion for discharge was denied. Ds argued that major delay was caused by state's failure to comply with their discovery requests. State countered that delay was occasioned by Ds' motion for continuance. Motion for continuance was filed in conjunction with motion to preclude testimony of confidential informant who failed to appear for scheduled deposition. Motion for continuance, requested in alternative, asked only that trial be delayed until state complied with discovery requests, providing informant for deposition, so that Ds could adequately prepare for trial. Purpose of pretrial discovery is to promote justice by providing both parties with as much information as possible to prepare for trial. [Citations omitted.] To put Ds in position where they must either go to trial unprepared or waive speedy trial rights is untenable, & Ds will not be charged with this delay. State also argued that CR 4(D) should apply to extend 1-year period based on unavailability of confidential informant. However, this rule would apply only if informant is unavailable at time motion for discharge is made, which was not true here. Finally, state argued that portion of delay was attributable to Ds' change of counsel. However, neither attorney sought continuance, & no actual delay resulted. Held, conviction reversed.

RELATED CASES: Dillard, (05-07-2018), 102 N.E.3d 310 (Ind. Ct. App. 2018) (delay not attributable to D where State failed to comply with discovery request); Fry, 885 N.E.2d 742 (App.) (the disclosure of the cell phone records to the defense three days before trial did not put D in the untenable position of choosing between his CR 4(B) right to a speedy trial and his constitutional right a fair trial); Blair, 877 N.E.2d 1225 (App.) (delay attributable to D where D did not move to compel production of documents that were not provided through motion to produce); Paul, 799 N.E.2d 1194 (App.) (Tr. Ct. properly found emergency situation as Crim. Rule 4(B)(1) exception to D's speedy trial request; see full review at B.5.c.2); Cole,780 N.E.2d 394 (App.) (continuances were properly charged to D; State diligently complied with D's discovery requests, notwithstanding logistical problems & Sheriff Department's lack of cooperation re: access to items); Marshall, 759 N.E.2d 665 (App.) (delay not attributable to D where State failed to comply with discovery requests & D actively pursued State's evidence); Miller, 570 N.E.2d 943 (App.) (comparing to Biggs).

TITLE: Bondurant v. State
INDEX NO.: B.5.c.4.
CITE: (2nd Dist. 10/19/87), Ind. App., 514 N.E.2d 301
SUBJECT: Computing delay - delays attributable to D
HOLDING: Tr. Ct. did not err in discharging D because of delay in bringing him to Tr. State moved for 1st continuance alleging Ct. congestion. Tr. Ct. later determined that this was not true cause of delay, properly charging delay to state. D acquiesced in 2d delay, which was chargeable to him. Ct. of appeals notes that, although this Tr. date was outside one-year period, D did not waive CR 4(C) rights by failing to object to it; D did not know at this time that initial delay was chargeable to state. Third delay occurred when Tr. Ct. continued case on own motion because discovery was incomplete. Record does not even disclose that D or counsel appeared on date of continuance. See Lyons, 431 N.E.2d 78. Delay was properly charged to state. Final delay resulted when Tr. judge withdrew from case, & new judge was selected before Tr. date but did not conduct Tr. on that date. Various days after this date was set, D filed "Motion to Dismiss & for Discharge" pursuant to CR 4(C). State argues this final delay was not chargeable to state because of exigent circumstances. Lyons, *supra*. However, there is no evidence Tr. judge could not have been prepared for original Tr. date. Nor is there evidence that state apprised judge of need to bring D to Tr. Final delay was properly charged to state. Finally, state argues D waived CR 4(C) rights by failing to object in timely fashion. D has duty to object at earliest opportunity only if he/she learns of untimely trial date before expiration of one-year period.

RELATED CASES: Blair, 877 N.E.2d 1225 (App.) (D, who failed to object to State's continuance of trial within the one-year period, acquiesced to resulting delay; CCS stated new trial date "by agreement of the parties;" further, two months after the Tr. Ct. sets new trial is not objecting at the earliest opportunity).

TITLE: Butts v. State
INDEX NO.: B.5.c.4.
CITE: (3rd Dist. 11/6/89), Ind. App., 545 N.E.2d 1120
SUBJECT: Computing delay - D charged only with 30 days during which judge should rule
HOLDING: Tr. Ct. erred in denying D's motion for discharge pursuant to CR 4(C). Delays which the state argues should be charged to D include 2 periods during which plea negotiations were being conducted. However, D does not abandon right to be tried within one year simply by engaging in informal plea negotiations. It must appear that D's acts caused actual delay in scheduling of trial. Smith, App., 495 N.E.2d 539. Delay occasioned by D's failure to appear for trial is attributed to state because Tr. Ct. found at time that D had never been notified of trial date. See Wilson, App., 361 N.E.2d 931. Seventy-day delay which began when Tr. Ct. denied D's motion for change of judge & reset trial outside one-year period on 3 of 4 charges is chargeable to D for those 3 charges. This is so because D's failure to object to setting of trial date outside one-year period amounted to acquiescence in trial date. Decker, 528 N.E.2d 1119. Final disputed delay of 91 days is partially chargeable to D & partially chargeable to state. Delay was occasioned by D's motion for jury trial, filed on day of trial itself. D is charged with delay of 30 days allotted for Tr. Ct.'s ruling on motion under TR 53.1(A). However, D cannot be charged with further delay resulting from Tr. Ct.'s failure to rule. Tr. Ct. failed to reset trial date until after one-year period had run on all charges, & D had no obligation to request Tr. Ct. to do so. Held, denial of motion for discharge reversed.

TITLE: Cook v. State
INDEX NO.: B.5.c.4.
CITE: 810 N.E.2d 1064 (Ind. 6-30-04)
SUBJECT: Speedy trial - effect of D's actions before trial date set
HOLDING: D should be charged under Indiana Criminal Rule 4(C) with delays that result from actions of the D that occur before a trial date has been set. Crim. R. 4(C) provides that one-year time limit is extended "where a continuance was had on [D's] motion, or the delay was caused by [D's] act," & makes no distinction regarding when trial date is set. Thus, delays caused by action taken by the D are chargeable to the D regardless of whether a trial date has been set. To extent inconsistent with this holding, Hurst v. State, 688 N.E.2d 402 (Ind. 1997), & Morrison v. State, 555 N.E.2d 458 (Ind. 1990) are *overruled* & several other cases (citations omitted) are disapproved. Ct. noted that State ex rel. O'Donnell v. Cass Superior Ct., 468 N.E.2d 209 (Ind. 1984), stands only for proposition that a D's agreement to a continuance sought by State before trial date is set is not chargeable to the D & does not extend time period of Crim. R. 4(C). Held, transfer granted, denial of motion to dismiss affirmed.

RELATED CASES: Lindauer, (06-20-2018), 105 N.E.3d 211 (Ind. Ct. App. 2018) (D cannot habitually move to reset the preliminary hearing at which the trial date was to be set and then assert a meritorious claim that his right to trial within a year was violated; here, D charged with 9-month delay resulting from his multiple requests for continuances to pursue plea negotiations with State before trial date set); Payton, 905 N.E.2d 508 (App.) (regardless of whether the State's witness's failure to attend depositions caused D's need to continue discovery, D's declining the prosecution's and the court's invitation to set a trial date while the discovery was continuing delayed the setting of the trial date which in turn delayed the trial).

TITLE: French v. State
INDEX NO.: B.5.c.4.
CITE: (4/13/88), Ind., 521 N.E.2d 346
SUBJECT: Computing delay - delays attributable to D
HOLDING: Delays moving trial date well outside 70-day limit under CR 4(B)(1) were attributable to D, so that discharge was not required. On day of trial, special judge indicated his desire to complete trial in one day. D's counsel had planned for 2-day trial & moved for continuance to reissue subpoenas for D's witnesses. When this was denied, D's counsel objected to special judge hearing case & trial was rescheduled 3½ months later. D argues that had Tr. Ct. allowed D to reissue subpoenas on original trial date, objection to special judge would not have been necessary. Thus, D argues delay in rescheduling should not be attributable to him. Nevertheless, Ind. S. Ct. determines that D's objection to special judge was cause of delay, & delay is attributable to D. Propriety of special judge's insistence that trial be completed in one day is not before Ct. Held, conviction affirmed.

RELATED CASES: Goble, App., 717 N.E.2d 1268 (State made prima facie showing that Tr. Ct. erred in granting D's motion for discharge); Lyons, 431 N.E.2d 78 (delay from filing motion for change of venue is chargeable to D); Tomes, App, 466 N.E.2d 66 (CR 4(C) time period tolled until new judge qualifies and assumes jurisdiction); Thomas, 491 N.E.2d 529 (delay caused by appointment and examination of Ct. psychiatrists is charged to D who files notice of insanity defense); Dunville, 393 N.E.2d 143 (delay caused by act of God, i.e., blizzard of 1978, was attributable to D; D failed to object immediately upon learning of new trial date); Bradberry, 364 N.E.2d 1183 (merits of D's motion or provocation offered by State is immaterial to determining whether delay is chargeable to D); Henderson, App., 647 N.E.2d 7 (although 139-day period between recusal & appointment of special judge was not delay caused by D, unavailability of judge is exigent circumstance which qualifies as Ct. congestion & tolls running of Crim. R. 4(C) one-year time period; additional delay caused by recusal of retiring special judge & appointment of new special judge also constituted exigent circumstance attributable to D).

TITLE: Haston v. State
INDEX NO.: B.5.c.4.
CITE: (3rd Dist., 6-30-98), Ind. App., 695 N.E.2d 1042
SUBJECT: Speedy trial - computing delay; permissive interlocutory appeal
HOLDING: Only time attributable to D for speedy trial purposes was time from when Tr. Ct. certified suppression issue for interlocutory appeal until date D's opportunity to seek appellate review expired by operation of law. Delay caused by D seeking interlocutory appeal is attributable to D. Vance, 620 N.E.2d 687. However, D has only thirty days from Tr. Ct.'s certification order to petition appellate Ct. to entertain jurisdiction in interlocutory appeal. Ind. App. R. 2(A). Here, because D failed to petition appellate Ct. to entertain jurisdiction within thirty days, only delay attributable to D was thirty days & not remaining three years it took State to bring D to trial. Thus, Tr. Ct. erred in denying D's motion to dismiss based on CR 4(C) violation. Held, conviction reversed.

TITLE: Havvard v. State
INDEX NO.: B.5.c.4.
CITE: (2nd Dist., 1-5-99), Ind. App., 703 N.E.2d 1118
SUBJECT: Speedy trial - computing delay; waiver of jury trial
HOLDING: Because D did not move to continue trial date when he waived jury trial, trial was not delayed by his actions, & Tr. Ct. erred in calculating delay attributable to D under Criminal Rule 4(C). D requested jury trial & then waived it one day before trial was scheduled to begin. Tr. Ct. then vacated jury trial & set D's case for bench trial seven months beyond one-year period allowed by CR 4(C). D filed objection to trial setting approximately fifty days later. Ct. held that D's-last minute waiver of jury trial did not mean that Tr. Ct. could not try him as scheduled. Tr. Ct. gave no reason in record for why trial could not or would not be held as scheduled. When record is silent concerning reason for delay, it is not attributable to D. Hendricks, App., 555 N.E.2d 17. Moreover, congestion will not be assumed when docket states no reason for delay. Solomon, App., 588 N.E.2d 1271.

State argued that even if delay from waiving jury trial was not attributable to D, he waived his CR 4(C) claim by failing to object to trial setting at earliest opportunity. Ct. held that D's objection, though not made at pre-trial conference at which Tr. Ct. set his trial outside allowable time, was nevertheless timely. D's duty to object to trial setting "at earliest opportunity" does not necessarily mean "immediately." Objection must be lodged in time to permit Tr. Ct. to reset trial for date within proper period. Martin, App., 419 N.E.2d 256. In this case, Tr. Ct. had approximately four months after D's objection in which to reset his trial or find that Ct. congestion prevented resetting his trial within one-year limit. Because D demonstrated that he was entitled to discharge on CR 4(C) grounds upon his motion, Tr. Ct. erred in failing to grant motion for discharge prior to trial. Held, convictions reversed & vacated; Staton, J., dissenting.

TITLE: Johnson v. State
INDEX NO.: B.5.c.4.
CITE: (4th Dist., 4-22-99), Ind. App., 708 N.E.2d 912
SUBJECT: Computing delay - misdemeanors; summons is same as arrest for purposes of CR 4(C)
HOLDING: Tr. Ct. did not err in calculating delay attributable to D for purposes of determining date by which State was required to bring her to trial pursuant to Criminal Rule 4(C). Here, summons was used in lieu of arresting D because she was charged with misdemeanor. D argued that she should have been tried one year from date on which she was charged, 9/29/95, rather than date summons was served on her, 10/19/95. CR 4(C) states that commencement date for computing delay is date charging information is filed or date of arrest on such charge, whichever is later, but term "summons" is not found in Rule. When individual is charged with misdemeanor, summons may be issued in lieu of issuing arrest warrant. Ind. Code 35-33- 4-1. Statute is for benefit of D in that it eliminates need for arrest. D cannot escape timetable requirements of CR 4(C) after benefiting from statute. Accordingly, timetable of CR 4(C) started on day summons ordered D to appear in Ct., 11/17/95. That was date that D's liberty was truly restrained as she was ordered to appear before Ct. & was subject to arrest if she failed to appear. Purpose of CR 4(C) is to assure criminal Ds of early trials, not to provide them with technical means of avoiding trial. Held, denial of motion to dismiss affirmed; Garrard, J., concurred with separate opinion.

TITLE: Morrison v. State

INDEX NO.: B.5.c.4.

CITE: (6/5/90), Ind., 555 N.E.2d 458, *overruled* in part on other grounds by Cook v. State, 810 N.E.2d 1064 (Ind. 2004)

SUBJECT: Speedy trial - computing delay; silent record

HOLDING: Waiver of speedy trial rights cannot be presumed where trial date which is within CR 4(C) one-year period passes & record is silent as to reason for delay or objection from D. D was charged with child molesting & was convicted at jury trial conducted 661 days later. D's motion for discharge was denied, & Ct. of Appeals affirmed. Morrison, App., 542 N.E.2d 564. On petition for transfer, D argues that presuming waiver violates general rule that state has burden of bringing D to trial within one year. Huffman, 502 N.E.2d 906. D has duty to object only if trial is set outside one-year period, & then only if that is done within one-year period so that Tr. Ct. can correct situation. Otherwise, failure to object does not constitute waiver, & waiver cannot properly be presumed from silent record. See also State ex rel. Henson v. Washington Circuit Ct., 514 N.E.2d 838. Furthermore, while failure to object to trial date outside one-year period waives any objection to being tried on that date, it does not toll running of one-year period. Ct. also found that delay resulting from difficulty in appointing special judge could not be charged to D, since Tr. Ct. should & could have continued cause due to Ct. congestion & tolled one-year period. Tr. Ct. made sua sponte notation of Ct. congestion & initiated lengthy process of appointing special judge. Ind. S. Ct. rejected argument that this was exigent circumstance excused under Loyd, 398 N.E.2d 1260, since Tr. Ct. had continuance available. When all delays were properly computed, state failed to bring D to trial within one year. Held, conviction reversed.

RELATED CASES: Cook, 810 N.E.2d 1064 (delays caused by action taken by D, are chargeable to D regardless of whether trial date has been set; Morrison *overruled* to extent inconsistent with this holding).

TITLE: Nelson v. State
INDEX NO.: B.5.c.4.
CITE: (9/5/89), Ind., 542 N.E.2d 1336
SUBJECT: Computing delay after mistrial
HOLDING: Tr. Ct. did not err in overruling D's motion for discharge under CR 4. D was charged with rape & criminal deviate conduct, & 1st trial, held 4/22-4/24/86, resulted in hung jury. On 4/29, state filed motion for retrial. On 7/23, D requested fall trial date, & trial was set for 10/21. D moved to continue this trial date, due to illness, & trial was reset for first available date, 2/17/87. State next moved to continue, based on concern for well-being of victim, who had become dependent upon secretary who would be unavailable on this date. Trial was reset for 4/7/87. State again moved to continue, for unknown reason, & D objected & moved for discharge. Tr. Ct. *overruled* D's objection & motion & reset trial for 6/2. D then moved to continue & renewed motion for discharge on 4/24. State requested continuance on 5/29 to locate victim. Tr. Ct. granted continuance & informed counsel that case could not be reset until 9/1 due to Ct. congestion. D again moved for discharge, & Tr. Ct. *overruled*. Only limitation for bringing D to trial following mistrial is "reasonable time." State ex rel. Brumfield v. Perry, Cr. Ct. 426 N.E.2d 692. Absence of essential witness through no fault of state is good cause for extending time for speedy trial. Kindred, 524 N.E.2d 279. Congestion of Ct. calendar is also legitimate reason for delay. Bradford, 453 N.E.2d 250. Only delay for which state could be charged was due to continuance for which no reason was stated. Other delays were "legitimate." Held, conviction affirmed. See, also, Faulisi, App. 602 N.E.2d 1032.

TITLE: Nicholson/Baker v. State
INDEX NO.: B.5.c.4.
CITE: (2nd Dist., 6-4-02), Ind. App., 768 N.E.2d 1043
SUBJECT: Speedy trial - consolidated cases; one party's continuance's binding absent objection
HOLDING: Tr. Ct. did not err in denying D Nicholson's motion to dismiss on speedy trial grounds.

D's Nicholson & Baker were charged with escape & cases were consolidated without objection by either party. Baker moved to continue case more than five times. Nicholson argued he shouldn't be held responsible for Baker's multiple motions for continuance. However, Nicholson never objected to consolidation of trials, never moved to separate his trial from Baker's, & never objected to any continuances sought by Baker. Held, judgment affirmed.

TITLE: Peele v. State
INDEX NO.: B.5.c.4.
CITE: (11-20-19), Ind. Ct. App., 136 N.E.3d 1155
SUBJECT: Drug convictions reversed for speedy-trial violation
HOLDING: Court of Appeals reversed Defendant's methamphetamine possession and resisting law enforcement convictions as a result of a speedy-trial violation. Thirteen days before speedy trial date, the State asked for a continuance to procure lab test results but failed to disclose to trial court it had not yet taken efforts to procure the results. The State's failure to take reasonable efforts to procure the lab results for purposes of Criminal Rule 4(D), and failure to disclose that it had not yet requested the lab results resulted in the trial court error in granting the State's motion for continuance.
Court rejected the State's assertion that Defendant had waived his speedy-trial request by not objecting to the new trial date at his first opportunity, instead concluding that he had. During the initial status conference, Defendant was informed that he did not have to bother objecting because it would be "assumed." Likewise, Court found Defendant's letter to the trial court sufficed to notify it of his objection to the new trial date and desire for new counsel as a result. Lastly, there was nothing about any purported waiver in Defendant's case that justified disregarding the clear violation of his speedy-trial rights.

TITLE: Smith v. State
INDEX NO.: B.5.c.4.
CITE: (05/23/2022), Ind. Ct. App., 188 N.E.3d 63
SUBJECT: Speedy trial -- trial court's sua sponte declaration of emergency necessitating continuance of jury trial
HOLDING: Defendant moved for speedy trial under CR 4(B). The trial court sua sponte continued the trial, citing emergency situation caused by Covid-19, specifically that only one courtroom could be used to comply with safety precautions such as social distancing resulting in court congestion. Court of Appeals affirmed trial court's finding of emergency due to pandemic and finding of local emergency is not required. Court also found that sentence was not inappropriate under Appellate Rule 7(B), where defendant's character reflected criminal history and nature of offense reflected actions that were senseless and unprovoked, resulting in serious permanent injury.

TITLE: State v. McGuire
INDEX NO.: B.5.c.4.
CITE: (9-5-01), Ind. App., 754 N.E.2d 639
SUBJECT: Speedy trial - time attributable to D
HOLDING: Where D filed motion requesting an indefinite continuance & did not take any affirmative action to express dissatisfaction with his previous request for the delay & that he desired to go to trial, the entire time period after the indefinite continuance request was granted was attributable to D & Criminal Rule 4(c) was not violated. CR 4(C) provides for discharge of a D held to answer for criminal charge for period in aggregate of more than one year, except when delay is attributable to acts by D, to emergency, or to congestion of Ct. calendar. Loyd v. State, 398 N.E.2d 1260 (Ind. 1980). When D seeks or acquiesces in delay, time limitations set by rule are extended by the length of delay. Vermillion v. State, 719 N.E.2d 1201 (Ind. 1999). Moreover, when D requests an indefinite continuance & later becomes dissatisfied that trial has not been reset, affirmative action must be taken to notify Ct. of desire to reinstate running of time period. Wheeler v. State, 662 N.E.2d 192 (Ind. Ct. App. 1996). Here, it was apparent that D's motion for indefinite continuance was granted, although not stated in the Chronological Case Summary (CCS), because trial did not take place on originally scheduled day & pretrial conference was set for matter with new trial date pending plea negotiations. Held, judgment granting D's motion for discharge reversed.

RELATED CASES: Rivers, App., 777 N.E.2d 51 (because D asked to be tried after co-D, he essentially requested & received indefinite continuance of trial. Accordingly, it was incumbent upon him to notify Ct. when he decided to go to trial); Powell, App., 755 N.E.2d 222 (time attributed to D where D moved for indefinite continuance & expressly indicated that he did not want to proceed to trial; reliance on Butts v. State, 545 N.E.2d 1120 (Ind. Ct. App. 1989), misplaced); Suggs, App., 755 N.E.2d 1099 (although CCS was silent, D's affirmative steps of signing plea agreement & seeking continuances were inconsistent with being brought to trial by trial date or within one year).

TITLE: State v. Penwell
INDEX NO.: B.5.c.4.
CITE: (2nd Dist., 10-23-07), Ind. App., 875 N.E.2d 365
SUBJECT: Speedy trial - delay after denial of D's petition for certiorari
HOLDING: Tr. Ct. erred in charging the delay resulting from a stay pending D's petition for certiorari to U.S. S. Ct. to the State. D sought & received a stay of proceedings from Tr. Ct. pending her petition for certiorari. When U.S. S. Ct. denied D's petition on October 3, 2005, it sent notice of the denial to D's counsel & to Indiana Ct. App. No notice was sent to the State or to Tr. Ct., & State did not learn of denial until October 2006. *Citing* State v. McGuire, 754 N.E.2d 639 (Ind. Ct. App. 2001) & Wheeler v. State, 662 N.E.2d 192 (Ind. Ct. App. 1996), Ct. held it was incumbent upon D to take affirmative action to notify Tr. Ct. that she was dissatisfied with delay & desired to go to trial. Until she did so, the time under Crim. R. 4(C) was attributable to her. Held, judgment reversed & remanded. Barnes, J., dissenting, would charge the delay in setting trial date after denial of petition for certiorari to State, noting that attorney general's failure to file a notice of appearance as required by S. Ct. Rule 9(2) was "hardly...[D's] fault. The State was just as able as [D] to track the resolution of her certiorari petition." The State, not D, had affirmative duty to try D within one year & D is "under no obligation to remind the State of its duty." Marshall v. State, 759 N.E.2d 665 (Ind. Ct. App. 2001).

TITLE: Talbert v. State
INDEX NO.: B.5.c.4.
CITE: (2/09/2023), 204 N.E.3d 2625 (Ind. Ct. App.)
SUBJECT: No speedy trial violation found where Defendant's litigation tactics delayed trial
HOLDING: The State charged Defendant with Level 3 felony counts of criminal confinement and aggravated battery, Level 6 felony counts of domestic violence and strangulation, and three counts of Level 6 felony intimidation. Defendant requested a speedy trial, which was scheduled for Jan. 7, 2020. A month later, the State amended the charges to include Level 1 felony attempted murder. Defendant filed a pro se motion to dismiss the Level 3 felony charges despite being represented by counsel. That same day he wrote a letter complaining about his counsel and asked for a new attorney. His attorney withdrew, and a new one was appointed. The new attorney was appointed a month before the jury trial date. At a status conference, the attorney said he was still catching up on the details and requested a continuance to May 2020. But on March 16, 2020, the Indiana Supreme Court ordered a suspension and rescheduling of all jury trials due to the emerging COVID-19 pandemic. That postponed Defendant's trial. Meanwhile, Defendant requested and received a new attorney, and his trial date was reset for Sept. 1, 2020. His new attorney requested to move the trial date so he could prepare, which the trial court granted, rescheduling the trial for Nov. 9, 2020. Defendant wasn't satisfied with his new attorney, who eventually withdrew. The court then let Defendant continue pro se. Once he was representing himself, Defendant filed several motions claiming he was entitled to discharge and challenging the charging information. The court scheduled a hearing for all the motions on April 30, 2021. But on April 28, Defendant withdrew the case under Trial Rule 53.1. He also asked the Indiana Supreme Court to appoint a special judge but was denied. Defendant's trial eventually began on Oct. 4, 2021, after being further delayed by his own motions and by the judge's scheduling conflicts. He proceeded pro se and was found guilty of criminal confinement, aggravated battery, domestic battery, and strangulation. He was also found to be a habitual offender and was sentenced to an aggregate of 31 years. Defendant raised five issues on appeal, the first being whether he was entitled to discharge under Criminal Rule 4(B) because his request for new counsel resulted in the vacation of his first trial date and caused him to be held more than 70 days before trial. The Court of Appeals found no error in crediting to Defendant both the acquiescence to the vacation and resetting of the January 8, 2020, status conference and the request for a May 2020 trial date. The trial court also did not err in concluding Defendant had thus waived his earlier speedy trial request. The second issue was whether Defendant's constitutional right to a speedy trial was violated. Delays were caused by his repeated changes of counsel, the COVID-19 public health emergency, his pursuit of an interlocutory appeal, and court congestion resulting in his trial occurring 23 months after being charged. The Court determined Defendant consistently pursued litigation tactics that delayed his trial. Further, Defendant could not show prejudice from the delay. Third, Defendant argued the trial court erred when it denied his motion to dismiss the State's charge of Level 3 felony criminal confinement due to an inadequate charging information. He argued the criminal confinement charging information alleged as an element of the offense that Defendant had caused bodily injury, but the charging information did not allege any facts in support of a bodily injury element. The Court disagreed. "Because it is axiomatic that prolonged strangulation creates a substantial risk of death, the charging information sufficiently alleged facts necessary to put Defendant on notice of the crime charged." Finally, the last issue was whether the State presented enough evidence to prove Defendant committed Level 3 felony criminal confinement. Finding the evidence was sufficient, the Court held that a reasonable jury could conclude from the victim's testimony and the physician's report that Defendant choked her in a manner that she suffered a substantial risk of death. Held: judgment affirmed.

TITLE: Tinker v. State
INDEX NO.: B.5.c.4.
CITE: (4/22/2016), 53 N.E.3d 498 (Ind. Ct. App. 2016)
SUBJECT: Speedy trial violation - unexplained delays chargeable to State
HOLDING: Because the State did not bring D to trial within one year of the date charges were filed, Tr. Ct. erred when it denied his motion for discharge pursuant to Criminal Rule 4(c). On interlocutory appeal, D argued that Tr. Ct. erroneously assigned time to him that should have been counted against the State for 4(c) purposes. On 9/26/12, 69 days after charges were filed, the parties appeared at a pretrial conference and informed Tr. Ct. that a plea had been offered and accepted. Tr. Ct. correctly attributed the 167-day delay between the pretrial conference and new trial date setting of 3/12/13 to D.

However, Tr. Ct. erred in assigning the next 203-day time period to D because three scheduled trial dates passed without a CCS entry to explain why the case was not tried. Court declined the State's invitation to remand "at this late date" to allow Tr. Ct. to explain why it assigned those days to D. See T.R. 77(B); Alter v. State, 860 N.E.2d 874 (Ind. Ct. App. 2007).

Three hundred fifty seven days later, on 9/23/14, Tr. Ct. set trial for 1/27/15. D had no obligation to object to the belated trial date since the setting occurred after the one-year time period had expired. Held, judgment reversed and charges against D ordered dismissed with prejudice.

TITLE: Wright v. State
INDEX NO.: B.5.c.4.
CITE: (6-10-77), Ind., 363 N.E.2d 1221
SUBJECT: Computing delays - psychiatric exams
HOLDING: Delays were attributable to D for purposes of determining whether timely trial was accorded. D's insanity plea & motions which accompanied its filing, were not filed by his attorney of record, but by his attorney's partner. Nonetheless, D submitted to psychological exams & moved for continuance of his competency hearing. Although D never objected to entry of such plea, D later withdrew his insanity plea. D's silence & acceptance of benefits attaching to purportedly unauthorized act of attorney's partner ratified them. D's failure to voice objection to fact that his insanity plea was filed by his attorney's partner precluded D from raising such issue for first time on appeal. Held, judgment affirmed.

RELATED CASES: Graham, 464 N.E.2d 1 (where delays were necessarily occasioned by D's insanity plea & by resulting psychiatric exams, D could not claim right to speedy trial was violated by delays caused by proceedings he requested).

TITLE: Young v. State
INDEX NO.: B.5.c.4.
CITE: (4/12/88), Ind., 521 N.E.2d 671
SUBJECT: Computing delay - resignation of public defender
HOLDING: Where public defender's resignation was not due to D's actions, resulting delay is not chargeable to D. D's Ct.-appointed counsel resigned position as public defender, & Tr. Ct. removed cause from jury trial schedule. New public defender appeared for D two weeks later, & Tr. Ct. set new trial date. Cf. Little, 415 N.E.2d 44, where D replaced Ct.-appointed counsel with retained counsel.

RELATED CASES: Isaacs, App., 673 N.E.2d 757 (delay caused by withdrawal of D's counsel was chargeable to D because it was caused either by his act, which in turn caused his counsel's withdrawal, or was the result of an act by D's counsel).

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.c.5 CR 4(D) (unavailability of State's evidence)

TITLE: Chambers v. State
INDEX NO.: B.5.c.5.
CITE: (4th Dist.; 05-3-06), Ind. App., 848 N.E.2d 298
SUBJECT: Criminal Rule 4(D)-State failed to meet burden of showing justification for continuance
HOLDING: Tr. Ct. abused its discretion when it granted the State a continuance pursuant to 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. Criminal Rule 4 (D) provides that a Tr. Ct. may grant the State a continuance when it is satisfied: (1) that there is evidence for the State that cannot then be had; (2) that reasonable effort has been made by the State to procure the evidence; and (3) that there is just ground to believe that such evidence can be had within ninety-days. Here, prior to the running of the seventy-day time period, the State moved for continuance based on its assertion that the State Lab had returned to the State only two of the three items that were sent for testing, and that the State could not go to trial without the third item. The court granted the continuance despite the fact that the D reminded the court of its speedy trial motion. After the expiration of the seventy days but before the next jury trial date, D filed a Motion for Discharge, which was denied. Months later, after many continuances by the D, D renewed Motion to Discharge based on discovery that State Lab had finished testing the third item a few days prior to the State's Criminal Rule 4(D) request for a continuance, but simply had not returned the third item to the State. The Tr. Ct. again denied the Motion.

The mere fact that a piece of evidence was not in the prosecutor's physical possession did not mean that the piece of evidence could not be had before the passage of the speedy trial deadline. Because the State could have obtained the results by calling the Lab, the State failed to show that the evidence could not then be had. Moreover, without some evidence that the State made an effort to contact the Indiana State Police Laboratory, the State failed to show it made a reasonable effort to procure the missing evidence. Thus, Tr. Ct. erred in denying the D's Motion to Dismiss. Held, convictions reversed.

RELATED CASES: Small, 112 N.E.3d 738 (Ind. Ct. App. 2018) (State failed to show it made reasonable effort to procure missing evidence when it moved for continuance).

TITLE: Dilley v. State

INDEX NO.: B.5.c.5.

CITE: (10-23-19), Ind. Ct. App., 134 N.E.3d 1046

SUBJECT: Trial court erroneously granted State's motion for continuance under C.R. 4(D) based upon unavailability of laboratory test results

HOLDING: Trial court erred in granting State's motion to continue pursuant to Criminal Rule 4(D), which violated Defendant's right to speedy trial and entitled him to discharge. Four days after methamphetamine dealing charges were filed, Defendant requested a speedy trial and the matter was set for trial within 70 days. Seventeen days before trial, the State filed a motion to continue pursuant to Criminal Rule 4(D) because they were still awaiting laboratory results for the drugs they found on Defendant and the results would be unavailable by the trial date. Over Defendant's objection, the trial court granted the State's continuance. The State represented to the Court that they had made every reasonable effort to obtain the lab results prior to the scheduled trial date. But at trial, a police officer testified that he personally transported the drugs to be tested to the State Lab on a date after the State had moved for a continuance. The Court of Appeals noted that the prosecutor clearly knew that the drugs were not yet submitted for testing when they moved to continue yet did not mention this fact to the trial court. Thus, it cannot be said that reasonable efforts had been made to procure the evidence for purposes of Rule 4(D). Also, because the Attorney General did not respond to the Defendant's argument on direct appeal regarding the timing of the sending of drugs to the laboratory for testing, Defendant presented Prima Facie error that the trial court erred in granting the State's continuance.

TITLE: Griffin v. State

INDEX NO.: B.5.c.5.

CITE: (5th Dist., 6-15-98), Ind. App., 695 N.E.2d 1010

SUBJECT: Speedy trial - CR 4(D); Tr. Ct. only required to determine unavailability of witness on trial date

HOLDING: Under express language of CR 4(D), Tr. Ct.'s rescheduling of trial 28 days beyond 70-day period due to unavailability of State's witness was authorized by CR 4(D). Time within which D who has demanded speedy trial may be timely tried may be extended by additional ninety days if Ct. is satisfied there is State's evidence which cannot be had on timely trial date but that will be available within ninety days. CR 4(D). When unavailable evidence is particular witness, reasonable effort requirement of rule is satisfied where State is not at fault for absence of witness. Here, D was properly tried 98 days after he requested speedy trial because chemist for State police was out of country on original trial date, which was within 70-day speedy trial period. Neither language of CR 4(D) nor any authority require Tr. Ct. to examine every other remaining day in 70-day period before selecting date within CR 4(D) 90-day extension. Thus, although Tr. Ct. was required to determine that witness was unavailable on date set for trial, Tr. Ct. was not required to determine that witness was unavailable on any other date between date of motion for continuance & expiration of 70-day period. Held, judgment affirmed.

RELATED CASES: Wilhelmus, App., 824 N.E.2d 405 (given absence of key witnesses, Tr. Ct. did not abuse discretion in granting State's request for 14-day continuance); Smith, App., 802 N.E.2d 948 (continuance under CR 4(D) was justified where the father of a police officer who had been stalked & intimidated by D had died & the officer needed to attend to family matters).

TITLE: Littrell v. State
INDEX NO: B.5.c.5.
CITE: (8/21/2014), 15 N.E.3d 646 (Ind. Ct. App. 2014)
SUBJECT: CR 4(D) extension runs from end of CR 4(B) 70-day period
HOLDING: Where D had filed motion for speedy trial, 90-day extension State obtained through CR 4(D) to obtain drug analysis results began to run at expiration of CR 4(B) 70-day period, not the day Tr. Ct. granted the State's extension request. Thus, because D was tried 152 days after he filed his motion for speedy trial, his right to a speedy trial was not violated. Held, judgment affirmed.

TITLE: Wiseman v. State
INDEX NO.: B.5.c.5.
CITE: (2nd Dist., 10-21-92), Ind. App., 600 N.E.2d 1375
SUBJECT: Speedy trial - CR 4(B) & CR 4(D)
HOLDING: Although CR 4(D) provides that "if when application is made for discharge of a D under this rule ... the cause may be continued," it does not preclude Ct. from continuing trial upon State's CR 4(D) motion prior to D's motion for discharge. Any continuance sought by state because of unavailable evidence that is believed available within 90 days, and which will result in trial outside of 70-day period sought by D under CR 4(B), is timely if sought at any time up to and including time of motion for discharge. It is not necessary for State to wait until motion for discharge is made.

Ct. also rejected D's argument that State failed to show reasonable effort to procure unavailable evidence (officer's testimony), because evidence went more to impeachment or sentencing than to case in chief. When unavailable evidence is testimony of witness, reasonable effort requirement goes to State's lack of fault in procuring absence of witness, and whether another witness could provide evidence is immaterial. Rule does not require that evidence be essential or unique, only that it be unavailable, and that State be entitled to present it. Smith, 502 N.E.2d 485, Kindred, 524 N.E.2d 279. Because there was no error in granting State's motion for continuance, there was no basis for claim of ineffective assistance of counsel concerning continuance. Held, denial of post-conviction relief affirmed.

RELATED CASES: Otte, 967 N.E.2d 540 (Ind. Ct. App. 2012) (two-week continuance was reasonable where essential State's witness was scheduled to be on vacation and out of the State on scheduled trial date); Wooley, 716 N.E.2d 919 (it is reasonable for law enforcement officials to rely on witness's assurance that she will appear, especially after making specific transportation plans for witness).

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.d. Refiling after dismissal

TITLE: Hughes v. State
INDEX NO.: B.5.d.
CITE: (3/5/85), Ind. App., 473 N.E.2d 630
SUBJECT: Speedy trial - refiling after dismissal
HOLDING: Dismissal & refiling of identical charges does not extend time which state must bring D to trial under CR 4. Ds challenged Tr. Ct.'s granting of state's motion to dismiss, arguing in part that it denied their speedy trial rights. Where dismissal occurs prior to jeopardy attaching, there is no bar to refiling information charging same offense in identical terms. Johnson, 246 N.E.2d 181; Winters, 160 N.E.2d 294. However, for purposes of D's speedy trial rights, such dismissal & refiling does not extend time in which to bring D to trial. Time is counted from first filing. Johnson, *supra*. Maxey, 353 N.E.2d 457. Thus, Ds' speedy trial rights were not affected by dismissal. Any speedy trial issue must be raised in Tr. Ct. where charges were refiled.

NOTE: Cf. Bentley, 462 N.E.2d 58; Young, 521 N.E.2d 671.

RELATED CASES: Burdine, 515 N.E.2d 1085; Fink, App., 469 N.E.2d 466 on *reh'g* 471 N.E.2d 1161 (Ct. distinguishes Shields (infra): here, state dismissed burglary charge & refiled confinement charge on day of trial/last day of 70-day period, Ct. finds CR 4(B) violation but D's failure to object waives error, *citing* Graham, 393 N.E.2d 764); Shields, App., 456 N.E.2d 1033 (no error in denial of D's CR 4(B) motion for discharge where prosecution dismissed charges 3 days before trial & later refiled them; purpose of D's CR 4(B) motion was served when Tr. Ct. set trial date within 70 days; D.

TITLE: May v. State
INDEX NO.: B.5.d.
CITE: (1st Dist., 8-21-03), Ind. App. 793 N.E.2d 1157
SUBJECT: Speedy trial - dismissal & refiling; no error
HOLDING: Tr. Ct. did not err in denying D's motion for discharge under Criminal Rule 4(C). D was not incarcerated during period between dismissal of information & refiling of charges. Thus, one-year time period within which to bring D to trial was tolled between time information was dismissed & time charges were eventually refiled. For purposes of C.R. 4(C), D was not subject to terms of pre-trial release applicable to his indictment on first set of charges after Tr. Ct.'s order of dismissal of such charges, deemed denial of State's motion to correct error from that order, & expiration of States' time in which to praecipe for appeal, as after that date there was no pending charges filed against D & nothing for which he could have been ordered to appear. Ct. also rejected D's argument that he was deprived of his right to a speedy trial under Indiana & United States Constitution, despite delays of 137 days between filing of first information & release of D's bond, 92 days between refiling of charges & rescheduling of motion for discharge hearing due to Ct. congestion, & period between denial of motion for discharge & grant of D's petition for interlocutory appeal. Held, judgment affirmed.

TITLE: Stinson v. State
INDEX NO.: B.5.d.
CITE: (1st Dist., 10-21-03), Ind. App. 797 N.E.2d 352
SUBJECT: Speedy trial - Crim. R. 4(C) tolled during period between dismissal & refiling of charges
HOLDING: Tr. Ct. did not err in denying D's motion for discharge pursuant to Indiana Criminal Rule 4(C). Two probable cause affidavits were filed against D on 7/19/01, & D appeared that day in Ct. for probable cause hearing. On 7/24/01, without filing formal charges, State moved to dismiss cause. On 12/10/02, State filed information based upon same allegations in earlier cause, & D was arrested on 12/17/02. Ct. held that, even assuming that the one-year period under Crim. R. 4(C) began running on 7/19/01, D was not entitled to discharge. D had been held to answer criminal charges for only five days prior to dismissal. Period between dismissal & arrest on 12/17/02 based upon refiled charges does not accrue against one-year period. Rather, dismissal & refiling of same charges tolls clock for actual days between dismissal & refiling. Bentley v. State, 462 N.E.2d 58 (Ind. 1984). Held, judgment affirmed. Sullivan, J., concurring in part & dissenting in part, notes that because there were never formal charges brought against D in July 2001, there was no "cause" to be dismissed. There was therefore no dismissal to trigger application of tolling rule. Nevertheless, the "pre-charges" under which D could have been held had he not made bond are sufficiently analogous so as to trigger & then toll the one-year period under Crim. R. 4(C).

B. PRETRIAL PROCEEDINGS

B.5. Speedy trial

B.5.e. Appellate review (see, also G.1.b.1 and Q.3)

TITLE: Dunn v. State
INDEX NO.: B.5.e.
CITE: (4/23/87), Ind., 506 N.E.2d 822
SUBJECT: Appellate review of CR 4 denials
HOLDING: Argument that D was denied release on his own recognizance after being held in jail 6 months is not an issue to be raised on appeal. Matter becomes moot when D is brought to trial. Cox, 419 N.E.2d 1279. Failure to bring D to trial within 6 months after arrest is not grounds for reversal of conviction. Held, conviction affirmed.

NOTE: Appropriate remedy is either writ of mandate (see Q.3) or interlocutory appeal (see G.1.b.1).

RELATED CASES: Battle, 415 N.E.2d 39 (any alleged violation of CR 4(A) raised no question for review on appeal from conviction because period when D would have been entitled to be released had expired).

B. PRETRIAL PROCEEDINGS

B.7. Judge

TITLE: Dike v. State
INDEX NO.: B.7
CITE: (1st Dist., 11-9-94), Ind. App. 642 N.E.2d 281
SUBJECT: Magistrate was validly appointed
HOLDING: Full-time magistrate appointed by juvenile/circuit Ct. Judge who retired was serving as properly appointed magistrate when she issued search warrant three days after judge retired. Ind. Code 31-6-9-2 authorizes judge of juvenile Ct. to appoint magistrate under Ind. Code 33-4-7, while Ind. Code 33-4-7 expressly applies to a Ct. authorized by statute to appoint magistrate. Although statutory scheme under which magistrate was appointed is ambiguous, Ct. noted that ambiguity does not affect result here, because order appointing magistrate was order of Ct., signed by judge. Ct. also noted that reorganization of county Ct's. did not divest circuit Ct. of authority to appoint magistrate. Reorganized Ct. had implicitly ratified appointment & appointment was not terminated by judge's retirement. Held, judgment affirmed.

TITLE: Gunter v. State
INDEX NO.: B.7.
CITE: (3rd. Dist., 01-20-93), Ind. App. 605 N.E.2d 1209
SUBJECT: Different judges for underlying trial & HO (HO) proceeding
HOLDING: Although law contemplates same judge (J) will preside throughout criminal trial, & it was error for J to disqualify himself & appoint special judge (SJ) only for HO phase of trial, error was not sufficiently prejudicial to require reversal. Sentence was enhanced by HO finding. Regular J had been prosecutor when D committed prior felonies used for HO enhancement, & present prosecutor had been his deputy at that time. When D moved for change of J because of situation, J denied change for underlying burglary trial, but disqualified himself & appointed SJ only for HO phase of trial. Regular J took burglary verdict & imposed 8year sentence, & SJ took verdict & imposed 30-year HO enhancement. Ct. first noted that while D objected to having two different Js handle different parts of trial, he was one who initiated consideration of matter. Ct. found fact J had been prosecutor when prior felonies were committed was not cause for disqualification, & that it was likely that J disqualified himself from HO phase in effort to accommodate appearance of propriety. Purpose of rule requiring same J to preside throughout all phases of trial is to insure fairness & evenhandedness to all parties. Because segments of HO proceeding are essentially discrete, & using two different juries to try underlying felony & HO phase has been held not error, Ct. found error in permitting different J to preside over HO phase was minimal, especially where each J imposed sentence for that phase. Ct. also found D did not set forth any prejudice he suffered from procedure used, & therefore concluded error in using two J's was harmless.

RELATED CASES: Matthews, 978 N.E.2d 438 (Ind. Ct. App. 2012) (the fact that the judge had represented D on one of his prior unrelated substance offenses which served as the basis for D's HSO did not require a mistrial in the guilt/innocence phase of the underlying offense to the HSO; judge's recusal from the HSO phase of the trial was sufficient).

TITLE: Meade v. State
INDEX NO.: B.7.
CITE: (2nd Dist. 03/16/92), Ind. App. 588 N.E.2d 521
SUBJECT: Successor judge - ruling on Post-Conviction Relief (PCR) subsequent to hearing
HOLDING: Successor judge may not rule on PCR petition when hearing on petition was conducted by another judge. D filed PCR petition & hearing was held, but no findings or decision regarding relief was made. Subsequently judge was replaced by another due to election, & successor judge entered findings of fact & conclusions of law, denying petition without additional hearing. T.R. 63(A) did not apply to allow successor judge to rule on petition, because original judge did not set forth any findings or decision prior to stepping down, as required by rule. Held, remanded with instructions to vacate denial & either appoint original judge as judge pro tempore to rule on petition, or conduct de novo evidentiary hearing on petition.

TITLE: State v. Smulls
INDEX NO.: B.7.
CITE: 935 S.W.2d 9 (Mo. 1996)
SUBJECT: Judge's Refusal to Acknowledge Race of Juror -- Batson Inquiry; Recusal Warranted
HOLDING: Where trial judge, in context of Batson inquiry, refused to acknowledge race of juror, saying that he did not "know what black means," and observing that "[y]ears ago they used to say one drop of blood constitutes black," serious questions were raised about judge's "willingness to do what Batson requires," and warranted his recusal from hearing petitioner's post-conviction petition. Focus of Supreme Court is not propriety of judge's ruling on Batson claim, nor whether trial was tainted, but whether judge's impartiality might reasonably be questioned so as to require recusal from consideration of post-conviction petition. Batson understanding of the import of the issues underlying Batson, to redress racial discrimination. Further, his requires trial judge to focus solely on race, and Judge's race-neutral language in this context belied a lack of use of phrase, "one drop of blood," recalled days when such measures were used to deny many legal protections to mixed-race citizens. "It is not the judge to whom we should afford the benefit of the doubt. The rights and due-process based expectations of the parties are the Court's proper focus." When the judge's on-the-record comments are combined with his status as a potential witness to off-the-record issues, fundamental fairness requires his disqualification.

B. PRETRIAL PROCEEDINGS

B.7. Judge

B.7.a. In general

TITLE: Abney v. State
INDEX NO.: B.7.a.
CITE: (6/22/2017), 79 N.E.3d 932 (Ind. Ct. App. 2017)
SUBJECT: Recusal of judge not required
HOLDING: It was unnecessary for judge to recuse himself, even though the elected prosecutor served on his campaign committee, because the prosecutor had yet to take any action on behalf of the judge and his role on the committee was not significant.

Defendant was charged in Howard County with drug-related offenses. He asked Judge William Menges to recuse himself because the Howard County elected prosecutor, Mark McCann, served on Judge Menges' campaign committee and had publicly endorsed him.

Even the mere appearance of bias may require recusal if an objective person, knowing all the circumstances, would have a "rational basis for doubting the judge's impartiality." Bloomington Magazine, Inc. v. Kiang, 961 N.E.2d 61, 64 (Ind. Ct. App. 2012). A party seeking recusal need not show "actual bias." In Bloomington Magazine, recusal was necessary because one of the attorneys had served as the chairman of the judge's election campaign, which would give a reasonable person a rational basis for doubting the judge's impartiality. Id. at 66. But here, McMann was not the campaign chairman and had yet to perform any election committee activities on behalf of Judge Menges. Moreover, Judge Menges noted that Defendant's counsel was a deputy public defender and that two members of his attorney's private law firm were the Chief Public Defender and the Chief Deputy Public Defender, who had also agreed to serve in the same role in the judge's campaign as had Prosecutor McMann. Under these circumstances, an objective person would not have a rational basis for doubting Judge Menges' impartiality. Held, judgment affirmed.

NOTE: Interestingly, the Court's decision did not discuss two recent U.S. Supreme Court cases on judicial bias and recusal, which stated, like here, that a party seeking recusal need not show actual bias. See Rippo v. Baker, 137 S. Ct. 905 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899 (2016).

RELATED CASES: Williams, 136 S. Ct. 1899 (U.S. 2016) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

TITLE: Calvert v. State
INDEX NO.: B.7.a.
CITE: (4th Dist. 10/8/86), Ind. App. 498 N.E.2d 105
SUBJECT: Judges - recusal
HOLDING: Tr. judge erred in refusing to recuse himself from case where he twice had appeared for prosecution against D when case was originally filed & had obtained Ct. order for sample of D's handwriting, which was admitted into evidence at present trial. D did not waive his right to request Tr. judge to disqualify himself by failing to make timely motion. Situation is one requiring recusal rather than routine change of judge motion. Stivers v. Knox County Dept. of Pub. Welfare, App., 482 N.E.2d 748. D's counsel objected at first opportunity after learning of Tr. judge's involvement with D. Here, Tr. judge refused to recuse himself, finding he did not have any bias/prejudice against D. Ct. finds Code of Judicial Conduct, Canon 3(C)(1) does not require showing of bias/prejudice when judge has actively been involved in prosecution. See Annot., 16 ALR 4th 550 §16. See also State ex rel. Wright v. Morgan County Ct. 451 N.E.2d 316 (in dicta, Ct. notes judge may not sit in case where he/she had role as attorney for one of the parties). Held, reversed & remanded for new trial.

TITLE: Cheek v. State
INDEX NO.: B.7.a.
CITE: (6/22/2017), 79 N.E.3d 388 (Ind. Ct. App. 2017)
SUBJECT: Recusal of judge not required
HOLDING: In a companion appeal to Abney v. State, the Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann had yet to do anything as a committee member. Cf. Zaias v. Kaye, 643 So.2d 687 (Fla. Dist. Ct. App. 1994) ("The fact that an attorney made a campaign contribution to a judge or served on a judge's campaign committee does not, without more, require disqualification." Id. Rather, sufficient grounds for disqualification include "a specific and substantial political relationship between the parties." Id.). Held, judgment affirmed.

RELATED CASES: Williams, 136 S. Ct. 1899 (U.S. 2016) (In companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member).

TITLE: Osborne v. State
INDEX NO.: B.7.a.
CITE: (8/15/85), Ind., 481 N.E.2d 376
SUBJECT: Lazy judge rule - denial not reviewable
HOLDING: Ind. S. Ct.'s denial of D's praecipe, requesting that case be withdrawn from judge (who did not rule until 15 months after PCR hearing) & that new judge be appointed in accordance with TR 53.2, is not reviewable or appealable. Rule's purpose is to expedite proceedings by withdrawing causes from trial judges who have delayed their rulings for an unreasonable length of time. To re-examine this Ct.'s rulings on such praecipes on appeal would be inconsistent with rule's purpose. Re-exam is unnecessary in light of alternative avenues to achieve both protection of parties' interests & interest of judicial administration. Held, denial of PCR affirmed.

TITLE: Williams v. Pennsylvania
INDEX NO.: B.7.a.
CITE: (6/9/2016), 136 S. Ct. 1899 (U.S. 2016)
SUBJECT: Judge must recuse for death penalty decision as prosecutor 30 years earlier
HOLDING: The 14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a D's case. Here, the Pennsylvania Supreme Court Chief Justice, who was considering D's post-conviction appeal, thirty years earlier made the decision to seek the death penalty against D. The inquiry is objective, that is, whether the average judge is likely to be neutral or whether there is an unconstitutional potential for bias. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009). The fact that the judge was just one of several judges on the Pennsylvania Supreme Court does not overcome the constitutional infirmity: "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." Held, cert. granted, opinion of Pennsylvania Supreme Court vacated, and case remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.; Roberts, C.J., dissenting, joined by Alito, J., Thomas, J., dissenting.

TITLE: Williams v. State
INDEX NO.: B.7.a.
CITE: (3rd Dist., 9-29-99), Ind., 716 N.E.2d 897
SUBJECT: Failure to rule on petition for post-conviction relief (PCR) - "lazy judge" rule
HOLDING: Ind. T.R. 53.2, which applies to petitions for PCR, sets 90-day limit for Tr. Ct. to hold case under advisement & issue final ruling. Proper remedy for challenging denial of "lazy judge" motion under this rule is to seek writ of mandate from Indiana S. Ct. to compel clerk to give notice & disqualify judge. State ex rel. Ind. Suburban Sewers, Inc. v. Hanson, 260 Ind. 47, 296 N.E.2d 660 (1973). In this case, on transfer, Ct. agreed with Ct. App. that D was estopped from claiming that post-conviction Ct. lost jurisdiction to rule on his PCR petition, because D waited until unfavorable judgment denying him PCR instead of seeking writ of mandate after clerk failed to withdraw case from Tr. Ct. for noncompliance with T.R. 53.2. Post-conviction Ct. never lost jurisdiction to rule on D's petition. However, Ct. disagreed that laches barred D's post- conviction claims. Held, transfer granted, opinion of Ct. App. at 699 N.E.2d 1151 vacated & remanded to post-conviction Ct. because State failed to establish by preponderance of evidence that D unreasonably delayed in seeking relief.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App. 2017), (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

B. PRETRIAL PROCEEDINGS

B.7. Judge

B.7.b. Change of judge (CR 12; Ind. Code 35-36-5-2; rejection of misdemeanor plea agreement, IC 35-35-3-3)

TITLE: Austin v. State
INDEX NO.: B.7.b.
CITE: (2nd Dist. 9/19/88), Ind. App., 528 N.E.2d 792
SUBJECT: Ex parte communications from private citizens - non-disclosure alone not reversible error
HOLDING: Tr. Ct. did not commit reversible error by refusing to disclose ex parte communications from private citizens. D was charged with distribution of obscene matter. Before trial, D discovered members of local anti-pornography group had contacted Tr. Ct. regarding handling of pornography cases. D moved for disclosure of these ex parte communications, & Tr. Ct. denied motion. On appeal, D argues that non-disclosure of these letters deprived him of opportunity to make informed decision re whether to seek recusal or disqualification. Ct. App. appreciates D's frustration, but reasons that it is not content of letters, but their impact on Tr. Ct. which is at issue & only Tr. Ct. itself can decide that. D does not allege, nor does record contain evidence, that Tr. Ct.'s impartiality was compromised by these letters. Held, conviction affirmed.

TITLE: Battles v. State
INDEX NO.: B.7.b.
CITE: (12/26/85), Ind., 486 N.E.2d 535
SUBJECT: Change of judge - prior relationship with D
HOLDING: Presiding at bond reduction hearing & exposure to D's prior criminal record does not necessarily disqualify judge.

RELATED CASES: Brown, App., 830 N.E.2d 956 (fact that trial judge was D's probation officer on a case in 1991 & had once argued a case against D in 1998 did not amount to judicial bias or prejudice); Brim, 471 N.E.2d 672 (presiding at prior guilty plea hearing where plea was withdrawn or rejected does not require change of judge, even if under such circumstances statute provides for peremptory change of judge); Hoover, App., 582 N.E.2d 403 (fact that trial judge rejected D's guilty plea agreement after finding deficiency in factual basis for plea & determining that terms of agreement were inappropriate for admissions made by D did not warrant disqualification of judge); Lasley, 510 N.E.2d 1340 (judge presided at prior child molest trial, sentenced D to consecutive terms on 11 counts of child molesting in second action; no knowledge gained which would have prejudiced judge against D).

TITLE: Bell v. State
INDEX NO.: B.7.b.
CITE: (5th Dist., 9-18-95), Ind. App., 655 N.E.2d 129
SUBJECT: Change of judge required - ex parte communications with co-conspirator
HOLDING: Tr. Ct. abused discretion & committed reversible error in denying D's verified motion for change of judge. Defense counsel discovered that trial judge had privately visited & provided legal research to D's alleged co-conspirator. Shortly thereafter, co-conspirator was granted use immunity for his testimony against D & judge recused himself from co-conspirator's case. Judge did not disclose that meeting with co-conspirator had occurred until confronted by defense counsel, & never discussed extent of his meeting. Judicial Canon 3(B)(8) specifically prohibits trial judge from engaging in ex parte communications related to case unless purely related to scheduling, administrative, or emergency issues. Here, trial judge made no effort to explain nature of his meeting with co-conspirator or to assure D that meeting in no way impacted on his case. Judge's failure to recuse himself from D's case, & his failure to fully disclose extent of his conversation with co-conspirator created appearance of impropriety under Judicial Canon 3(E)(1). Undisclosed ex parte communication, combined with judge's demeanor, rulings & orders subsequent to guilt phase of trial, negatively impact on public's confidence in integrity of judicial system. Matter of Guardianship of Garrard, (1993), App., 624 N.E.2d 68. Held, convictions reversed, remanded for new trial before impartial jurist.

TITLE: Bradberry v. State
INDEX NO.: B.7.b.
CITE: (5/22/74), Ind. App., 311 N.E.2d 437
SUBJECT: Change of judge -- hearing required for second motion
HOLDING: Hearing must be held or opportunity must be given to D to present additional evidence in support of verified motion for change of venue from county or from judge, even though it may be second or subsequent verified motion for change of venue. Here, denial of second and verified motion for change of judge without conducting hearing was error. Held reversed and remanded for new trial.

RELATED CASES: Burton, 292 N.E.2d 790, *overruled* on other grounds by Smith v. State, 689 N.E.2d 1238 (Ind. 1997) (fourth motion for change of venue properly denied where showing of bias or prejudice was inadequate).

TITLE: Brown v. State
INDEX NO.: B.7.b.
CITE: (2nd Dist., 8-20-97), Ind. App., 684 N.E.2d 529
SUBJECT: Recusal of judges - claim of prejudice
HOLDING: Tr. Ct. properly denied D's motion to dismiss & motion requesting recusal of all Ind. appellate judges. In both motions, D contended that all members of Ind. S. Ct., Appellate Ct. & Tax Ct. were prejudiced against him. Judge should recuse himself under circumstances in which reasonable person, knowledgeable of all circumstances, would have reasonable basis for doubting judge's impartiality. Tyson v. State, 622 N.E.2d 457 (Ind. 1993). Here, D was charged with ghost employment through his position of Clerk of Cts. Subsequent to allegations, Ind. S. Ct. issued two orders which prohibited D from exercising control over operations of Clerk's office. Ct. concluded that orders & statements of Chief Justice pertained to orderly operation of Clerk's office & did not provide reasonable basis to support D's allegations of prejudice. D failed to make requisite showing of even appearance of partiality. Held, judgment affirmed.

TITLE: Cook v. State
INDEX NO.: B.7.b.
CITE: (4/27/93), Ind. App. 612 N.E.2d 1085
SUBJECT: Change of judge -- bias or prejudice
HOLDING: Judge presumed unbiased & unprejudiced, & D seeking to rebut such presumption must establish from judge's conduct actual bias or prejudice that places D in jeopardy; such bias or prejudice exists only where there is undisputed claim or where judge has expressed opinion on merits of pending controversy. Here, evidence did not establish that judge who cried after rape victim testified at sentencing hearing was actually biased against D such that judge should have recused herself. Held, judgment affirmed.

RELATED CASES: Rippo, 137 S. Ct. 905 (2017) (D need not show actual bias to disqualify judge but merely that "the risk of bias is too high to be constitutionally tolerable"); Allen, 734 N.E.2d 741 (no bias shown in domestic violence case where judge's wife was president of County Coalition Against Domestic Violence & judge had publically spoken against domestic violence); Smith, App., 718 N.E.2d 794 (judge's revelation of his or her humanity does not rise to level of bias or prejudice); Hoover, App., 582 N.E.2d 403 (judge's bias must be shown from judge's conduct in order to warrant change of judge); Clemens, 610 N.E.2d 236 (no bias or prejudice is established by mere fact that D has appeared before judge previously).

TITLE: Daugherty v. State
INDEX NO.: B.7.b.
CITE: (7/18/84), Ind. App. 466 N.E.2d 46
SUBJECT: Change of judge -- relationship with Prosecutor
HOLDING: Judge's act of seeking compensation for special prosecutor, & mandating appropriation of funds when County Council failed to pay special prosecutor, did not go to merits of case or hinder defense; D did not show judge was not impartial or that fair trial was not received. Held, judgment affirmed.

TITLE: Ferrier v. State
INDEX NO.: B.7.b.
CITE: (12/9/80), Ind., 413 N.E.2d 260
SUBJECT: Change of judge -- waiver; motion not timely filed
HOLDING: D was not entitled to change of judge where his motion for change of judge was not timely field & contained no showing of good cause for delayed filing. D was not entitled to be excused from complying with rule dealing with right to change of judge simply because he chose to file motion for change of judge pro se & without advice of counsel. Held, denial of petition for post-conviction relief affirmed.

RELATED CASES: Ben-Yisrayl, 908 N.E.2d 1223 (Ind. Ct. App. 2009) (counsel may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits; where D waited 1.5 years to raise change of judge issue, he waived his claim); Denton, 496 N.E.2d 576 (no abuse of discretion in denying motion for change of judge to preside at retrial of habitual offender charge several years after underlying conviction; motion, denied as untimely, was not filed until three months after notice of renewed habitual offender charge & of date for retrial, & D did not allege any new evidence of cause for change of which he did not have knowledge at time trial date was set).

TITLE: French v. State
INDEX NO.: B.7.b.
CITE: (5th Dist., 7-31-01), Ind. App. 754 N.E.2d 9
SUBJECT: Change of judge - disparaging remarks about D
HOLDING: Tr. Ct. abused its discretion by denying D's motion for change of judge, which was based on disparaging remarks trial judge made against him during sentence modification hearing of another D. Specifically, judge stated that he: "had the distinct displeasure of spending a lot of time with [D], & very little of that time has been very much fun. I really can't think of anybody who has been more disagreeable to deal with than him. Had I been in your situation, I don't know that I would have shot the gun up in the air."

Normally, when trial judge learns information about D through judicial process, bias & prejudice will not be found even if judge makes remarks which are critical, disapproving, or even hostile. Sturgeon v. State, 719 N.E.2d 1173 (Ind. 1999). However, if remark shows high degree of antagonism so as to make fair judgment impossible, bias will be found. Id. Here, notwithstanding deferential standard of review, Ct. concluded that trial judge's comments in this case strayed from objectivity & impartiality which trial judges are obligated to display. Judge simply went beyond expressing frustration to displaying high degree of antagonism so as to make fair judgment virtually impossible. Held, judgment reversed & remanded for new sentencing hearing.

TITLE: Gibson v. State
INDEX NO.: B.7.b.
CITE: (6/24/83), Ind., 449 N.E.2d 1096
SUBJECT: Change of judge - bias
HOLDING: Judicial act of rejecting plea agreement without more particular matter reflecting bias is insufficient to support D's claim that he was denied fair trial because judge was biased against him. See Kleinrichert, 297 N.E.2d 822; Wright, 264 N.E.2d 67. Here, D contends judge's rejection of plea agreement, standing alone, should suffice to show disqualifying bias & prejudice. Ct. notes Tr. judges are able to compartmentalize knowledge of prior criminal conduct, confession, etc., setting it aside to fairly/impartially apply rules of evidence, criminal standard of proof/presumption of innocence. Held, no error.

RELATED CASES: Stidham, Ind., 637 N.E.2d 140 (Tr. Ct. did not err in denying COJ on ground judge was father of person D stole property from. Son was emancipated, had been living independently, and judge had not communicated with son for four months and had no interest in stolen property); Harrington, 584 N.E.2d 558 (it was not error for trial judge to deny motion for change of judge based on bias & prejudice, even though judge's actions after reversal of D's first conviction were improper & violation of Code of Judicial Conduct. Actions included letters to AG & dissenting justice & encouraging Petition for Rehearing); Blacknell, 502 N.E.2d 899 (Judges 49(1); denial of motion for change of judge was not error; here, Tr. judge filed disciplinary complaint against defense attorney based on statement to press that appeared in local newspaper prior to trial; statement was in direct violation of D.R. 7-107; D.R. 1-103 requires Tr. judge to report violation); Smith, 477 N.E.2d 857 (D fails to demonstrate actual prejudice of Tr. judge who was D in civil suit brought by Smith in federal Ct.); Bixler, 471 N.E.2d 1093 (Judges 45; no bias shown by (1) same church attendance of victim's family, or (2) drafting of will for relative of victim some years earlier); Gary, 471 N.E.2d 684 (fact that D appeared before same judge in prior action does not constitute bias, *citing* Clemons, 424 N.E.2d 113); Carter, 451 N.E.2d 639 (Judges 47, 47(2); bias not indicated by trying & heavily sentencing co-D); Smith, App., 497 N.E.2d 601 (Canon 2 of Code of Judicial Conduct did not require judge to grant motion for change of judge, which alleged judge would be unduly influenced in child molesting case which his wife had investigated); Gray, App., 450 N.E.2d 125 (Judges 51(4); interlocutory appeal of denial of change of judge premised on judge alleged bias against attorney; Ct. finds only "strained relationship," an insufficient basis for change of judge).

TITLE: Gonzalez v. United States
INDEX NO.: B.7.b.
CITE: (5/12/2008), U.S., 553 U.S. 242
SUBJECT: Counsel's consent to magistrate enough under Federal Magistrate Act
HOLDING: Express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the Federal Magistrates Act, which states: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States. "Under Gomez v. U.S., 490 U.S. 858 (1989) and Peretz v. U.S., 501 U.S. 923 (1991), such "additional duties" include presiding at voir dire if the parties consent, but not if there is an objection. Generally, where there is a full trial, there are various points at which rights either can be asserted or waived. Court has indicated that some of these rights require the D's own consent to waive. See New York v. Hill, 528 U.S. 110 (2000). Court held in Hill, however, that an attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls." Similar to Hill, acceptance of a magistrate judge at the jury selection phase is a tactical decision well suited for the attorney's own decision. Petitioner argues unconvincingly that the decision to have a magistrate judge for voir dire is a fundamental choice, or, at least raises a question of constitutional significance so that the Act should be interpreted to require explicit consent. Serious concerns about the Act's constitutionality are not present, and Petitioner concedes that magistrate judges are capable of competent and impartial performance when presiding over jury selection. Thomas, J., filed a dissent.

TITLE: Gray v. State
INDEX NO.: B.7.b.
CITE: (3rd Dist. 6/23/83), Ind. App. 450 N.E.2d 125
SUBJECT: Change of judge - hearing on motion
HOLDING: Issue whether Tr. judge erred by presiding over hearing regarding his own bias & prejudice & by ruling on motion for change of judge was waived. However, Ct. notes federal practice allows judge to determine sufficiency of affidavit requesting change before recusal is required. Affidavit is sufficient if it alleges material & specific facts that if true would convince a reasonable person that bias exists. Ronwin v. State Bar of AZ (CA9 1982), 686 F.2d 692; US v. Serrano (CA5 1979), 607 F.2d 1145. Here, attorney affidavit does not meet federal sufficiency standard. Held, no error.

RELATED CASES: Broome, App., 687 N.E.2d 590, *overruled* in part by Voss v. State, 856 N.E.2d 1211 (Ind. 2006) (presiding judge against whom change of judge motion is directed may, but need not, recuse himself when hearing on motion is necessary).

TITLE: Green v. State
INDEX NO.: B.7.b.
CITE: (7/30/90), Ind. App., 557 N.E.2d 1032
SUBJECT: Change of judge -- sufficiency of allegations
HOLDING: D intended to call judge as witness in post-conviction hearing & therefore believed judge would be unable to preside over hearing in unbiased manner. Verified motion alleged this, thereby complying with rule governing change of judge. Any error in denying D's motion was harmless because Ct. Commissioner conducted hearing. Held, denial of post- conviction relief affirmed.

RELATED CASES: Remsen, 495 N.E.2d 184 (grounds in support of motion merely recited abstract, nonfactual allegations & were consequently insufficient); Hobbs, App., 451 N.E.2d 356 (motion merely stating that D believes judge is biased & prejudiced against him fails to comply with statutory requirements).

TITLE: Hicks v. State
INDEX NO.: B.7.b.
CITE: (7/30/87), Ind., 510 N.E.2d 676
SUBJECT: Change of judge - on retrial after appeal
HOLDING: When cause is remanded for new trial, application for change of judge must be filed not later than ten days after party has knowledge that cause is ready to be set for trial. Denial of change of judge will be reversed only on clear abuse of discretion; fact that D has appeared before certain judge in prior actions does not establish existence of prejudice or bias. Held, conviction affirmed; DeBruler, J., concurring in part & dissenting on other grounds.

RELATED CASES: McKinney, App., 873 N.E.2d 630 (D's motion was untimely filed; fact that D had to be retried has no effect on operation of "subsequently discovered grounds exception" of CR 12(D)); Flowers, 738 N.E.2d 1051 (Tr. Ct. Did not err in denying change of judge or failing to recuse himself on retrial although he required D to wear stun belt; D's motion for change of judge was late & did not set forth good cause for delay); Abdul-Musawwir, App., 483 N.E.2d 464 (waiver may be found with either untimely filing or inadequate basis in allegations for change of judge).

TITLE: Johnson v. State
INDEX NO.: B.7.b.
CITE: (1/11/85), Ind., 472 N.E.2d 892
SUBJECT: Change of judge - for sentencing
HOLDING: Tr. Ct. did not err in denying Ds' motion for change of judge for sentencing. There is no right to change of judge for sentencing phase of proceedings. CR 12. See Yager, 437 N.E.2d 454. Here, Ds contend comments of trial judge (set forth in opinion) to jurors after verdict was returned showed prejudice requiring removal of judge for sentencing. Ds received lengthy sentences, but trial judge fully stated proper statutory reasons. Ct. finds Ds fail to demonstrate abuse of discretion. Held, no error.

RELATED CASES: Noble, 725 N.E.2d 842 (although judge's statement after verdict might be seen as that of judge preparing himself for lengthy sentence, remark might also be seen as declaring truth that Ds who are convicted typically wish they had not committed their crimes; held, denial of change of judge not clearly erroneous).

TITLE: Mahrdt v. State
INDEX NO.: B.7.b.
CITE: (1st Dist., 02-14-94), 629 N.E.2d 244
SUBJECT: Change of Judge (COJ) not required
HOLDING: Because judge's ex parte communication with sheriff's office was administrative in nature, it did not show sufficient bias, etc., to require recusal & Tr. Ct. did not abuse discretion in denying D's motion for COJ. In context of discovery problems arising from State's failure to provide D access to breath test machine (see, card at M.6.b), judge called sheriff's office to reschedule inspection, & said he did not know who he talked with. Ct. found judge did not violate Judicial Canons 2 & 3. Canons allow for ex parte communications for scheduling & administrative purposes, or emergencies not dealing with substantive issues, if judge has reasonable belief no party will gain tactical advantage from actions & promptly notifies parties of action & gives opportunity to respond. Ct. found communication was not one between judge & State's primary witness about key physical evidence, but instead was merely administrative, & did not create appearance of impropriety. Ct. concluded D did not show prejudice from Tr. Ct.'s communications (partially because appellate Ct. reversed Tr. Ct.'s ruling on suppression of evidence), & there was no abuse of discretion in denying motion for COJ.

RELATED CASES: Inman, 4 N.E.3d 190 (Ind. 2014) (State's ex parte submission of exhibit log was only of administrative value to Tr. Ct. and thus not require change of judge).

TITLE: Matter of T.H. v. State
INDEX NO.: B.7.b.
CITE: (1st Dist., 6-11-04), Ind. App., 810 N.E.2d 348
SUBJECT: Change of judge - juvenile delinquency proceedings
HOLDING: In juvenile delinquency proceeding, Tr. Ct. correctly denied D's motion for change of judge, because D failed to file an affidavit showing cause for her motion. Ind. Code 31-32-1-1 provides that a change of judge may be granted in delinquency proceeding only for good cause shown by affidavit filed at least twenty-four hours before fact-finding hearing. T.R. 76, which does not require filing affidavit showing cause for change, is inapplicable to juvenile delinquency proceedings. Held, judgment affirmed.

TITLE: Matthews v. State
INDEX NO.: B.7.b.
CITE: (12/12/2016), 64 N.E.3d 1250 (Ind. Ct. App. 2016)
SUBJECT: Code of Judicial Conduct does not create enforceable rights for litigants
HOLDING: Where the defendant's CR 12 motion for change of judge was not properly filed, the Code of Judicial Conduct does not create enforceable rights in litigants and cannot be used to secure a change of judge. The Code does fix a judge's obligations, but these obligations are enforced first by the judge herself, or by a disciplinary action of the Indiana Supreme Court. Allowing the defendant to obtain a change of judge via the Code would effectively nullify CR 12 by creating a way around it, and would also allow litigants to usurp the supervisory authority of the supreme court.

TITLE: Miller v. State
INDEX NO.: B.7.b.
CITE: (7/13/2018), 106 N.E.3d 1067 (Ind. Ct. App. 2018)
SUBJECT: Denial of motion for change of judge - no abuse of discretion
HOLDING: Trial court did not abuse its discretion in denying D's motion for change of judge in the remand proceedings ordered by the Indiana Supreme Court. Because D thought Jeremy Kohn and Kohn's girlfriend were laughing at him, he slashed Kohn's throat with a knife. He was charged with, inter alia, attempted murder. He was tried to the bench; the judge found D guilty (but mentally ill) of attempted murder, but in doing so, it applied the wrong mens rea. Thus, the Supreme Court remanded the case for the trial court to reconsider the evidence in light of the proper mens rea. Before the Indiana Supreme Court's opinion was certified, the trial court prematurely entered its findings. See Ind. Appellate Rule 65(E). Pursuant to D's petition for writ in aid of appellate jurisdiction, the Supreme Court vacated the premature findings. Once the case was remanded, D filed a motion for change of judge. The trial judge denied the motion, and on the same day it issued revised findings, insisting that it did, in fact, apply the proper mens rea in the findings it issued after its verdict, and again concluded that the State proved D had the requisite specific intent for attempted murder. Because D did not timely file his motion for change of judge, the Court reviewed the trial court's ruling for an abuse of discretion instead of for clear error. See Ind. Criminal Rule 12(D)(2). Applying that standard, the Court found that the fact the trial court issued its findings prematurely did not display bias. It also found that the tone of the trial court's findings – which D characterized as "staunchly [defensive]" – did not display bias. Finally, a person with knowledge of the circumstances of the case would not have a reasonable basis for doubting the trial judge's impartiality. See Ind. Code Judicial Conduct, Rule 2.11(A) and paragraphs 1 and 2 of Commentary. Held, judgment affirmed.

TITLE: Newville v. State
INDEX NO.: B.7.b.
CITE: (2/13/91), Ind. App., 566 N.E.2d 567
SUBJECT: Change of judge -- comments relating to D
HOLDING: Judge was not biased against D on ground that court's statement that "you never have had anything for a defense" indicated that judge predetermined D's guilt; statement made prior to second trial was referring to D's lack of defense in first trial which ended in mistrial, so that court was not stating opinion as to whether D was guilty of charges in second trial. Held, conviction affirmed.

RELATED CASES: Ware, App., 560 N.E.2d 536 (trial judge's allegedly sarcastic comments during bench trial, including "I want to see how creative this is," did not demonstrate that judge improperly made premature resolution of credibility of D's defense & his guilt before evidence was complete, nor did judge abandon his "neutrality role" in questioning defense witnesses; judge was attempting to determine how D's automobile repossession activities were relevant to question of his guilt for operating motor vehicle while privileges were forfeited for life & judge's confusion, & perhaps skepticism, were more properly considered natural reactions to defense).

TITLE: Rankin v. State
INDEX NO.: B.7.b.
CITE: (11/27/90), Ind., 563 N.E.2d 533
SUBJECT: Change of judge -- previous service as prosecutor
HOLDING: Tr. Ct. did not err in denying motion for change of judge during habitual offender proceedings, notwithstanding fact that judge had signed information charging earlier felony when judge served as prosecuting attorney; neither party intended to call judge as witness regarding identity or factual proof of convictions. Held, conviction affirmed.

RELATED CASES: Jackson, 33 N.E.3d 1173 (Ind. Ct. App. 2015) *sum. aff'd*, 50 N.E.3d 767 (Ind. 2016) (no need to change judge who had served as prosecutor in prior case State used to support habitual offender charge because D did not contest the existence and validity of the predicate conviction); Patterson, 923 N.E.2d 90 (Ind. Ct. App. 2010) (where judge was prosecutor who signed the information charging D and participated in the probable cause hearing, judge should have disqualified himself under Judicial Canon 2.11(A) and trial counsel's failure to move for change of judge constituted IAC); Dishman, 525 N.E.2d 284 (D was not entitled to change of judge in robbery prosecution, even though presiding judge had been prosecuting attorney immediately before assuming bench and had prosecuted D in two cases which formed basis for habitual offender charge; once D's certified convictions were presented to jury, determination of status as habitual criminal was virtually foregone conclusion, & D had stated, when he withdrew prior request for change of judge, that he knew of no bias or prejudice on part of presiding judge).

TITLE: Rippo v. Baker
INDEX NO.: B.7.b.
CITE: (3/6/2017), 137 S. Ct. 905 (S. Ct. 2017)
SUBJECT: "Actual bias" not required to disqualify a judge
HOLDING: Due process requires recusal of a judge based on bias, even if there is no evidence of "actual bias," when, considering all the circumstances under an objective standard, "the risk of bias is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975).

During trial, D received information that the federal government was investigating the presiding judge for bribery. D surmised that the local district attorney, who was prosecuting him, was helping the government investigate the judge. D sought to disqualify the judge, on 14th Amendment due process grounds, contending the judge could not impartially adjudicate a case in which one of the parties was investigating him. The judge denied the request, and D was convicted of capital murder. D later filed a post-conviction action, where he established that the local district attorney had, in fact, helped the government investigate the judge during D's trial. The Nevada Supreme Court ruled D was not entitled to discovery or an evidentiary hearing in his post-conviction matter because his allegations "did not support the assertion that the trial judge was actually biased in this case."

The Nevada Supreme Court applied the wrong standard. Due process may sometimes require a judge to recuse herself even if she has no actual bias. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). Here, on remand, the Nevada courts shall determine if the risk of bias by the judge was too high to be constitutionally tolerable. Held, cert. granted, opinion at 368 P.3d 729 reversed, and remanded for further proceedings. Per Curiam.

RELATED CASES: Cheek, 79 N.E.3d 388 (Ind. Ct. App. 2017) (in companion appeal to Abney v. State, Court held that where Howard County Prosecutor McMann was on Judge William Menges' campaign committee, recusal of Judge Menges was not necessary because McMann he had yet to do anything as a committee member), Abney, 79 N.E.3d 932 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take action on behalf of judge and his role on committee was not significant).

TITLE: Singleton v. State
INDEX NO.: B.7.b.
CITE: (7/21/77), Ind. App., 364 N.E.2d 1041
SUBJECT: Change of judge -- waiver
HOLDING: Disqualification of trial judge must be seasonably raised. If complaining party sits idly by & awaits outcome of proceedings after receiving knowledge of trial judge's disqualification, or after circumstances or law creates presumption of such knowledge, he will be held to have waived disqualification & consented to trial by judge presiding. Here, neither D nor his attorney learned of disqualification of judge until after trial & timely preserved the issue in motion to correct errors. Held, conviction reversed & remanded.

TITLE: Smith v. State
INDEX NO.: B.7.b.
CITE: (5/14/85), Ind., 477 N.E.2d 857
SUBJECT: Change of judge -- belated motion
HOLDING: Application for change of judge must be filed within ten days after plea of not guilty or within five days after setting case for trial. Case set for trial on August 23, 1982 with trial scheduled to commence on October 19, 1982; however, D did not move for change of judge until sentencing hearing held on November 19, 1982. Conviction affirmed.

RELATED CASES: Abdul-Musawwir, App., 483 N.E.2d 464 (record showed new counsel was appointed three days before trial, & change of judge motion was filed immediately; nevertheless, affidavit apparently failed to allege necessary information mandated by CR 12).

TITLE: State ex rel. Gaston v. Gibson Circuit Ct.
INDEX NO.: B.7.b.
CITE: (5/11/84), Ind., 462 N.E.2d 1049
SUBJECT: Change of judge (COJ) - CR 12 controls
HOLDING: Writ of mandate. Opinion ratifies denial of request that Gibson County judge grant D's motion for COJ. Here, D contended conflict between CR 12 & Ind. Code 35-36-6-1(c) [added 1983] be resolved in favor of mandatory change of judge. Ind. S. Ct. holds that although right to change of judge is substantive (conferred only by legislature), method & time of asserting right is procedural (controlled by Ct. rule). Thus, CR 12 controls. DISSENT by Hunter contends majority "creates a serious constitutional anomaly" by giving more protection in civil than in criminal cases.

RELATED CASES: Crawford, App., 634 N.E.2d 86 (D did not adequately follow CR 12 to obtain change of judge, & even if he had, there were insufficient grounds to require COJ); Wilcoxen, 619 N.E.2d 574 (D was not entitled to COJ pursuant to Ind. Code 35-36-5-1, because CR 12 requires factual basis for such COJ, & procedural rules take precedence over procedural statutes. D did not allege any bias or prejudice of trial judge but relied on statute & argued that failure to enforce statute denied him equal protection because State can choose judge by choice of filing case. Ct. saw no reason to deviate from Gaston holding); State ex rel. Stidham v. Clark County Ct., 523 N.E.2d 429 (Ind. Code 35-35-3-3(d), requiring change of judge where guilty plea to misdemeanor charge is rejected, conflicts with CR 12 & CR 12 controls); State ex rel. Jeffers v. Lawrence Circuit Ct., 467 N.E.2d 741 (Ind. Code 35-36-5-1 violates separation of powers; CR 12 controls change of judge; Hunter DISSENTS).

TITLE: State v. Hahn
INDEX NO.: B.7.b.
CITE: (2nd Dist., 1-25-96), Ind. App., 660 N.E.2d 606
SUBJECT: Change of judge required - actual prejudice
HOLDING: Judge Pro Tempore erroneously denied State's motion for change of judge. In its verified application for change of judge, State asserted that current prosecutor & his staff had prosecuted Judge Pro Tempore for class D felony theft & perjury & had obtained convictions for those offenses as class A misdemeanors. Ct. App. reversed convictions, & S. Ct. denied transfer approximately three weeks before Judge Pro Tempore's appointment. State also noted that attendant to criminal prosecution, Judge's license to practice law had been suspended for 20 months. Ct. held that facts cited, taken as true, supported rational inference of bias or prejudice pursuant to Crim. R. 12(B). Further, State's application complied with required procedures for subsequently discovered grounds for change of judge under Crim.R. 12(D)(2). Accordingly, Judge Pro Tempore should have granted State's motion for change of judge. Held, reversed & remanded.

TITLE: Sturgeon v. State
INDEX NO.: B.7.b.
CITE: (11-18-99), Ind., 719 N.E.2d 1173
SUBJECT: Change of judge - standard of review
HOLDING: Appropriate standard of review of trial judge's decision to grant or deny motion for change of judge under Indiana Criminal Rule 12 is whether judge's decision was clearly erroneous. Reversal will require showing that which leaves Ct. with definite & firm conviction that mistake has been made. Spranger, 650 N.E.2d 1117. In this case, fact that judge presided over Co- D's sentencing hearing & may have heard evidence involving D does not, in itself, raise inference of bias or prejudice. Thus, trial judge's decision to deny D's motion for change of judge was not clearly erroneous. Held, judgment affirmed.

RELATED CASES: Azania, 778 N.E.2d 1253 (same standard of review applies to post-conviction Ct. motions under Rule 1(4)(b); both Rule 12 & this rule require change of judge if affidavits support rational inference of bias or prejudice).

TITLE: Taylor v. State
INDEX NO.: B.7.b.
CITE: (3/6/92), Ind., 587 N.E.2d 1293
SUBJECT: Change of judge -- adverse ruling
HOLDING: Adverse rulings & findings by trial judge are not sufficient reasons to believe that judge has personal bias or prejudice per se. Held, conviction affirmed.

RELATED CASES: Radcliff, 579 N.E.2d 71 (fact that Tr. Ct. found D in contempt due to misbehavior in courtroom was insufficient reason to find bias & prejudice for removal of trial judge; in spite of D's insults & obscene references to judge, judge maintained quiet decorum & was justified in finding D in contempt); Stafford, 499 N.E.2d 236 (adverse ruling on motion for continuance, which motion was based on violations of discovery order, did not show bias or prejudice, even where local rule appeared to require continuance).

TITLE: Terry v. State
INDEX NO.: B.7.b.
CITE: (1st Dist., 11-05-92), Ind. App., 602 N.E.2d 535
SUBJECT: Insufficient showing of bias of judge
HOLDING: Although D filed multi-million dollar lawsuit against judge, where judge acknowledged lawsuit & that it arose from conduct involving case pending before him, but stated that he bore no bias or prejudice toward D, it was not error for judge to refuse to recuse himself from case. D's dissatisfaction with special judge's performance led him to call for grand jury investigation & file lawsuit. D's main objection to judge's performance, "chronicle of delayed rulings," in case, had been previously dismissed by Ind. S. Ct., & Ct. found record did not reveal any evidence of actual personal bias or prejudice on part of judge. Despite Ind. Judicial Canon 3(C), Ct. declined adoption of per se rule requiring judges to recuse themselves whenever they are Ds in lawsuit filed by D. To adopt such rule would allow litigants to eliminate any judge found unsatisfactory by merely filing lawsuit against him or her. Because Ct. found no evidence of actual bias or prejudice on part of judge, it was not error for him to decline to recuse himself.

NOTE: D in this case was himself former judge who had extremely complex & negative dealings with local officials. Judge was appointed as special judge by Ind. S. Ct., & D was very litigious. How much impact these facts had on decision are unknown.

RELATED CASES: Smith, App., 678 N.E.2d 1152 (act of informing defense counsel that plea agreement would result in shorter term of imprisonment for D indicated neither actual bias nor appearance of partiality; no error in denying motion for recusal).

TITLE: Thakkar v. State
INDEX NO.: B.7.b.
CITE: (2nd Dist., 12-20-94), Ind. App., 644 N.E.2d 609
SUBJECT: Change of judge - re-sentencing hearing
HOLDING: Tr. Ct. erred in denying D's motion for change of judge prior to re-sentencing hearing. D received maximum sentences on convictions of Performance of Illegal Abortion & Battery as class C felonies. In sworn statement, D stated that trial judge attended oral argument on first appeal, following which he publicly commented that D had received fair trial, that evidence was devastating, that no one claimed during oral argument that D was not guilty, & that it was common for lawyers to blame misfortunes of their clients on trial judge. Ct. found remarks carried unmistakable coloring of hostility toward D's exercise of his right to appeal, straying far afield from objectivity & impartiality which Tr. Cts'. are obligated to display. See Ind. Code of Judicial Conduct, Canons 2 & 3. Appearance of bias & partiality requires recusal not only prior to conviction, but also for sentencing or appellate review. Held, reversed & remanded.

TITLE: Underhill v. State
INDEX NO.: B.7.b.
CITE: (12/3/81), Ind., 428 N.E.2d 759
SUBJECT: Change of judge -- verification of motion
HOLDING: Both of D's motions for change of judge stood on independent bases & therefore rose or fell on their individual form & merits. Thus, fact that original motion for change of judge was made under oath did not supply verification missing from second motion for change of judge. Tr. Ct. did not err in failing to hold hearing on D's motion. Held, conviction affirmed.

TITLE: Voss v. State

INDEX NO.: B.7.b.

CITE: (11-22-06), Ind., 856 N.E.2d 1211

SUBJECT: Change of judge- opposition to death penalty does not establish bias; sitting judge must determine own bias

HOLDING: State's CR 12 (b) change of judge motion & affidavit alleging the judge was biased against the State due to the judge's position on the death penalty did not support a finding of a rational inference of bias in this death penalty case. State cited to Tr. Ct.'s rulings in three cases holding that the death penalty is unconstitutional. The three rulings were reversed by the Indiana S. Ct. Because each of the judge's opinions was supported by reasonable legal argument, they did not show bias or prejudice against the State. The State also cited to the judge's comments in a newspaper about the problems associated with the death penalty. Because there was nothing indicating in the judge's comment that he could not set aside his personal opinion & follow the law, the comment did not create an inference of bias. Finally, the fact that the judge had represented three death penalty Ds prior to becoming a judge did not show an inference of bias. It was improper for the Tr. Ct. to appoint another judge to rule on the Criminal rule 12(B) motion or his appearance of impartiality under the Judicial Canons. Under CR 12(B), the required determination- whether the asserted facts, treated as true, support a rational inference of bias or prejudice- is the type of evaluation that judges do frequently in the ordinary course of their work. Sound judicial policy does not require this decision to be made by a person other than the sitting judge. Further, the issue under the Judicial Canons may provide an independent basis requiring disqualification even if the analysis required for determination under CR 12(B) would not require change of judge. In contrast to the process for ruling upon a CR 12(B) motion for change of judge, Canon 3 requires a judge to consider a broad array of circumstances, not merely assertions of historical fact set forth in an affidavit. This determination must be made by the sitting judge. Held, judgment reversed; Indiana S. Ct. expressly disapproved of language in Broome v. State, 687 N.E.2d 590 (Ind. Ct. App. 1997), that a presiding judge may temporarily refer the case to another judge to determine the merits of the CR 12(b) motion.

TITLE: Whitehead v. Madison County Circuit Court
INDEX NO.: B.7.b.
CITE: (12/29/93), Ind., 626 N.E.2d 803
SUBJECT: Change of judge – post-conviction proceedings in general
HOLDING: Provision for change of judge in post-conviction cases are neither "automatic" as might be said under Indiana Trial Rule 76(B) nor "discretionary" as under Indiana Criminal Rule 13. Instead, rule requires judge to examine affidavit, treat historical facts recited in affidavit as true, & determine whether these facts support rational inference of bias or prejudice. Held, denial of post-conviction relief affirmed.

RELATED CASES: State ex rel. Rondon, 569 N.E.2d 635 (previously, rule had been viewed as providing automatic change of judge); Jackson, App., 643 N.E.2d 905 (D asserted belief that post- conviction court judge was biased against him because judge had previously been chief probation officer who signed petition to revoke D's probation; no error in denying motion for change of judge where juvenile probation revocation was unrelated to present conviction).

TITLE: Whitehead v. Madison County Circuit Court
INDEX NO.: B.7.b.
CITE: (12/29/93), Ind., 626 N.E.2d 802
SUBJECT: Change of judge -- post-conviction proceedings; look to federal case law
HOLDING: Structure & substance of Indiana Post-Conviction Rule 1 are similar to methods used in federal courts; counsel may find federal case law helpful in approaching requests for change of judge under this rule.

RELATED CASES: Spangler, 759 F.Supp. 1327 (judge should recuse if fully informed objective observer would entertain significant doubt that justice would be done should judge continue to serve); Holland, 655 F.2d 44 (remarks at trial may show personal prejudice); J.F. Edwards Construction, 542 F.2d 1318 (only personal bias, not general or judicial bias is disqualifying); In re Int'l Business Machs., 618 F.2d 923 (earlier adverse rulings do not require disqualification).

TITLE: Williams v. State
INDEX NO.: B.7.b.
CITE: (10/13/2017), 86 N.E.3d 185 (Ind. Ct. App. 2017)
SUBJECT: Rejecting plea did not demonstrate trial court bias
HOLDING: Trial court did not commit clear error in denying Defendant's motion for change of judge; the motion was untimely, and the trial court's rejection of the parties' plea agreement did not demonstrate bias.

Defendant shot two people; one died. The State charged him with, inter alia, murder, attempted murder, and carjacking. In February of 2015, the parties agreed Defendant would plead guilty to murder and attempted murder; he would concurrently serve sentences of 55 and 30 years. After hearing victim impact testimony, the trial court rejected the agreement, finding Defendant should serve the sentences consecutively. The matter proceeded to trial with the same judge, but Defendant did not file a motion for change of judge. The jury deadlocked; the judge declared a mistrial. The new trial was scheduled for October 31, 2016, with the same judge set to preside. Defendant finally moved for a new judge in early September of 2016, just six weeks before the new trial and nearly 18 months after the trial court rejected the plea.

Defendant's motion to change judge was untimely under Criminal Rule 12(D)(1) because he did not file it within 30 days of the initial hearing. Further, Defendant does not allege "subsequently discovered grounds" that would have extended the deadline to file the motion.

Also the trial court's rejection of the plea does not demonstrate bias. Ellis v. State, 744 N.E.2d 425 (Ind. 2001) is instructive, even though it involved a claim that a plea was involuntary, not that the judge was biased. In Ellis, as here, after hearing victim impact testimony, the trial court rejected a plea that would have allowed Ellis to serve four rape sentences concurrently. Ellis held that a trial court may guide the parties as to what sentence it might find acceptable as long as its guidance does not carry an implied or express threat that failure to plead would result in an unfair trial or unduly severe sentence. Id. at 430. The trial court here did not cross that line, so it's rejection of the plea agreement did not show bias. Held, judgment affirmed.

TITLE: Wilson v. State
INDEX NO.: B.7.b.
CITE: (4/7/88), Ind. App., 521 N.E.2d 363
SUBJECT: Change of judge -- cannot rescind recusal
HOLDING: Once judge disqualifies himself from case, he cannot thereafter reinstate himself without revoking or setting aside his prior order of disqualification, & cannot attempt to rescind that disqualification & reinstate himself unless it affirmatively appears that valid grounds for such reinstatement exist. Held, conviction affirmed.

TITLE: Wilson v. State
INDEX NO.: B.7.b.
CITE: (4th Dist. 12/26/84), Ind. App., 472 N.E.2d 932
SUBJECT: Change of judge (COJ) - CR 12 mandates hearing
HOLDING: Tr. Ct. erred in denying D's motions for COJ without a hearing. Here, D moved for change after successful appeal. (Conviction reversed for denial of right to jury trial. D alleged bias of judge.) After judge refused to grant prosecutor's motion to dismiss DWI charge & set cause for trial, D again moved for COJ. Ct. finds language of CR 12 mandates hearing on COJ or COV motions. Ct. distinguishes cases decided under previous CR 12, which provided for "hearing or other opportunity" to substantiate motion. See Otte v. Tessman, 426 N.E.2d 660 (TR 56 language mandates hearing on summary judgment). Ct. distinguishes Linder 456 N.E.2d 400: D merely argued Hanrahan, 241 N.E.2d 143 was applicable to COV motion; D did not argue CR 12 on appeal. Held, reversed & remanded.

RELATED CASES: Hickman, App., 537 N.E.2d 64 (hearing was not required where D's motion simply alleged that he & judge descended in part from rival Indian tribes); Stovall, 477 N.E.2d 252 (Crim L 641.9; activities of Tr. Ct. constituted hearing as term is defined in Hunt v. Shettle, App., 452 N.E.2d 1045, here, each side offered argument & examined judge re statement of lack of relationship with victim's family); Abdul-Musawwir, App., 483 N.E.2d 464 (Judges 51(2,3); where D's motion was untimely & did not set forth necessary information mandated by CR 12, there is no error in denying it without a hearing).

B. PRETRIAL PROCEEDINGS

B.7. Judge

B.7.c. Special judge (TR 79 - formerly CR 13)

TITLE: Cotton v. State
INDEX NO.: B.7.c.
CITE: (12-14-95), Ind., 658 N.E.2d 898
SUBJECT: Nunc pro tunc order reflected appointment of special judge
HOLDING: Nunc pro tunc entries rested upon sufficient written memorials & served to show that special judge qualified & assumed jurisdiction before sitting in judgment. Ct. App. dismissed D's appeal after concluding that Record of Proceedings failed to adequately reflect special judge's qualification & assumption of jurisdiction. In response to dismissal, both presiding judge & special judge entered nunc pro tunc orders reflecting appointment of special judge. Ct. App. again dismissed appeal, concluding that nunc pro tunc entries were insufficient as basis for jurisdiction of special judge. To provide sufficient basis for nunc pro tunc entry, supporting written material: 1) must be found in records of case; 2) must be required by law to be kept; 3) must show action taken or orders or rulings made by Ct.; & 4) must exist in records of Ct. contemporaneous with or preceding date of action described. Stowers v. State, (1977), Ind., 363 N.E.2d 978. Here, Ct. held that chronological case summaries, which were not put in Record of Judgments & Orders, provided sufficient basis for curative nunc pro tunc entry because they provided dates & details of special judge's qualification & assumption of jurisdiction. Held, transfer granted, appeal reinstated & remanded to Ct. App. to be resolved on merits.

TITLE: Johnson v. State
INDEX NO.: B.7.c.
CITE: (4th Dist., 08-11-05), Ind. App., 832 N.E.2d 985
SUBJECT: PCR - special judge properly appointed under CR 13
HOLDING: Manner in which special judge was appointed for post-conviction relief proceeding was not erroneous. The selection of a special judge in criminal cases is governed by Indiana Criminal Rule 13. Ct. looked to C.R. 13(c)), which provides for counties with fewer than four judges & instructs to follow the alternate assignment list required under the local rules by C.R. 2.2. The county's local rule included a rotating system among the three Ct's. All the Ct.'s judges had excluded themselves at some point, which normally would have meant the case would be transferred to another county. However, in the interim of all the disqualifications, a new judge was elected to the originating Ct. & the case was reassigned to her prior to being moved out of county. Based on the circumstances in the case, Ct. did not construe the local rule as requiring assignment to the other county's judge if a regular judge is available in the originating county who has not presided over the case.

Ct. also found that Tr. Ct. had jurisdiction to assign a new judge despite a pending appeal on Tr. Ct.'s denial of Petitioner's Motion for Change of Judge. As a general rule, once an appeal is perfected the Tr. Ct. loses subject matter jurisdiction. Ind. App. Rule 3(A). Tr. Ct. reassigned case to different judge three times while appeal was pending. However, judge, who eventually presided over PCR, was appointed as special judge after appeal opinion had been certified & Ct. found no problem with this appointment. Ct. also found several issues raised as to Tr. Ct. refusing to issue subpoenas, Petitioner's presentation of newly discovered evidence, & of ineffectiveness of trial & appellate counsel as either waived for failing to present cognizant argument or not being raised in PCR Ct. or as being properly decided at trial & not prejudicial. Held, judgment affirmed.

TITLE: Skipper v. State
INDEX NO.: B.7.c.
CITE: (7/14/88), Ind., 525 N.E.2d 334
SUBJECT: Special judge -- failure to follow procedures & waiver
HOLDING: Improper appointment of special judge, in that no panel was submitted to parties for striking, was not reversible error where D's only objection was that he wished not be tried before regularly presiding judge, & there was no evidence of any prejudice on part of special judge. This case involved application of CR 13, which formerly governed process of special judge selection in criminal proceedings (now governed by TR 79). Held, cause remanded to Tr. Ct. with instructions to expunge conviction for robbery; Tr. Ct. affirmed in all other things.

RELATED CASES: Lucas, 552 N.E.2d 335 (improper for second panel of judges submitted for striking to contain judge that was struck from first panel; failure to object to irregularity waived error & error would not be considered fundamental absent showing of actual bias or prejudice on part of chosen judge).

TITLE: State ex rel. Wright v. Morgan County Ct.
INDEX NO.: B.7.c.
CITE: (7/22/83), Ind., 451 N.E.2d 316
SUBJECT: Prosecutor elected judge - pending cases
HOLDING: Before the Ct. on petition for writ of mandamus to require application of CR13. Upon county prosecutor's election to superior Ct., lame duck superior Ct. judge entered order transferring to circuit Ct. relator's & 100 other causes commenced by prosecutor. Transfer was made pursuant to Ind. Code 34-2-11-2. Order stated transferred causes required an expeditious disposition which would be thwarted if cases were not transferred, a ground for transfer under statute. Relator contends CR 13 should govern, *citing* Shaw, App., 381 N.E.2d 883 (in case of conflict between procedure provided for by state & criminal trial rules, latter govern. Ct. distinguishes Shaw. Statute in this instance does not deal with procedural matter covered by Rule. Proceeding under either CR 13 or statute was proper in this instance. Held, writ denied.

TITLE: Taylor v. State
INDEX NO.: B.7.c.
CITE: (5/20/87), Ind., 507 N.E.2d 978
SUBJECT: Special judge - time for qualifying
HOLDING: Where special judge did not qualify within time period allotted in TR 79(5), denial of D's motion for revocation of special judge was error. Here, D filed timely petition for change of judge in PCR proceeding. Motion was granted as matter of right & Ct. named panel of 3 judges. D struck 1 judge on 1/24/84. On 1/27/84, prosecutor struck 1 judge. Remaining judge appeared & qualified on 2/21/84. TR 79(5) provides that if special judge does not appear & qualify within 10 days after appointment, such failure shall revoke appointment & selection of special judge shall begin again. Held, denial of PCR held void for want of jurisdiction; cause remanded for new hearing on merits.

NOTE: On 5/19/87, Ind. S. Ct. amended TR 79(5) to allow special judges 20 days to qualify.

TITLE: Williams v. State
INDEX NO.: B.7.c.
CITE: (08-24-93), Ind., 619 N.E.2d 569
SUBJECT: Regular, not special, judge to preside after remand
HOLDING: Where special judge presided at PCR hearing, & case was remanded for new death penalty hearing after reversal of denial of PCR, it was proper for regular judge who presided at original trial, & not special judge, to preside at subsequent proceedings. T.R. 79(15) provides for continuing jurisdiction of special judge in event of subsequent PCR proceedings but is not intended to prolong jurisdiction of special judge appointed for PCR proceeding. Authority of special judge terminates with conclusion of PCR proceeding.

B. PRETRIAL PROCEEDINGS

B.7. Judge

B.7.d. Commissioner/pro-tem (CR 14)

TITLE: Billingsley v. State
INDEX NO.: B.7.d.
CITE: (2nd Dist., 08-29-94), Ind. App., 638 N.E.2d 1340
SUBJECT: Entry of judgment by Judge Pro Tem proper
HOLDING: Where D's trial began on date Judge Pro Tem was appointed, it was not necessary that Judge Pro Tem be reappointed when trial was not completed until next day & sentencing was not conducted by same Judge Pro Tem until 30 days later. Ct. disagreed with decision in Boushehry v. State, Ind. App. 622 N.E.2d 212, finding requirement of subsequent appointment inconsistent with judicial economy. Ct. discussed several practical difficulties that would arise under reasoning of Boushehry, & concluded that although general authority of Judge Pro Tem ends at expiration of term of appointment, he or she has continuing special jurisdiction to: 1) rule on any matter taken under advisement during term; 2) conclude & rule on any trial or hearing commenced during term; 3) hear & determine all motions relating to evidence or conduct of trial or hearing commenced during term; & 4) conduct sentencing hearing & impose sentence in matter tried during term. Special authority comes from appointment & qualification of Judge Pro Tem, & no further order or appointment is necessary. Ct. also found Judge Pro Tem had authority & responsibility to so act under Trial Rule 63(A). Therefore, Judge Pro Tem, who was properly appointed, had authority to preside over all of D's trial & sentencing. Held, conviction affirmed.

RELATED CASES: Woods v. State, Ind. App., 640 N.E.2d 1089 (Ct. noted sua sponte that valid appointment of Judge Pro Tem for trial date conferred authority upon him to enter judgment & preside over sentencing phase of proceedings).

TITLE: Eakins v. State
INDEX NO.: B.7.d.
CITE: (1st Dist. 9/24/85), Ind. App., 482 N.E.2d 1157
SUBJECT: Referee - no power to enter judgment
HOLDING: Because referee has no judicial power to enter judgment, referee's decision is nullity from which no appeal can be taken. See Ingmire v. Butts, App. 312 N.E.2d 885. Here, D appealed conviction for telephone harassment & battery, entered by "referee judge." Parties acquiesced throughout trial, assuming judicial role. Ct. reaches issue sua sponte (continuing duty to take notice of lack of appellate jurisdiction). Referee can act as instrumentality to inform & assist Ct. by conducting hearings & reporting facts/conclusions to Tr. Ct. See TR 53(C); cf. Ind. Code 33-4-1-82.2 (powers of Vanderburgh Circuit Ct. master commissioner). Held, remanded with instructions to enter final judgment as provided by TR 53.

TITLE: Floyd et al. v. State
INDEX NO.: B.7.d.
CITE: (Ind., 12-30-94), 650 N.E.2d 28
SUBJECT: Authority of Judge Pro Tempore to enter final order
HOLDING: Any challenge to judge pro tempore's authority to enter final order must be raised at time of trial, or issue is waived both on appeal & on collateral attack in post-conviction relief proceeding. Where party fails to object, reviewing Ct's. should deny relief on grounds of waiver. It is improper to dismiss appeal or PC petition based on lack of jurisdiction. Once valid appointment is made & judge pro tempore begins hearing evidence, he or she has jurisdiction to hear case to completion, even if term of appointment has expired. Even where objection to authority to enter final order has been properly preserved, judge pro tempore may enter sentence after term of appointment has expired, State ex rel. Hodshire v. Bingham, 33 N.E.2d 771; T.R. 63(A). Ct. also outlined proper procedure to be employed by reviewing Ct. when challenge to authority of Ct. officer to enter final appealable order has been properly preserved for appeal. Where record does not disclose whether valid appointment was made, proper appointment papers should be certified in accordance with Appellate Rule 7.2(C). Dismissal of appeal is proper only where issue is preserved & Ct. officer did not have authority to enter final appealable order. Ct. noted that it will strongly disapprove of anything but strict compliance with rules for appointment of judges pro tempore & special judges. Held, transfer granted, Dickson, J., concurring & dissenting; DeBruler, J., dissenting.

RELATED CASES: Hill, App., 646 N.E.2d 374 (judge presided over sentencing hearing over D's objection that judge had previously disqualified himself; although it may have been error for judge to enter judgment subsequent to his prior disqualification, D's agreement with State regarding special judge waived any objection to defective appointment).

TITLE: Long v. State
INDEX NO.: B.7.d.
CITE: (01-25-12), 962 N.E.2d 671 (Ind. Ct. App. 2012)
SUBJECT: Master Commissioner - no authority to enter sentencing order after guilty plea
HOLDING: Tr. Ct. did not err by rejecting the sentence imposed by the master commissioner who presided at D's guilty plea hearing. A Marion County master commissioner has the powers and duties prescribed for a magistrate. Magistrates are generally precluded from entering a final appealable order. However, if a magistrate presides at a criminal trial, the magistrate may do the following: (1) Enter a final order. (2) Conduct a sentencing hearing, and (3) Impose a sentence on a person convicted of a criminal offense. Ind. Code 33-23-5-9(b).

Here, after D pled guilty to class A misdemeanor OWI and HSO enhancement, the master commissioner entered an order sentencing D to one year executed in the Marion County Jail followed by two years executed in work release. However, Tr. Ct. rejected the mater commissioners's order and ordered another sentencing hearing after which the court entered an Order sentencing D to two years executed in the Marion County Jail followed by one year executed on work release. Because D pled guilty rather than proceeded to trial, the master commissioner did not have the authority to enter a final appealable order or to sentence D. Thus, Tr. Ct. had the authority to reject the master commissioner's sentencing recommendation, conduct another hearing and enter a different sentencing order within the limits of the plea agreement. Held, judgment affirmed.

RELATED CASE: L.J. v. Health & Hosp. Corp., 113 N.E.3d 274 (Ind. Ct. App. 2018) (commissioner does not have authority to enter a final order of regular commitment; see full review at H.2).

TITLE: Pitman v. State
INDEX NO.: B.7.d.
CITE: (1st Dist., 04-05-94) 635 N.E.2d 1098
SUBJECT: Issue of improper judge can't be raised first time on appeal
HOLDING: Appellate counsel was not ineffective in failing to raise issue that master commissioner was not qualified to sentence D. D was tried before Ind. Code 33-4-7-7 & 8 were in effect, but Ct. found even if sentencing by master commissioner was improper, he was serving as judge de facto, & there was no objection to his presiding at time of sentencing. Because issue could not be raised for first time on appeal, appellate counsel was not ineffective for not raising it. Ct. also rejected argument that appellate counsel was ineffective for not raising IAC of trial counsel for not objecting to master commissioner's lack of qualification, because this could have been matter of trial strategy. Ct. *cited* to Gordy v. State, 315 N.E.2d 362, finding that where record didn't show whether commissioner had ever been formally qualified as pro tem or special judge, failure to raise issue in MCE was fatal. In Gordy Ct. noted that both parties submitted to commissioner's authority as judge, & therefore he was acting as judge de facto if not judge de jure. Case seems to be in conflict with arguments raised in Boushehry, 622 N.E.2d 212, (see, separate card) & others finding no appealable judgment even where neither party raised issue.

RELATED CASES: Jones, 976 N.E.2d 1271 (Ind. Ct. App. 2012) (although the commissioner who was appointed a pro tempore and presided over D's jury trial had the authority to enter the sentencing order, Tr. Ct.'s amendment to sentencing order changing D's placement from community corrections and probation to DOC did not require reversal where D never objected at trial level to the second sentencing hearing or amended order).

TITLE: Rhinehardt v. State
INDEX NO.: B.7.d.
CITE: (4/30/85), Ind., 477 N.E.2d 89
SUBJECT: Change of judge -- D's disapproval of judge pro tem
HOLDING: D desired to have presiding judge hear his case instead of judge pro tem. This is not grounds for motion for change of judge. Held, conviction affirmed.

TITLE: Ringham v. State
INDEX NO.: B.7.d.
CITE: (5-29-02), Ind., 768 N.E.2d 893
SUBJECT: Valid appointment of Judge Pro Tempore, not commissioner
HOLDING: Although judge stated he was sitting as "commissioner" rather than as judge pro tempore, Tr. Ct.'s finding that judge was validly appointed as judge pro tempore was not clearly erroneous, thus he properly presided over D's preliminary hearing & trial. Ind. Code 33-5.1-2-27(d) provides that, upon request of either party, magistrate to whom proceeding has been assigned shall transfer proceeding back to superior Ct. judge. However, pursuant to Trial Rule 63(E), a judge who is unable to attend & preside at his Ct. for any cause may appoint in writing a judge pro tempore to conduct Ct. business during his absence. In this case, record was unclear over judge's appointment status, so State requested & received permission to file supplemental record containing appointment papers.

Ct. App. erroneously concluded that because judge stated he was sitting as "commissioner"- rather than as judge pro tempore & because papers appointing him were not notarized, file stamped & recorded in Tr. Ct.'s CCS for day of trial, judge was presiding not as properly appointed judge pro tempore but in capacity of master commissioner. Reversible error did not occur because of irregularities in this case. Although Trial Rule 63(E) requires written appointment of judge pro tempore to be entered of record, there is no explicit requirements as to timing of that entry. Supplementing record pursuant to Appellate Rule 32 was sufficient to establish compliance with Trial Rule 63(E). Finally, although judge referred to himself as "commissioner" when he explained regular judge's absence to parties, a judge's status is determined by examination of record, not judge's self-description. Dearman v. State, 632 N.E.2d 1156 (Ind. Ct. App. 1994). Held, transfer granted, Ct. App. decision at 753 N.E.2d 29 vacated, judgment of Tr. Ct. affirmed.

RELATED CASES: Boyer, App., 883 N.E.2d 158 (in enacting Ind. Code 33-23-5-9(b), legislature intended to give a magistrate presiding over a criminal trial the power to enter a final order and to enter a judgment of conviction).

TITLE: Survance v. State
INDEX NO.: B.7.d.
CITE: (7/16/84), Ind., 465 N.E.2d 1076
SUBJECT: Judge pro-tem - authority; procedure
HOLDING: Judge pro-tem, acting under color of authority pursuant to his appointment, was judge de facto, if not judge de jure. Any challenge of his authority must be made at time irregularities occurred & may not be raised first on appeal. Gordy, 315 N.E.2d 362 (case deals with commissioners). Here, regular judge appointed a pro-tem for D's trial, but continued to conduct other Ct. business during recesses & second day of D's trial. Ct. notes use of judges pro tempore in such a manner is contrary to intent & language of TR 63. Judge pro-tem is appointed to act during absence of regular judge & exercises all powers of regular judge during that period. A Ct. may not have 2 judges with power & jurisdiction to act in same case at same time. Citations omitted. D's failure to object at trial waives error on appeal. Held, affirmed.

RELATED CASES: Williams, 485 N.E.2d 100 (Ct. supports practice that pro tem be appointed special judge if consideration of legal matter extends beyond time of appointment; however, where matter has distinct phases, such as guilty plea & sentencing hearing, it is proper for special judge to accept plea & regular judge to conduct sentencing hearing); Eagan, 480 N.E.2d 946 (D not entitled to new trial where judge, after giving final instructions to jury, appointed pro-tem whose sole function was accepting jury's verdict); Ct. distinguishes case from Bailey, App., 397 N.E.2d 1024, which resulted in reversal because judge assigned case to pro-tem after jury empaneled & one witness had testified); Kimball, 474 N.E.2d 982 (D failed to prove judge pro-tem was special judge & subject to CR 13); Powell, 440 N.E.2d 1114 (D submitted to authority of special judge orally appointed by regular judge (who had no power to make such appointment) on day of trial; held, error waived). B.8. Prosecutor

TITLE: Tongate v. State
INDEX NO.: B.7.d.
CITE: (09-16-11), 954 N.E.2d 494 (Ind. Ct. App. 2011)
SUBJECT: Trial judge could rule on motion to correct error where magistrate presided at trial
HOLDING: There was no error where trial judge denied D's motion to correct error, even though magistrate presided over trial. Although a magistrate may enter a final order in a criminal matter, he is not required to do so. See Ind. Code § 32-23-5-5(14) and Ind. Code § 33-23-5-9. Trial judge was able to rule on motion because he listened to audio recording of trial before ruling on motion to correct error. To extent D argues it was impossible for trial judge to evaluate demeanor of witnesses, D fails to identify any issue related to witness demeanor. Held, judgment affirmed.

B. PRETRIAL PROCEEDINGS

B.8.a. In general

TITLE: Isaac v. State
INDEX NO.: B.8.a.
CITE: (12-23-82), Ind., 605 N.E.2d 144
SUBJECT: Prosecutor - Disqualification; pre-judice to State's interest
HOLDING: Tr. Ct. has duty to relieve prosecutor disqualified by reason of prejudice or hostility to State's interest. However, if prosecutor objects to such disqualification, Tr. Ct. must afford prosecutor opportunity to be heard before making determination. Here, petition to revoke probation may not be dismissed without Tr. Ct.'s permission, & Tr. Ct. may relieve prosecutor who refuses to proceed with evidence after denial of prosecutor's motion to dismiss. Held, judgment of Ct. App. reversed; Tr. Ct.'s judgment affirmed.

RELATED CASES: Holovachka, 142 N.E.2d 593 (upon proof of personal involvement of prosecutor in grand jury proceeding, & where prosecutor refused to disqualify himself, it became incumbent upon Tr. Ct. to order prosecuting attorney disqualified from proceedings & to appoint disinterested person in prosecuting attorney's place).

TITLE: Neeley v. State
INDEX NO.: B.8.a.
CITE: (4th Dist., 6-26-73), Ind. App., 297 N.E.2d 847
SUBJECT: Bench trial - No findings of fact & conclusions in criminal cases
HOLDING: Civil rule (T.R. 52 (a)) relating to making of special findings of fact & conclusions thereon by Ct. in action tried upon facts without jury or with advisory jury is not applicable to criminal cases. In view of this rule, Tr. Ct. in criminal case did not commit reversible error when it denied D's motion for special findings & conclusions. Held, judgment affirmed.

TITLE: Perkins v. State
INDEX NO.: B.8.a.
CITE: (1st Dist., 6-30-04), Ind. App., 812 N.E.2d 836
SUBJECT: Prosecutor - disqualification for alleged defects in bond
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss charging information for alleged violation of Ind. Code 5-4-1, which sets forth bond requirements for prosecuting attorneys. D claimed that prosecutor was not lawfully in office when charges were filed & was without authority to file charges because prosecutor's bond did not comply with requirements of statute. Ind. Code 5-4-1-9 provides that elected prosecutor shall comply with bond provisions "before commencement of his term in office," but Ct. rejected D's argument that prosecutor is required to file a separate bond at beginning of each elected term. Ct. also rejected D's arguments that bond on file was defective because: 1) it did not contain prosecuting attorney's signature or indicate that it was executed by prosecutor; & 2) named surety is not a "freehold surety: as required by Ind. Code 5-4-1-20(d)(1). Even if D's alleged defects as to prosecutor's bond are true, such defects do not defeat prosecutor's authority as elected prosecutor of Bartholomew County. See Ind. Code 5-4-1-12. Held, judgment affirmed.

TITLE: Rhodes v. Miller
INDEX NO.: B.8.a.
CITE: (7-28-82), Ind., 437 N.E.2d 978
SUBJECT: Prosecutor - Disqualification
HOLDING: Tr. Ct. has authority & responsibility to find that prosecuting attorney and/or members of his staff should be disqualified upon finding facts to be true with reference to such disqualification, & then to appoint special prosecuting attorney to try cause. Tr. Ct. does not have authority to bind county to pay deputy prosecuting attorney to assist prosecutor without there first being monies appropriated by proper authorities & county to pay for such services. When special prosecutor is appointed by Tr. Ct. regular prosecuting attorney is disqualified to further act as prosecuting attorney in cause. Prosecuting attorney can ask to be recused from trial where he finds that, because of circumstances, he cannot act as prosecuting attorney in cause consistent with Rules of Professional Conduct. Prosecutor's motion stating that prosecutor & his deputy were inexperienced in trying jury cases could not be interpreted as request for recusal & appointment of special prosecutor, but, rather, where prosecutor referred to trial counsel as special deputy prosecutor & continued to work with him as deputy, appointment of special counsel to act in cause could not obligate county to pay special counsel for his services. D cannot disqualify prosecuting attorney by naming him as witness. Held, judgment of special judge reversed, & cause remanded with orders to set aside mandate; DeBruler, J., dissenting.

B. PRETRIAL PROCEEDINGS

B.8.b. Change of prosecutor (Ind. Code 33-14-1)

TITLE: Aschliman v. State
INDEX NO.: B.8.b.
CITE: (4th Dist., 9-25-91), Ind. App., 578 N.E.2d 759, vacated on other grounds, 589 N.E.2d 1160
SUBJECT: Prosecutor - Change of prosecutor
HOLDING: D was not entitled to change of prosecutor, though D had previously filed complaint with disciplinary commission & filed federal lawsuit against prosecutor, absent showing of conflict of interest or probable cause to believe that prosecutor had committed crime. D's unilateral actions were not supported by any judicial determination or independent confirmation. Here, request for appointment of special prosecutor was properly denied absent evidence supporting D's claim of prosecutorial vindictiveness. Held, judgment affirmed; Garrard, J., dissenting.

RELATED CASES: Kindred, 521 N.E.2d 320 (D was not entitled to appointment of special prosecutor, despite fact that one day prior to filing of conspiracy charge, D filed civil action against prosecutor).

TITLE: Richardson v. State
INDEX NO.: B.8.b.
CITE: (1st Dist. 12/23/85), Ind. App., 486 N.E.2d 1058
SUBJECT: Special prosecutor (SP) - challenge by prosecutor
HOLDING: Ct. rejects D's contention that State ex rel. Goldsmith v. Superior Ct. of Hancock County, 386 N.E.2d 942 renders outgoing prosecutor incapable of disqualifying incoming prosecutor. In that case, deputy prosecutor filed petition to withdraw & Tr. Ct. disqualified entire staff. After taking office, new prosecutor (Goldsmith) challenged appointment of SP. Ind. S. Ct. held petition to withdraw filed by outgoing prosecutor cannot bind incoming prosecutor. Here, incoming prosecutor filed affidavit in support of appointment of SP, alleging appearance of impropriety because of his own past professional associations with Ds (attorney & attorney's secretary). Ind. Code 33-14-1-6 provides for appointment of SP without factual determination if elected prosecutor admits disqualification. King, App., 397 N.E.2d 1260. Ct. finds Goldsmith "wholly distinguishable." Held, no error; conviction reversed on other grounds.

TITLE: State v. Tippecanoe County Court
INDEX NO.: B.8.b.
CITE: (4-2-82), Ind., 432 N.E.2d 1377
SUBJECT: Prosecutor - Change of prosecutor; disqualification of entire staff
HOLDING: Although it appeared that nothing in prosecuting attorney's representation of accused in two prior theft cases would have any relation to present theft case, where habitual offender charge was based upon prior cases in which prosecuting attorney represented accused, prosecutor had to be disqualified in case in which accused was charged with theft & with being habitual offender. Here, since prosecutor had administrative control over entire staff, Tr. Ct. properly disqualified entire staff of deputies. Held, petition for permanent writ denied.

B. PRETRIAL PROCEEDINGS

B.8. Prosecutor

B.8.c. Special prosecutor (Ind. Code 33-14-1)

TITLE: Camm v. State
INDEX NO.: B.8.c.
CITE: (11-15-11), 957 N.E.2d 205 (Ind. Ct. App. 2011)
SUBJECT: Special prosecutor - literary contracts
HOLDING: Tr. Ct. erred when it denied D's Petition for Special Prosecutor where the prosecutor's literary contract created an irreversible, actual conflict of interest with his duty to the people of the State of Indiana. The Tr. Ct. may appoint a special prosecutor if the court finds by clear and convincing evidence that appointment is necessary to avoid an actual conflict of interest. Ind. Code 33-39-1-6(b)(2). An actual conflict of interest arises where a prosecutor places himself in a situation inherently conducive to dividing loyalties between his duties to the State and his personal interests.

Here, the prosecutor signed a contract to author and publish a book about the Camm case while the case was pending on appeal. When the case was reversed, the contract was ultimately cancelled, but the prosecutor repeatedly made clear his commitment to writing the book after the re-trial. The Rules of Professional Conduct prohibit a lawyer from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to representation. By contracting to write the book, the prosecutor permanently compromised his ability to advocate on behalf of the people of the State of Indiana in Camm's trial. Moreover, the prosecutor's book and his continued commitment to write it has made him an issue at trial because D can now argue that the book affected the decision to prosecute for a third time. A prosecutor cannot be both committed to writing a book about the case and serve as prosecutor. Cancellation of the contract does little to obviate the personal interest. Such a personal interest creates an actual conflict of interest with his duties as a prosecutor requiring his removal. Held, judgment reversed and remanded for the appointment of a special prosecutor.

TITLE: Cox v. State
INDEX NO.: B.8.c.
CITE: (5/19/86), Ind., 493 N.E.2d 151
SUBJECT: Special prosecutor - procedure; collateral attack
HOLDING: Ct. rejects D's attack upon appointment of special prosecutor. Here, D contends residency in Madison County but employment as deputy prosecutor in Delaware County violated Ind. Code 33-14-1-6. See also 1977 Ind. A'tty. Gen. Op. No. 4 (deputy prosecutor must reside in judicial circuit he/she serves). Ct. finds special prosecutor was de facto public official. Her authority cannot be collaterally attacked. Lack of authority must result in harm to D in order to constitute reversible error. See Hasselbring, App., 441 N.E.2d 514; King, App., 397 N.E.2d 1260. Held, conviction affirmed.

RELATED CASES: Anderson, 699 N.E.2d 2576 (D's federal & state constitutional rights were not violated by participation of inactive member of another state's bar in his prosecution; there was no evidence of wrongdoing by de facto prosecutor during trial or any source of prejudice from her participation).

TITLE: Jones v. State
INDEX NO.: B.8.c.
CITE: (4th Dist., 02-27-09), 901 N.E.2d 655 (Ind. Ct. App. 2009)
SUBJECT: Reappointment of special prosecutor required for related cases
HOLDING: Tr. Ct. erred in denying D's request for reappointment of special prosecutor.

Appointment of special prosecutor may be required if elected prosecutor will be a witness in the case, or if the elected prosecutor has a special interest in the outcome of the case. State ex rel. Goldsmith v. Superior Court of Hancock County, 270 Ind. 487, 386 N.E.2d 942 (1979). When an elected prosecutor seeks appointment of a special prosecutor for a particular action and such appointment takes place, the elected prosecutor is disqualified from any further participation in that action. Rhodes v. Miller, 437 N.E.2d 978 (Ind. 1982). Furthermore, if an elected prosecutor is disqualified from a case and special prosecutor is appointed, the elected prosecutor's entire staff of deputies must be recused in order to maintain integrity of the process of criminal justice. Goldsmith.

Here, facts underlying charges are that D would telephone local chapter of Red Cross, represent that he was elected prosecutor of Elkhart County, and seek to obtain disaster relief funds. Elected prosecutor requested appointment of special prosecutor for express purpose of avoiding the appearance of impropriety. However, approximately a month later, after special prosecutor had been appointed, deputy prosecutor filed an amended information in forgery case and filed a motion to dismiss impersonating a public servant charge. Court held that regaining control over the case was improper. Dismissal of impersonation charge did not, by itself, obviate the need for a special prosecutor and substance of case against D was largely unchanged. D's alleged modus operandi in committing theft and forgery against the Red Cross was impersonating elected prosecutor and capitalizing on his reputation. Held, judgment reversed and remanded for appointment of special prosecutor in forgery and theft cases.

TITLE: King v. State
INDEX NO.: B.8.c.
CITE: (2nd Dist., 12-17-79), Ind. App., 397 N.E.2d 1260
SUBJECT: Special prosecutor - When factual basis for disqualified required
HOLDING: If elected prosecutor admits his disqualification & requests appointment of special prosecutor, judicial determination of factual basis for such disqualification is not necessary. If elected prosecutor opposes appointment of special prosecutor, judicial determination of factual basis for elected prosecutor's disqualification must be made prior to special prosecutor's appointment. Prosecuting attorney is constitutional officer & is not subject to arbitrary order of disqualification at whim of Tr. Ct. Judge. D, who sought to invalidate indictment signed by special prosecutor, did not question that scope of authority of special prosecutor included certain classes of crimes which had not been properly investigated or prosecuted, but D did question whether "drug cases" fell within classification, relying on instructions given to grand jury which returned his indictment to support his position, but D had failed to include such instructions in record, & thus waived this argument. Evidence supported Tr. Ct.'s determination that "drug cases" were within types of crimes not being properly investigated or prosecuted, & thus were within scope of special prosecutor's authority. Held, judgment affirmed; Sullivan, J., concurring; Miller, P.J., dissenting.

TITLE: Lake Co. Property Owners Assn. v. Holovachka
INDEX NO.: B.8.c.
CITE: (6-16-54), Ind., 120 N.E.2d 263
SUBJECT: Special prosecutor - citizens have no right to demand appointment
HOLDING: Although citizens may petition for discipline of prosecuting attorney by Tr. Ct. judge, citizens have no right to demand such action. That matter is one within discretion of Tr. Ct. judge, & thus, refusal of Tr. Ct. to grant petition to appoint special prosecutor to investigate alleged irregular activities of regular prosecutor was not appealable, since no right of action existed in first instance. Held, appeal dismissed.

TITLE: Sears v. State
INDEX NO.: B.8.c.
CITE: (12/20/83), Ind., 457 N.E.2d 192
SUBJECT: Special prosecutor (SP) - for habitual phase only
HOLDING: Where prosecutor had represented D in one or more cases listed in HO charge, but no attorney-client privilege existed as to perjury charge, Tr. Ct. properly appointed SP for habitual phase only. Here, D contends SP was necessary for trial on perjury charge. SP is necessary only when D can demonstrate that, by reason of former confidential relationship with prosecutor, prosecutor has acquired special knowledge of facts being litigated/closely interwoven therewith. State ex rel. Meyers v. Tippecanoe County Ct., 432 N.E.2d 1377. Held, no error.

RELATED CASES: Garren, 470 N.E.2d 719 (same holding).

TITLE: State ex. rel. Griffin v. Lawler
INDEX NO.: B.8.c
CITE: (12-27-95), Ind., 657 N.E.2d 188
SUBJECT: Special prosecutor - eligibility requirements
HOLDING: Duly appointed special prosecutor whose service ceases as either prosecuting attorney or deputy prosecuting attorney in another county is not disqualified under Ind. Code 33-14-1-6(c) from continuing to serve as special prosecutor. Eligibility requirements of statute require that person appointed to serve as special prosecutor be either prosecuting attorney or deputy prosecuting attorney in another county. In denying D's petition for writ of mandamus, Ct. held that statutory requirement applies at time of appointment only. Legislature did not intend to disqualify duly appointed special prosecutors from continuing if they ceased service as regular or deputy prosecutors.

TITLE: State v. Hermann

INDEX NO.: B.8.c.

CITE: (7/29/20), Ind. Ct. App., 151 N.E.3d 1256

SUBJECT: Part-time deputy prosecutor with conflict of interest in criminal case, who was one of three deputy prosecutors in small prosecutor's office, did not cause entire prosecutor's office to be in conflict.

HOLDING: Trial court erred in disqualifying entire prosecutor's office and appointing a special prosecutor.Defendant was indicted by a grand jury for theft and forgery, after which she filed a petition to appoint a special prosecutor, alleging that one of the three deputy prosecutors in the Franklin County Prosecutor’s Office had a conflict of interest and therefore the whole office should be disqualified. The trial court granted the petition and appointed a special prosecutor. The State then filed an interlocutory appeal. Court of Appeals finds that it is well settled that if the elected prosecutor has a conflict of interest, the whole prosecutor's office is disqualified. However, it is not necessary to disqualify the whole office if one deputy has a conflict of interest. Court of Appeals held it is not necessary to disqualify the whole office, since the deputy prosecutor who has the conflict is a part-time deputy who primarily handles child-support matters and has had no involvement in the criminal case even though it is a small office with only three deputy prosecutors. Trial court's order disqualifying entire office and appointing special prosecutor reversed.

TITLE: State v. Waldon
INDEX NO.: B.8.c.
CITE: (4th Dist. 8/20/85), Ind. App., 481 N.E.2d 1331
SUBJECT: Special prosecutor (SP) - de facto
HOLDING: Tr. Ct. erred in granting D's motion to dismiss where SP dismissed original information & signed & filed new one. Here, D's motion argued that SP's authority terminated when original information was dismissed. Ct. would reject D's narrow construction of Ind. Code 33-14-1-6 & contention that phrase "particular case" equals pending case. Ct.'s exhaustive analysis of statute & case law (see n.2) would conclude that statute should be construed to disqualify regular prosecutor through all proceedings. However, state's failure to include copy of order appointing SP forces Ct. to base holding on conclusion that SP was acting as de facto public officer, thus his action cannot be challenged collaterally by a motion to dismiss. See Bagnell, App., 413 N.E.2d 1072; King, App., 397 N.E.2d 1260. Held, reversed & remanded for further proceedings.

TITLE: Wilcoxen v. State
INDEX NO.: B.8.c.
CITE: (08-25-93), Ind., 619 N.E.2d 574
SUBJECT: No error in denial of motion for special prosecutor
HOLDING: Although prosecutor had limited role in investigation, Tr. Ct. did not err in refusing to appoint special prosecutor. D, convicted of murder, argued Tr. Ct. should have appointed special prosecutor because prosecutor was likely to be necessary witness due to participation in crime investigation. Shortly after victim's body was found, police conducted search for knife D claimed he took from victim. Prosecutor was at scene & aided in search for knife. Videotape of search contained voice of prosecutor commenting on case & fact they couldn't find knife, as well as on condition of body. D's motion for special prosecutor was denied, as well as subsequent motion for mistrial based on prosecutor's involvement. Tape was introduced in evidence, but it was unclear whether jury saw it. Tr. Ct. ruled that if tape was played to jury, sound would be eliminated, & that prosecutor's involvement was insufficient to cause him to be potential witness. Tr. Ct. also ruled State could not ask questions concerning prosecutor's participation in search, & that he could not argue in closing about any part of his participation. Ind. Code 33-14-1-6 relates to appointment of special prosecutor. To require disqualification, it must be shown that prosecutor would be necessary witness to defense & that his testimony would be significantly useful. Because fact knife was never found & testimony about condition of body were presented by State through police, it was not necessary that prosecutor be witness. Therefore Ct. found no error in denying motion for special prosecutor.

TITLE: Williams v. State
INDEX NO.: B.8.c.
CITE: (04-18-94), Ind., 631 N.E.2d 485
SUBJECT: Special prosecutor not required
HOLDING: Tr. Ct. did not err in refusing to appoint special prosecutor, even though deputy prosecutor had formerly been defense attorney for one of D's co-Ds, & negotiated plea agreement for him that required his testimony against D. D also claimed his attorney provided information about case to former counsel/deputy prosecutor before she concluded her representation of co-D. Test for conflict is whether controversy in pending case is substantially related to matter where lawyer represented another client, & test is fact sensitive. Ct. noted that prosecutor's entire staff does not have to be disqualified because deputy has conflict of interest, if it is not clear that deputy received confidential information from D or that such information provided assistance to prosecution, Daugherty, 466 N.E.2d 46. Ct. distinguished Banton, App., 475 N.E.2d 1160, whereas public defender attorney represented one co-D, & then after becoming elected prosecutor, entered appearance to prosecute other co-D in exactly same matter. Here, Tr. Ct. held hearing on motion & deputy said she didn't disclose any information gained from D's counsel to prosecutor. She also said she & prosecutor never discussed details regarding pending prosecution, except during her previous representation of co-D. She had not participated in any way in prosecution of D & did not participate at his trial. Ct. determined that while D's & co-D's cases were closely interwoven, D did not show prejudice from deputy's prior representation of co-D. Held, judgment affirmed.

RELATED CASES: Swallow, 19 N.E.3d 396 (Ind. Ct. App. 2014) (no error in refusing to appoint special prosecutor when D's public defender withdrew as counsel and became employed by prosecutor, where no confidential information was shared with prosecutor's office); Kubsch, 866 N.E.2d 726 (where prosecutor previously represented co-D who testified against D in exchange for charges being dismissed, Tr. Ct. did not abuse its discretion in refusing to appoint special prosecutor; State showed no actual conflict existed).

TITLE: Wininger v. State
INDEX NO.: B.8.c.
CITE: (1st Dist., 8-18-88), Ind. App., 526 N.E.2d 1216
SUBJECT: Special prosecutor - No authority to continue role
HOLDING: Special prosecutor appointed at request of outgoing prosecutor improperly continued his role absent affidavit filed by incoming prosecutor alleging conflict of interest in his prosecution of Ds or finding that special prosecutor's appointment was necessary to avoid appearance of impropriety. Proper remedy for challenging appointment of special prosecutor, & validity of his acts, necessitated direct challenge by filing of application for writ of prohibition in S.Ct. Held, judgment reversed.

RELATED CASES: Bagnell, 413 N.E.2d 1072 (special prosecutor was at least acting as de facto public official when he signed charging indictment against D, & as such, his actions in doing so could not be collaterally attacked).

B. PRETRIAL PROCEEDINGS

B.8.d. Private prosecutor

TITLE: Sedelbauer v. State
INDEX NO.: B.8.d.
CITE: (3d Dist. 11/16/83), Ind. App., 455 N.E.2d 1159
SUBJECT: Special prosecutor - assistant
HOLDING: Tr. Ct. did not err in allowing Bruce Taylor from Citizens for Decency through Law to aid in prosecution of case. Taylor was admitted pro hac vice to serve as co-counsel; he appeared with, not in place of, deputy prosecutor. Indiana Cts. exercising criminal jurisdiction have inherent power/duty to appoint attorneys to assist in trial of criminal cases. State ex rel. Goldsmith v. Hancock Sup. Ct., 386 N.E.2d 942; Williams, (1919), 188 Ind. 283. Ct. rejects D's contention that allowing someone so opposed to pornographic materials to aid in prosecution was highly prejudicial/amounted to deprivation of due process/equal protection of law. D cites no authority. Record reveals no indication Taylor represented state's interest outside legal boundaries/inconsistent with state's interest. Held, no error.

RELATED CASES: Bebout, App., 714 N.E.2d 1152 (appointment of special prosecutor pursuant to Ind. Code 33-14-1-6 is not required before prosecutor from one county may provide assistance at trial to prosecutor from another county).

B. PRETRIAL PROCEEDINGS

B.10.. Competence of D to stand trial

TITLE: Anderson v. State
INDEX NO.: B.9.
CITE: (4/6/2017), 74 N.E.3d 1212 (Ind. Ct. App. 2017)
SUBJECT: Concurring opinion urges mental health treatment instead of criminal charges and incarceration
HOLDING: Court affirmed Defendant's conviction for Class B misdemeanor battery by bodily waste, rejecting Defendant's sufficiency and material variance challenges to his conviction. In a concurring opinion, Judge Mathias noted that Defendant was suffering from paranoia and/or schizophrenia at time of the offense, and expressed his "ongoing concern that Indiana's criminal justice system continues to turn a blind eye to individuals suffering from mental illness who would be better served by commitment to a mental health treatment facility instead of incarceration in a local jail or the Department of Correction." In several concurring opinions, Judge Mathias has emphasized the need for psychiatric examinations early in cases to determine whether defendants suffering from serious mental illness could have possibly had the requisite mens rea at the time of the crime. See, e.g., Gross v. State, 41 N.E.3d 1043, 1051-52 (Ind. Ct. App. 2015); Habibzadah v. State, 904 N.E.3d 367, 370-71 (Ind. Ct. App. 2009).

TITLE: Burt v. Uchtman
INDEX NO.: B.9.
CITE: 422 F.3d 557 (7th Cir. 2005)
SUBJECT: Duty to Assess Competency - Heavily Medicated D's Abrupt Guilty Plea
HOLDING: A state Tr. Ct. judge who knew that the D in a capital murder case was medicated with heavy doses of an array of powerful antipsychotics should have sua sponte ordered a mid-trial competency hearing when the D suddenly insisted on pleading guilty against counsel's advice. Although the D had been found competent to stand trial 8 months before trial, the trial judge knew that he was receiving heavy doses of the antidepressant doxepin, as well as several powerful psychotropic drugs, including diazepam, imipramine, and thioridazine, and that his medications had been changed as trial approached. When the D suddenly insisted on pleading guilty mid-trial, the Judge briefly inquired into the D's mental state, but did not order a competency evaluation or hearing. D's death sentence had previously been commuted to life without parole by the Illinois governor, and the 7th Circuit here reversed his conviction.

TITLE: Denzell v. State
INDEX NO.: B.9.
CITE: (06-14-11), 2011 Ind. LEXIS 510
SUBJECT: Competency - pending charges did not violate D's right to due process
HOLDING: When the record reflects that D can be restored to competency, but he purposely decompensates, he may not assert a due process violation. Here, D was arrested for resisting law enforcement and public intoxication. A court-ordered evaluation determined D suffered from paranoid schizophrenia and was incompetent to stand trial. D tried to assert a fundamental-fairness argument for incompetency even though he was purposely "cheeking" his medication in order to avoid going to trial. Court did not err in denying D's motion to dismiss, as it would be counter intuitive to allow a D to assert a due process violation for incompetency if the D himself purposely decompensated to avoid court. Held, transfer granted, Court of Appeals' opinion at 935 N.E.2d 1245 summarily affirmed in all other respects, denial of motion to dismiss affirmed.

RELATED CASES: Curtis v. State, 948 N.E.2d 1143 (Ind. 2011) (pending criminal charges do not violate D's right to due process if Tr. Ct. has not committed D and has not made an appropriate finding that D will never be restored to competency).

TITLE: Hammer v. State
INDEX NO.: B.9.
CITE: (10/18/89), Ind., 545 N.E.2d 1
SUBJECT: Competence to stand trial (CST) - raised in post-conviction (PCR) petition
HOLDING: Tr. Ct. erred in failing to appoint 2 psychiatrists to examine D who raised issue of CST on PCR. D was convicted of armed robbery & kidnapping in 1975. In 2d PCR petition, filed in 1988, D raised issue of CST at time of trial. At PCR hearing, D & 2 other witnesses testified that he had been taking at least 4 kinds of medication at least 4 times a day during his trial. D also testified about his ability to understand proceedings at trial. Report of California psychiatrist, which was included in pre-sentence report, was admitted. Report indicated that psychiatrist had advised against D's extradition to Indiana. Based on this evidence, PCR Ct. denied petition, & D appealed denial. Decision of PCR Ct. will not be set aside lightly, & Ind. S. Ct. finds that evidence presented supported finding of PCR Ct. However, Ind. Code 35-36-3-1 requires that, upon having reasonable ground for believing D to lack CST, Ct. must appoint 2 disinterested psychiatrists to examine D, & must receive their testimony at hearing. Here, PCR Ct. failed to appoint psychiatrists to examine D. Held, appeal held in abeyance; cause remanded to PCR Ct. to receive psychiatric evaluations of D. Shepard, J., DISSENTS, arguing that examinations 14 years after trial will be of little value.

TITLE: In the Matter of K.G., D.G., D.C.B., & J.J.S.
INDEX NO.: B.9
CITE: (4th Dist., 5-20-04), Ind., 808 N.E.2d 631
SUBJECT: Competency determination - juveniles
HOLDING: 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. Tr. Ct. had found juveniles incompetent to stand trial using the adult statute & the Ct. App. upheld this ruling. *Citing* the rehabilitative nature of the juvenile justice system & the Court's position as *parens patriae*, S.Ct. found that such use of the adult standard would not be appropriate. In coming to this conclusion, Ct. also noted the limited facilities operated by the Department of Mental Health that house juveniles & that placement in these facilities conflicts with understanding under juvenile law that individual will be housed in child's county of residence & near his family if possible. See Ind. Code 31-37-19-23. Ct. reached this holding despite acknowledging that Ind. Code 31-32-1-1 provides that procedures for criminal trials govern juvenile proceedings unless otherwise specified by juvenile law, & that no juvenile statute specifically speaks to competency as it relates to delinquency proceedings. Using a broad reading of legislative intent, Ct. determined that Ind. Code 31-32-12-1, which authorizes mental or physical examinations & treatment under certain circumstances when a physician determines them appropriate & consistent with the statute, is the proper vehicle to accomplish a competency finding in a juvenile proceeding. Held, transfer granted, Ct. App. decision at 781 N.E.2d 700 vacated, judgment reversed & remanded for further proceedings consistent with opinion.

TITLE: Luster v. State

INDEX NO.: B.9.

CITE: (7-15-19), Ind. Ct. App., 130N.E.3d 131

SUBJECT: Due process requires a trial court must consider a Defendant's competency when that Defendant is participating in a community corrections revocation hearing.

HOLDING: Trial court sua sponte raised Defendant's competency at community corrections revocation hearing and appointed two medical experts to evaluate Defendant. One expert determined Defendant did not "demonstrate the capacity to stand trial for the charges in this legal matter." Nonetheless the trial curt proceeded with the revocation proceeding stating that the statute concerning competency contemplates a prejudgment assessment and a community corrections violation was a post-judgment proceeding. The Court of Appeals reversed and remanded the community corrections violation with instructions for the trial court to consider the competency evaluations and to determine if the Defendant is competent to understand and participate in the proceedings against him. The Court of Appeals determines failure to consider evidence of Defendant's competency prior to proceeding with the petition to revoke placement was a violation of due process.

TITLE: McManus v. State
INDEX NO.: B.9.
CITE: (8-31-04), Ind., 814 N.E.2d 253
SUBJECT: Denial of motion for mistrial due to incompetency - use of medications
HOLDING: During course of capital murder trial, D moved for mistrial on numerous occasions, arguing that the various drugs administered to D rendered him incompetent. To be competent at trial, a D must be able to understand the nature of the proceedings & be able to assist in the preparation of his defense. Timberlake v. State, 753 N.E.2d 591 (Ind. 2001). Standard is defined as whether or not the D currently possesses the ability to consult rationally with counsel & factually comprehend proceedings against him or her. Brewer v. State, 646 N.E.2d 1382 (Ind. 1995). Here, throughout course of trial, D suffered pain & symptoms of a panic attack & was given drugs to treat anxiety. During competency hearings, emergency room physician & jail nurse testified as to effect of medication & that they were able to communicate with D. Tr. Ct. denied motion for mistrial, finding no evidence suggesting D was unable to assist in his defense or participate in trial. After D complained of similar symptoms & was hyperventilating, Tr. Ct. ordered a one-week continuance, during which D's medication regimen was changed.

In denying D's subsequent motion for mistrial, Tr. Ct. based its decision on continual reports from medical professionals who maintained contact with D throughout trial. While testimony was often equivocal, the consensus of witnesses was that the medications assisted D in participating in his trial. Without the medications, D proved to be unable to cope with stress of the proceeding. D's situation is markedly different from the D who requires medication to attain competence so that trial can begin. Administration of medication appeared to manage sudden onset of stress, rather than to medicate a diagnosed psychosis. Ct. noted that reliance on psychotropic drugs during trial is obviously to be approached with great care, & competency hearings to evaluate effects on D's ability to appropriately participate in his / her defense are very important. Ct. could not say Tr. Ct.'s competency finding in this case was clearly erroneous. Held, judgment affirmed.

TITLE: Middleton v. State
INDEX NO.: B.9.
CITE: (2d Dist. 02/27/91), Ind. App., 567 N.E.2d 141
SUBJECT: Competency - Guilty Pleas (GP)
HOLDING: Tr. Ct.'s failure to inquire as to whether D was under influence of drugs or alcohol during GP proceedings was not error, because requirement for inquiry is triggered only when D's comprehension to understand proceedings is questionable & facts in case did not rise to that level. Additionally, Ct. did not err in refusing to allow D to withdraw GP because of heroin intoxication at plea hearing, because it did not so debilitate his mind as to render plea involuntary. D filed for PCR alleging that GP Ct. should have held competency hearing before accepting his plea or allowed him to withdraw it subsequently, & that his trial counsel was ineffective (IAC) for not adequately questioning his competency. Evidence revealed that during GP hearing, D was able to understand that Ct. couldn't accept plea to possession of heroin with intent to deliver if he maintained it was for personal use, & he quickly made appropriate answers to Ct.'s questions. While defense counsel tried to inform judge of his concerns about D's competency prior to sentencing hearing, there was no evidence in record that he advised Ct. at any time prior to GP that D was under influence of heroin & could not make knowing, voluntary, & intelligent plea. D's original intent was to go to trial under influence of heroin because he had been using it for 8 years, & there was also evidence he had driven mother of his child to work immediately prior to driving to Ct. Ct. found insufficient indications of D's incompetence to find IAC for failing to object to hearing, & because of good plea bargain obtained, even if trial counsel had been ineffective, it was reasonable inference to assume D would have accepted bargain under any circumstances. Held, denial of PCR petition affirmed.

TITLE: People v. Pokovich
INDEX NO.: B.9.
CITE: 39 Cal. 4th 1240 (Cal. 2006)
SUBJECT: Fifth Amendment protects statements during competency exam
HOLDING: California Supreme Court held Fifth Amendment's prohibition against compelled self-incrimination bars prosecutors from impeaching a D with statements he made during a court-ordered competency examination. The majority decided that the impairment of the competency examination process that would result if such statements were available for impeachment outweighs the potential risk to the justice system's truth-seeking function posed by forbidding such testimony. A state statute forbids the state from trying a mentally incompetent person. Therefore, if a Tr. Ct. has any doubt about a D's competency, it must order a competency examination. The court initiates the competency-determination process, and the D has no right to refuse to submit to an evaluation. Partial dissents were filed on two separate grounds. One dissent maintained that if no coercion or compulsion was involved in obtaining a D's statements in a competency evaluation, then the statements should be admissible for impeachment purposes, as the Firth Amendment bars the use of statements that were truly involuntary. Another dissent stated that the majority did not need a federal constitutional analysis because the state statutes authorizing competency evaluations also grant immunity to any statements made during evaluations.

TITLE: Riggins v. Nevada
INDEX NO.: B.9.
CITE: 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992)
SUBJECT: Forced medication — trial; due process
HOLDING: Forced administration of antipsychotic drugs to D during his murder trial, in absence of findings as to need for treatment & medical appropriateness of drug administered, created unacceptably high risk that D's constitutionally protected trial rights were prejudiced & requires reversal of his conviction. Before trial, D had complained of hearing voices & having trouble sleeping & received prescription for Mellaril & Dilantin. Shortly before trial, D moved to have Mellaril & Dilantin suspended until end of trial. Tr. Ct. denied motion, in one-page order which gave no indication of rationale. D pursued an insanity defense but was convicted of murder & sentenced to death. D contends that involuntary administration of Mellaril denied him "full & fair trial." Once D moved to terminate administration of Mellaril, state became obligated to establish need for Mellaril & medical appropriateness. State could have made sufficient showing of need by demonstrating that it could not adjudicate D's guilt or innocence without administering Mellaril, or that it was necessary, considering less intrusive alternatives, for D's own or others' safety. D did not contend that he had right to be tried without Mellaril if discon tinuation rendered him incompetent to stand trial, & Court does not resolve that issue here. Although it cannot be determined from record, D's right to present true demeanor to jury & to assist in his defense may have been impaired. Because record contains no finding that involuntary medication was necessary, Court cannot determine that substantial probability of trial prejudice was justified. Reversed & remanded. Thomas & Scalia, JJ. DISSENT. Kennedy, J., CONCURS & asserts that Due Process bars forced medication to render D competent to stand trial, absent "extraordinary showing."

TITLE: State v. Davis
INDEX NO.: B.9.
CITE: (12-18-08), Ind., 898 N.E.2d 281
SUBJECT: Authority to dismiss charges for incurably incompetent D
HOLDING: Addressing issue left unresolved in Jackson v. Indiana, 406 U.S. 715 (1972) Court held that it was a violation of basic notions of fundamental fairness as embodied in Due Process Clause of Fourteenth Amendment to hold criminal charges over head of incompetent D who will never be able to stand trial. Within ninety days after a D has been committed due to lack of competency to stand trial, the superintendent of state institution where D is placed is required to certify to Tr. Ct. whether there is substantial probability that the D will attain competency within the foreseeable future. Ind. Code 35 36 3 3 (a). If such probability does not exist, then the DMHA must initiate regular commitment proceedings under Ind. Code 12 26. Statutes for commitment during a criminal proceeding do not speak to any procedure regarding pending criminal charges once a D is committed under the civil statutory scheme.

Courts have inherent authority to dismiss criminal charges where the prosecution of such charges would violate a D's constitutional rights. Ind. Code 35-34-1-4 (a)(7) and (a)(9). Further, the open ended catchall provision of Ind. Code 35-34-1-4 (a)(11)("[a] any other ground that is a basis for dismissal as a matter of law") is recognition that there may be additional reasons for dismissal of criminal charges. A violation of a D's constitutional right to due process certainly fits in that category.

Involuntary commitment to a hospital for the mentally ill is such a deprivation of liberty as can only be accomplished by a state in strict observation of requirements of due process. Commitment must be justified on basis of a legitimate state interest, and reasons for committing a particular individual must be established in an appropriate proceeding. O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring). Here, D's pretrial confinement has extended beyond the maximum period of any sentence Tr. Ct. can impose, and State has advanced no argument that its interests outweigh D's substantial liberty interest. Held, transfer granted, Court of Appeals' opinion at 875 N.E.2d 779 vacated, judgment affirmed.

RELATED CASES: Gross, 41 N.E.3d 1043 (Ind. Ct. App. 2015) (due process required dismissal of Class B felony child molesting and Class D felony dissemination of matter harmful to minor charges filed in 2003, where D's pretrial confinement extended beyond maximum time allowed by law and superintendent at the facility at which he is confined determined that there is a substantial probability he will never be restored to competency); Coats, 3 N.E.3d 528 (Ind. 2014) (finding that D cannot be restored to competency must be made by DMHA, rather than Tr. Ct., after commitment to DMHA; see full review at B.9.e); Leedy, 998 N.E.2d 307 (Ind. Ct. App. 2013) (even though uncontested testimony established that Larue Carter Center in Indianapolis was better equipped to treat D's severe brain injury than DMHA facility here (Logansport State Hospital), commitment to DMHA did not violate right to due process because Ind. Code 35-36-3-1 requires commitment to DMHA and the evidence established that the DMHA facility had sufficient expertise to treat D's brain injury); Curtis, 948 N.E.2d 1143 (Ind. 2011) (pending criminal charges do not violate D's right to due process if Tr. Ct. has not involuntarily committed D and has not made an appropriate finding that D will never be restored to competency); Matlock, 944 N.E. 2d 936 (Ind. Ct. App. 2011) (Tr. Ct. did not abuse its discretion by denying D's motion to dismiss, even though the time D was detained while temporarily incompetent exceeded the maximum sentence he could receive for class A misdemeanor OWI; the State has substantial interest in determining the guilt or innocence of someone who may drive a vehicle after regaining competency); J.S., 937 N.E.2d 831 (Ind. Ct. App. 2010) (where it was clear that the juvenile was not going to regain

competency before he turned eighteen years old and the juvenile court lost jurisdiction, the juvenile court did not abuse its discretion by dismissing his case although the expert did not make a finding that the juvenile would never be restored to competency); Denzell, 935 N.E.2d 1245 (Ind. Ct. App. 2010) *Sum*. *aff'd* by 948 N.E.2d 808 (Ind. 2011) (although D's aggregate term of confinement was longer than his maximum possible sentence, there had been no determination that he could not be restored to competency; thus, D did not meet the Davis test for dismissal); Jones, App., 918 N.E.2d 436 (where sentences for each misdemeanor would have to run consecutively because D committed the offenses while released on his own recognizance, the 756 days D has spent in either jail or committed to DMH has not exceeded the maximum sentence for one of the misdemeanors; thus, motion to dismiss the third misdemeanor should have been denied); Habibzadah, App., 904 N.E.2d 367 (Tr. Ct. properly denied motion to dismiss attempted murder charges against incompetent D because it is possible that D may be restored to competency and he has not been confined for longer than potential maximum sentence he faces.

B. PRETRIAL PROCEEDINGS

B.9.a Competence of D to stand trial

B.9.a General

TITLE: Adams v. State
INDEX NO.: B.9.a.
CITE: (6/29/87), Ind., 509 N.E.2d 812
SUBJECT: Competency - hearing; waiver of attendance at trial
HOLDING: Tr. Ct. did not err in refusing to conduct competency hearing. Here, D filed 10 pro se motions despite fact he had public defender. D's counsel filed motion that D lacked comprehension to stand trial. Tr. Ct. appointed 2 doctors to examine D; one found him competent & one found him incompetent. Tr. Ct. appointed third doctor who found D competent. D continued to file pro se motions. His public defender withdrew; another was appointed. On day of voir dire, D refused to leave his jail cell. He claimed he was physically & mentally unable to attend his trial because of his mental condition. Tr. Ct. conducted a hearing in D's cell, during which D was examined by nurse & found fit to attend trial. Tr. Ct. found D waived right to be present at trial. Ct. finds Tr.Ct. justifiably relied on finding of 2 doctors that D was competent; therefore, no competency hearing was required. 6th Amend. & Ind. Const. Art. 1, §13, guarantee right to be present during trial. Cape, 400 N.E.2d 161. D may waive right to be present at trial. Blatz, 486 N.E.2d 990; Martin, 457 N.E.2d 1085; Faison, 428 N.E.2d 784; Shepler, 412 N.E.2d 62. Ct. finds D waived right to be present; therefore, it was not error for Tr. Ct. to proceed with trial absente reo. Held, conviction affirmed. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Culpepper, App., 662 N.E.2d 670 (no error in denying D's request for competency hearing; D's behavior did not create bona fide question as to his competency to stand trial)

TITLE: Bramley v. State
INDEX NO.: B.9.a.
CITE: (9/11/89), Ind., 543 N.E.2d 629
SUBJECT: Competence to stand trial (CST)
HOLDING: Tr. Ct. did not abuse its discretion in finding CST. D proceeded pro se with standby council, but refused to cooperate and refused to remain in Ct. Prosecutor moved for pretrial CST determination, & at CST hearing, 1 Ct.-appointed psychiatrist testified that D sufficiently understood nature of charges & proceedings, but that he doubted that he would be able to assist or cooperate with counsel or represent himself. Other psychiatrist testified that D was competent, & that his disruptive conduct was purposeful & voluntary. Tr. Ct. found CST. Although D refused to attend trial, Tr. Ct. brought him back from time to time, during which D's conduct was so disruptive that he was found in contempt 4 times. Standby counsel requested that DOC evaluate D prior to sentencing, & report of psychologist & psychiatrist indicated that they failed to see how D could have cooperated with counsel. They further recommended that D receive mental health treatment rather than being committed to DOC. At sentencing, Tr. Ct. stated that portion of CST statute which reads that competency may be determined "at any time before the final submission of any criminal case to the jury" is a limiting timetable. Tr. Ct. noted that CST issue was correctly determined at trial. On appeal, D argues that Tr. Ct. erred in failing to reconsider CST at sentencing in light of D's conduct at trial & report from DOC examiners. D *cites* Pate v. Robinson (1966), 383 U.S. 375, 86 S. Ct. 836, 10 L.Ed.2d 815; Evans, 300 N.E.2d 882; & Tinsley, 298 N.E.2d 429. In Evans, Ind. S.Ct. wrote that facts may come to light after trial which create reasonable grounds to question D's CST at time of trial, thus requiring post-trial hearing. In these cases, however, there had been no CST determination before trial. Here, CST had been determined, & Tr. Ct. found determination to be correct. Held, no abuse of discretion.

TITLE: Dodson v. State
INDEX NO.: B.9.a.
CITE: (1/28/87), Ind., 502 N.E.2d 1333
SUBJECT: Failure to seek competency determination
HOLDING: Counsel was not ineffective for failing to secure determination of D's mental competence. Trial & conviction of D who is mentally incompetent violates due process. Pate v. Robinson, (1966), 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815. Immediately after arrest, D was admitted to hospital on emergency basis for psychiatric evaluation. Physicians made preliminary determination that D was not psychotic & he was returned to jail. Counsel testified at PCR hearing that he had received D's hospital file but was unaware of D's purported mental problems. D did not tell attorney of any mental health problems or about his suicide attempt while in jail. Counsel did discuss D's case with friend who was a psychiatrist; she indicated D did not appear to be suffering from any obvious mental defects. D is considered competent if D has sufficient present ability to consult with lawyer with reasonable degree of rational understanding & if D has rational as well as factual understanding of proceedings against him/her. Dusky v. US, (1960), 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824. Trial counsel found D lucid & thought he fully comprehended proceedings against him. Ct. notes perhaps some attorneys would have reached different conclusion, but that fact standing alone does not render counsel ineffective. Held, conviction affirmed.

RELATED CASES: Barber, 141 N.E.3d 35 (Ind. Ct. App. 2020) (no IAC for failure to raise competency of intellectually disabled D to plead guilty); Mast, App., 914 N.E.2d 851 (D received IAC where counsel advised him to plead guilty without waiting for results of two competency evaluations)

TITLE: Donald v. State
INDEX NO.: B.9.a.
CITE: (07-22-10), 930 N.E.2d 76 (Ind. Ct. App. 2010)
SUBJECT: Probation revocation - due process requires competency
HOLDING: Although a D is not entitled to a competency evaluation under Ind. Code 35-36-3-1, the Due Process Clause of the United States Constitution requires that a D be competent when participating in a probation revocation hearing. A D during a probation revocation hearing is entitled to the minimum requirements of due process, such as an opportunity to be heard and present evidence and the right to confront and cross-examine adverse witnesses. Without competency, the minimal due process rights guaranteed to probationers at revocation hearings would be rendered meaningless. Thus, Court followed other jurisdictions by finding due process requires a competency evaluation if there are reasonable grounds to doubt competency in probation revocations.

Here, D had a history of diabetes that had led to a stroke in the past. D's attorney, based on a thirty -minute consultation on the day of the probation revocation hearing, claimed that D could not assist him. The prosecutor agreed that D was suffering from some kind of condition. Rather than address whether a competency evaluation was warranted, Tr. Ct. found D had no standing to request a competency evaluation in a probation revocation hearing. Because Tr. Ct. never addressed whether there were reasonable grounds to order an evaluation, D should be allowed to address this issue. Held, judgment reversed and remanded for further proceedings consistent with this opinion.

RELATED CASES: Hutchison, 82 N.E.3d 305 (Ind. Ct. App. 2017) (Tr. Ct. did not commit fundamental error by failing to conduct competency evaluation before revoking D's probation), Leedy, 998 N.E.2d 307 (Ind. Ct. App. 2013) (even though uncontested testimony established that Larue Carter Center in Indianapolis was better equipped to treat D's severe brain injury than DMHA facility here (Logansport State Hospital), commitment to DMHA did not violate right to due process because Ind. Code 35-36-3-1 requires commitment to DMHA and the evidence established that the DMHA facility had sufficient expertise to treat D's brain injury).

TITLE: Dragon v. State
INDEX NO.: B.9.a.
CITE: (1/12/79), Ind., 383 N.E.2d 1046
SUBJECT: Competency to stand trial -- waiver
HOLDING: Under statute relating to competency to stand trial, Tr. Ct. is required to hold competency hearing if reasonable grounds exist to believe that D is presently incompetent. Although waiver is inapposite concept in determining accused's competency to stand trial, attempted waiver or specific withdrawal of competency issue is circumstance bearing on Tr. Ct.'s decision whether to hold competency hearing. Held, denial of petition for post-conviction relief affirmed.

RELATED CASES: Tinsley, 298 N.E.2d 429 (one who may be incompetent cannot knowingly & intelligently waive his right to hearing on matter).

TITLE: Heartfield v. State
INDEX NO.: B.9.a.
CITE: (2/9/84), Ind., 459 N.E.2d 33
SUBJECT: Competency - arraignment
HOLDING: Where D entered not guilty plea at arraignment, there was no error in arraigning D following filing of suggestion of incompetence but before competency hearing. Here, D *cites* Summers, App., 285 N.E.2d 830 (judgment vacated, case remanded with instructions to determine if D was competent at arraignment). Ct. distinguishes Summers: Summers pled guilty at arraignment; Heartfield entered not guilty plea at arraignment. Ct. examines law re arraignment. Assuming D was under disability at time of arraignment, that disability was removed when D was held competent to stand trial. Held, no error.

TITLE: McManus v. Neal
INDEX NO.: B.9.a.
CITE: (2/18/2015), 779 F.3d 634 (7th Cir. 2015)
SUBJECT: Constitutionally Inadequate Determination of Competence to Stand Trial
HOLDING: The Indiana State Courts did not reasonably apply the federal constitutional standard for determining competence to stand trial. On the first day of trial, McManus suffered a panic attack, with symptoms so severe that he was taken to the hospital. The next day he had another panic attack and was again taken to the hospital. He was given Versed, Xanax and morphine and returned to jail with Xanax and Lortab. McManus' attorneys moved for a mistrial, or in the alternative, a continuance so that he could be evaluated for competence to stand trial. The Tr .Ct. summarily denied both requests. McManus became sick a third time on the third day of testimony, and the judge continued the trial for a week while he was treated. The Tr. Ct. did not order a competence evaluation, but rather asked a psychiatrist to help get Mcmanus "fixed up" to continue with the trial. McManus's medications were adjusted in an attempt to control his anxiety. Defense counsel again moved for a mistrial, stating that McManus had had two more panic attacks during the continuance, was unaware of what had previously happened at trial, and was unable to communicate with them or make decisions. The Tr. Ct. did not order a competence evaluation or hold a competence hearing, but rather questioned the treating psychiatrist about the medications and denied the motion, ruling that McManus was receiving the optimum treatment he could get, that things would not be any better at a later time, and that they could "get through this trial in a proper fashion." McManus was tried, convicted, and sentenced to death for the murders of his estranged wife and two young daughters.

On Direct Appeal, the Ind. S. Ct. rejected McManus' argument that he had been incompetent to stand trial. The Court recited the federal due process standard, but deferred to the Tr. Ct.'s ruling.

The Habeas Court finds that Tr. Ct. failed to adjudicate the competency question under the federal constitutional standards set out in Dusky, Pate, and Drope, and that the Ind. S.Ct.'s deferential review failed to protect the due process rights implicated. Further, the Ind. S.Ct.'s analysis failed to apply the federal standard. Court found that "the consensus of the witnesses was that the medications assisted McManus in participating in his trial." The federal due process inquiry is whether the D had a present factual and rational understanding of the trial proceedings and the capacity to assist his lawyers with a reasonable degree of understanding. Dusky. Because the state courts did not reasonably apply the federal due process standard in adjudicating McManus' competence to stand trial, the 7th Cir. reversed his convictions and sentences.

TITLE: Montano v. State
INDEX NO.: B.9.a.
CITE: (4th Dist., 4-27-95), Ind. App., 649 N.E.2d 1053
SUBJECT: Standard for determining competence
HOLDING: In criminal competency proceedings, burden of proof need not be assigned to one party or the other to show that D either is or is not competent. D argued that decision regarding competency to stand trial without either an assigned burden of proof or standard of proof is constitutionally inadequate to assure level of fundamental fairness & due process required by Fourteenth Amendment. Ind. Code 35-36-3-1 et seq., which governs competence to stand trial, is not unconstitutional despite fact that it does not allocate burden of proving competency to state. Hansley v. State, App., 575 N.E.2d 1053. Due process is satisfied where, as here, State provides D access to procedures for making competency evaluation. Medina v. California, 505 U.S. 437, 112 S. Ct. 2572 (see card at B.9.c). Held, denial of petition for PCR affirmed.

RELATED CASES: Leedy, 998 N.E.2d 307 (Ind. Ct. App. 2013) (even though uncontested testimony established that Larue Carter Center in Indianapolis was better equipped to treat D's severe brain injury than DMHA facility here (Logansport State Hospital), commitment to DMHA did not violate right to due process because Ind. Code 35-36-3-1 requires commitment to DMHA and the evidence established that the DMHA facility had sufficient expertise to treat D's brain injury).

TITLE: State ex rel. Van Orden v. Floyd Circuit Court
INDEX NO.: B.9.a.
CITE: (12/9/80), Ind., 412 N.E.2d 1216
SUBJECT: Competency to stand trial -- judicial determination
HOLDING: D not entitled to jury determination of her competency under Sixth Amendment of United States Constitution or Art. I, section 20 of Indiana Constitution. Sixth Amendment guarantees jury trial in criminal prosecutions, & Indiana Constitution guarantees "in all civil cases, the right of trial by jury shall remain inviolate." Competency proceeding is not "criminal prosecution" or civil case, but is one portion of criminal procedure, similar to other pretrial hearing procedures conducted for purpose of resolving other constitutional or legal questions. Held, D's petition for writ of mandate alleging that circuit Ct. judge had exceeded his jurisdiction in denying D jury trial on issue of her competency to stand trial was denied.

TITLE: Walker v. State
INDEX NO.: B.9.a.
CITE: (09-28-93), 621 N.E.2d 627
SUBJECT: D competent to stand trial
HOLDING: Although D invoked insanity defense & psychiatric examination revealed he was brain damaged at birth, mentally retarded & mentally ill, & had history of bizarre behavior; evidence was sufficient to show him competent to stand trial. At competency hearing, one doctor testified that D knew charge & penalty, was not psychotic or out of touch with reality, but that while D understood words of penalty, he didn't seem to have clear comprehension of its meaning. Other doctor testified that D presented borderline case, but that he had sufficient comprehension to understand proceedings to make defense. Both doctors found D to be mentally ill. Ct. found Tr. Ct. did not err in permitting D to stand trial because there was sufficient evidence of his competency.

RELATED CASES: Like, 426 N.E.2d 1355 (plea of not guilty by reason of insanity did not in itself raise reasonable basis for believing D to be incompetent).

B. PRETRIAL PROCEEDINGS

B.9. Competence of D to stand trial

B.9.b. Types of incompetency

TITLE: Ferry v. State
INDEX NO.: B.9.b.
CITE: (9/14/83), Ind., 453 N.E.2d 207
SUBJECT: Competency - low I.Q.; confession; voluntariness
HOLDING: Fact that D initially was found incompetent to stand trial (1/81) does not render10/80 confession involuntary. Here, D contends he was "mentally & emotionally subnormal" when he gave confession, thus statements were not knowingly & intelligently made. See Kern, 426 N.E.2d 385; Lonson, 406 N.E.2d 256. D's I.Q. was between 71 & 79. State of mind rendering one incompetent to stand trial is subject to change over time. See Malo, 361 N.E.2d 1201; Ind. Code 35-5-3.1-2 [now Ind. Code 35-36-3-2]. Ct. examines testimony of interrogating officers & finds state has met its burden to prove voluntariness. Held, no error.

RELATED CASES: Goodman, 453 N.E.2d 984 (totality of circumstances determine voluntariness, not I.Q. alone; cases holding confessions of Ds with low I.Q.s involuntary are *cited*).

TITLE: Ferry v. State
INDEX NO.: B.9.b.
CITE: (9/14/83), Ind., 453 N.E.2d 207
SUBJECT: Competency - uncooperative client
HOLDING: Tr. Ct.'s determination that D was competent to stand trial was proper; fact that D's attorney had difficulty communicating with D, making it difficult to prepare for trial does not necessarily indicate D was incompetent to stand trial. Test of competency to stand trial is whether D has ability to assist in preparation of his/her defense & understand nature of proceedings. Mato, 429 N.E.2d 945; Carter, 422 N.E.2d 742; Ind. Code 35-5-3.1-1(a) [now Ind. Code 35-36-3-1(a)]. Willingness to assist in defense is different from ability to assist. See Brown, 131 N.E.2d 777. Held, no error.

RELATED CASES: Perry, 471 N.E.2d 270 (Ct. finds fact D was represented by 5 different public defenders does not indicate an inability to consult with attorney with reasonable degree of rational understanding; held, no abuse of discretion in refusing to hold competency hearing).

TITLE: Harper v. State
INDEX NO.: B.9.b.
CITE: (10/3/91), Ind., 579 N.E.2d 68
SUBJECT: Competency to stand trial -- slight retardation/low intellect
HOLDING: Mere weakness of intellect will not shield one who commits crime as long as he has mental capacity to master impulse to commit crime & has capacity to know right from wrong. Although D was of low normal intelligence, D was able to understand proceedings & assist in defense. Held, conviction affirmed.

RELATED CASES: McDowell, 456 N.E.2d 713 (D, who was deaf, uneducated, & mentally retarded, but could communicate with others through interpreters, was found to be competent).

TITLE: Harshman v. State
INDEX NO.: B.9.b.
CITE: (7/15/83), Ind., 451 N.E.2d 46
SUBJECT: Competency to stand trial -- prior treatment
HOLDING: Commitment to state hospital for treatment of mental illness seventeen years before trial & motion for appointment of psychiatrist for determination of competency to stand trial, without more, did not provide reasonable ground for believing D was incompetent to stand trial; thus, trial judge committed no error in failing to hold hearing on issue of D's competency to stand trial. Held, denial of petition for post-conviction relief affirmed.

TITLE: Hensley v. State
INDEX NO.: B.9.b.
CITE: (8/8/91), Ind. App., 575 N.E.2d 1053
SUBJECT: Competency to stand trial -- schizophrenia
HOLDING: Determination that D was competent to stand trial for rape was not abuse of discretion. Although court-appointed psychiatrists both testified that D was schizophrenic, both psychiatrists also testified that D was aware of charges against him & was able to assist his attorney. In addition, D demonstrated at competency hearing that he was aware of victim's name & he denied raping anyone. Held, conviction affirmed.

TITLE: Montano v. State
INDEX NO.: B.9.b.
CITE: (10/12/84), Ind., 468 N.E.2d 1042
SUBJECT: Competency - drug induced
HOLDING: Tr. Ct. did not err in denying D's request for another competency hearing. Here, D was committed to Dept. of Mental Health (DMH) after finding of incompetency. DMH psychiatrist later referred D back to Ct. as competent. Tr. Ct. held hearing & found D competent. Psychiatrists testified D was taking 400 mg. psychotropic drug Thorazine, which helped him relax, enabled him to understand, concentrate & work on problem before him. D argued competence was artificially induced by Thorazine. Where competency determination has been made & no event/occurrence subsequent to determination is offered to indicate change, Tr. Ct. does not abuse discretion by denying further hearing. Buhring, 453 N.E.2d 228. Held, no error.

RELATED CASES: Sherwood, 485 N.E.2d 97 (Crim L 273(2); D was taking sleeping pill (placidyl) in evening & librium during day; D stated medication did not have any adverse effect re his appearance in Ct.; held, mere fact D was taking medication for personal condition does not render him incompetent to appear in Ct. nor per se unable to knowingly/intelligently enter a plea, *citing* McKrill, 452 N.E.2d 946).

TITLE: Ritchie v. State
INDEX NO.: B.9.b.
CITE: (10/16/84), Ind., 468 N.E.2d 1369
SUBJECT: Competency - loss of memory
HOLDING: Loss of memory is not basis for determining D is incapable of adequately assisting in defense. Reagon, 251 N.E.2d 829. Here, D contends testimony of 3 psychiatrists that D's impaired memory might hinder his ability to assist in defense. Ct. in Reagon held that where D understood charges & was fully aware of events since fatal car accident (basis of charges), D was competent to stand trial even though he had lost recollection of facts relative to accident. Held, no error in competency determination.

RELATED CASES: Stevens, 461 F.2d 317 (lack of memory is inadequate ground for holding D incompetent to stand trial); Evans, 489 N.E.2d 942 (Ct. rejects D's contention that recall at sentencing of things that could have helped at trial constitutes incompetency & requires reversal of conviction).

TITLE: State v. Van Orden
INDEX NO.: B.9.b.
CITE: (4th Dist., 3-6-95), Ind. App., 647 N.E.2d 641
SUBJECT: Competency - claim of forced medication
HOLDING: Post-conviction Ct. erred in finding that D was medicated involuntarily to attain competence to assist in her defense at trial. D wanted to stand trial for murder, but Tr. Ct. found her incompetent to do so. D initially refused to take recommended medication, but thereafter, she voluntarily accepted alternative of medication over hospitalization so that she could proceed to trial. D did not object to medication at second competency hearing or at trial, nor did she ask Tr. Ct. to remove her from medication at trial for purposes of supporting her insanity defense. Ct. held that any objection to administration of medication must be renewed at every stage of proceeding. Pretrial confinement did not make D's choice to accept medication a per se involuntary decision. Ct. found D's reliance on holding of Riggins v. Nevada, 112 S. Ct. 1810, involving force medication, was misplaced. When sanity is at issue, jury is entitled to consider D's words & Ct. room demeanor, Chambers v. Mississippi, 93 S. Ct. 1038. D failed to show that outcome of trial would have differed had jury seen her in un-medicated state. Moreover, State presented substantial evidence of probative value to jury regarding drugs used to medicate D & its effect on her demeanor during trial. Extensive testimony by examining psychiatrists & admission of D's autobiography was sufficient information for jury to understand that her Ct. room demeanor was chemically produced & did not reflect her illness at time of crime. Held, post-conviction Ct. reversed.

B. PRETRIAL PROCEEDINGS

B.9. Competence of D to stand trial

B.9.c. Procedure for determining

TITLE: Barnes v. State
INDEX NO.: B.9.c.
CITE: (5/6/94), Ind., 634 N.E.2d 46
SUBJECT: Competence to stand trial -- conflicting opinions
HOLDING: When there is conflict of evidence submitted by physicians, Court generally will not overturn Tr. Ct.'s determination as long as reasonable grounds exist to support it. Court will review decision as to competency of D only for abuse of discretion. Here, Tr. Ct.'s determination that D was competent to stand trial was reasonably supported by one physician's testimony that D was competent, although another physician testified D was not competent to stand trial. Held, judgment affirmed, Shepard & Sullivan, C.J., J., dissenting; DeBruler & Dickson, J.J., concurring.

RELATED CASES: Kedrowitz, 199 N.E.32 386 (Ind. Ct. App.) (juv. Ct. weighed conflicting evidence and did not abuse its discretion by choosing to rely on the testimony of doctors who opined that D was competent to stand trial).

TITLE: Clifford v. State
INDEX NO.: B.9.c.
CITE: (1/3/84), Ind., 457 N.E.2d 536
SUBJECT: Competency - hearing; when required
HOLDING: Tr. Ct. did not err in failing to conduct hearing re D's competence to stand trial where examining doctors reported he was competent. IN statute & due process considerations require hearing take place only where evidence before Ct. raises bona fide/reasonable doubt re D's sanity. Adams, 386 N.E.2d 657; Brown, 346 N.E.2d 559; Cook, 284 N.E.2d 81. Held, no error.

REATED CASES: Hutchison, 2017 Ind. App. Lexis 337, (trial court did not commit fundamental error by failing to conduct competency evaluation before revoking D's probation); Manuel, 535 N.E.2d 1159 (Tr. Ct. did not have to order competency hearing sua sponte, notwithstanding D's communication impediment and handicap and D's unusual behavior at trial where record did not demonstrate that either counsel or anyone else believed D to be incompetent); Fegins, 400 N.E.2d 164 (although court-appointed psychiatrists made observation in their reports that might have given rise to bona fide doubt under other circumstances as to necessity of competency hearing, such observations did not, ipso facto, mandate hearing where both psychiatrists determined that D was competent to stand trial and there was no evidence of history of serious mental disorder, no unusual courtroom behavior, nor any prior determination of incompetency); Fine, 490 N.E.2d 305 (no abuse of discretion in failing to order hearing on competency to stand trial even though at hearing to determine acceptability of guilty plea, D refused to admit essential element of intent required for murder). Gibson, 490 N.E.2d 297 (Ind. 1986) (Tr. Ct. did not abuse discretion by failing to hold competency hearing before accepting guilty plea; D testified he was free of influence of drugs or alcohol & did not suffer from mental/emotional disability; his attorney explained D was depressive but had been found competent to stand trial 3 months earlier; concern for competency does not equal doubt concerning competency); Underhill, 477 N.E.2d 284 (Ind. 1985) (Tr. Ct. did not err in accepting D's guilty plea without first holding competency hearing; D filed notice of insanity, which he withdrew after 3 Ct.-appointed doctors examined him & found him competent to stand trial); Hill, App., 451 N.E.2d 683 (Ind. 1983) (Tr. Ct. did not err in failing to conduct competency hearing before accepting D's guilty plea; DISSENT by Staton argues forcing incompetent accused to stand trial is a denial of due process, *citing* Tinsley, 298 N.E.2d 429, & contends D's behavior in Tr. Ct. cannot override other reasonable grounds for hearing (history of serious mental disorder/commitment), *citing* Johnson, 319 N.E.2d 126).

TITLE: Corder v. State
INDEX NO.: B.9.c.
CITE: (8/20/84), Ind., 467 N.E.2d 409
SUBJECT: Competency to stand trial -- physician/patient privilege
HOLDING: Physician/client privilege applies only to those communications necessary to treatment or to diagnosis. Physician in this case was appointed by Tr. Ct. for purpose of making mental examination of D. Because purpose of examination was to determine whether insanity defense applied to case & not to treat D, no privilege existed. Held, conviction affirmed.

TITLE: Cotton v. State
INDEX NO.: B.9.c.
CITE: (8-20-01), Ind., 753 N.E.2d 589
SUBJECT: Denial of second competency hearing - observation of D at trial
HOLDING: Tr. Ct. did not err in denying D another competency hearing after conviction despite fact that during first hearing he had, unbeknownst to doctors, not been taking his medication. Two doctors found D to be competent to stand trial. Although one doctor relied on fact that D was on his medication, the other doctor's finding (which was not based on medication) coupled with observations of D throughout trial suggest that D was indeed competent. Ind. Code 35-36-3-1 requires that competency determination be made if Ct. has reasonable grounds for believing that D lacks ability to understand proceedings & assist in preparation of his defense. Smith v. State, 443 N.E.2d 1187 (Ind. 1983). Here, there were no reasonable grounds for believing D was incompetent based on observations of him at trial. Held, judgment denying D's motion to correct errors affirmed.

TITLE: Denes v. State
INDEX NO.: B.9.c.
CITE: (5/28/87), Ind., 508 N.E.2d 6
SUBJECT: Competency to stand trial -- second competency hearing
HOLDING: No abuse of discretion in failing to conduct second competency hearing prior to D's trial for attempted murder. Report submitted by physician indicated that D, who had been in remission from mental illness, may become incompetent by time of trial if his regular medication was not resumed. However, defense counsel did not request or suggest any impaired capacity of D to understand & participate in his defense. Because Tr. Ct. had opportunity to observe D's participation in trial proceedings, & defense counsel failed to move for further competency hearing, Tr. Ct. did not abuse its discretion. Held, judgment affirmed.

TITLE: Medina v. California
INDEX NO.: B.9.c.
CITE: 505 U.S. 437, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992)
SUBJECT: Competency to Stand Trial - Burden & Standard of Proof
HOLDING: Due process clause is not violated by state's allocating to criminal D burden of proving by preponderance of evidence incompetence to stand trial. State procedural rules which are part of criminal process are entitled to more deference than three-part balancing test Mathews v. Eldridge, (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 provides, & to extent that decisions involving issues of criminal procedure relied on Mathews, they were incorrect. Appropriate standard was set out in Patterson v. New York (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281: whether rule in question offends some principle of justice so rooted in traditions & conscience of our people as to be ranked as fundamental. It is historically clear that one who is mentally incompetent may not be made to stand trial; however, history shows no consistency in allocation of burden of proof on this issue. There is no special reason to place burden on state; while incompetent D may be impaired in ability to assist counsel in demon strating incompetence, that inability itself can constitute probative evidence of incompetence, & defense counsel may have best informed view of D's ability to participate in defense. Further, placing burden on state does not further some other objective, such as deterring unlawful conduct by government actors. D also challenged statute's erection of presumption of competence, but Court finds it no more offensive than allocation of burden of proof. O'Connor & Souter, JJ. CONCUR, disagreeing with abandonment of Mathews balancing test. Blackmun & Stevens DISSENT.

TITLE: Palmer v. State
INDEX NO.: B.9.c.
CITE: (12/12/85), Ind., 486 N.E.2d 477
SUBJECT: Competency to stand trial -- court-appointed experts
HOLDING: It is appropriate under certain circumstances to appoint expert to assist D in preparation for trial. Tr. Ct. must provide access to experts where it is clear that prejudice will otherwise result. In addition, due process requires State to provide indigent Ds with access to psychiatric assistance. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). Simple act of filing defense of insanity provides for appointment of medical experts. Held, conviction affirmed.

TITLE: Smith v. State
INDEX NO.: B.9.c.
CITE: (1/18/83), Ind., 443 N.E.2d 1187
SUBJECT: Competency - judicial notice of prior hearing
HOLDING: Judge may not take judicial notice of alleged prior adjudication of D's competency in companion case or of any evidence adduced in that proceeding. See Majko, 207 N.E.2d 212; Freson, App., 433 N.E.2d 55; Treesh v. DeVeny, 64 N.E.2d 41; 29 Am. Jur.2d Evidence §58. This is true even where record produced was one made in same Ct. in prior, separate case & subject matter & parties were related to instant case. Freson. Here, judge was ordered by Ind. S. Ct. to determine competency of D. Instead of holding hearing, judge judicially noticed outcome of competency hearing in companion case. Ct. holds judicial notice of those proceedings was improper & remands case for full blown competency hearing.

TITLE: Smith v. State
INDEX NO.: B.9.c.
CITE: (1/18/83), Ind., 443 N.E.2d 1187
SUBJECT: Competency - when raised
HOLDING: Notwithstanding language of Ind. Code 35-5-3.1-1 (now Ind. Code 35-36-3-1), competency to stand trial may be raised at any time, including long after trial, conviction & sentencing have occurred. Evans, 300 N.E.2d 882; Tinsley, 298 N.E.2d 429. Statute requires Tr. Ct., upon determining competency hearing is necessary, to appoint 2 competent disinterested psychiatrists to examine D & requires psychiatrists to testify at hearing. Here, special judge held hearing on competency as part of hearing on belated MCE. Judge held D waived competency question by failing to raise it before submission of case to trier of fact, which must be done if statute is read literally. On appeal, Ind. S. Ct. ordered judge to make a determination of D's competency to stand trial. Judge did not appoint psychiatrists or hold a new hearing but instead judicially noticed finding of competency in companion case. Ct. now orders judge to hold competency hearing in full compliance with statute & holds D's appeal in abeyance pending remand to determine competency.

TITLE: Stolarz v. State
INDEX NO.: B.9.c.
CITE: (4th Dist. 2/16/83), Ind. App., 445 N.E.2d 114
SUBJECT: Competency - determination during trial
HOLDING: Tr. Ct. did not err in failing to hold competency hearing during trial where motion for mistrial based upon D's incompetency to stand trial was made by state, not by D, & where record does not demonstrate abuse of discretion. Here, upon D's pretrial motion for competency determination, Tr. Ct. appointed psychiatrists & after a hearing found D competent to stand trial. State twice moved for mistrial during D's testimony at trial. No mistrial or competency hearing motions were filed by D. Ct. holds D may not take advantage of adversary's motion as grounds for reversal on appeal. TR 46. Ct. finds no fundamental error in failure to hold sua sponte competency hearing. Held, no error.

RELATED CASES: Minnick, 965 N.E.2d 124 (Ind. Ct. App. 2012) (D was not entitled to new competency evaluation before new sentencing hearing where Logansport State Hospital earlier advised Tr. Ct. that D was competent and at hearing D assisted counsel, offered relevant testimony, and was very clear and concise in his allocution); Stover, App., 621 N.E.2d 664 (D was convicted of rape & criminal confinement of fellow patient at psychiatric facility, & prior to trial D was determined to be competent to stand trial. At sentencing hearing, defense counsel indicated D was no longer receiving medication & requested new competency hearing. Ct. found Tr. Ct. did not err in refusing second hearing, finding D's comments at sentencing hearing were lucid responses).

TITLE: Thomas v. Murphy
INDEX NO.: B.9.c
CITE: (2nd Dist., 12-29-09), 918 N.E.2d 656 (Ind. Ct. App. 2009)
SUBJECT: Competency - procedure for incurably incompetent Ds
HOLDING: Tr. Ct. properly found that Thomas and Dausman's request for a preliminary injunction preventing the DMHA from placing criminal Ds lacking sufficient comprehension to stand trial in a state institution when the medical and psychiatric treatment professionals recommend placement in a less restrictive setting is not ripe for adjudication. The DMHA is the gatekeeper for individuals who have been adjudged incompetent to stand trial. At this time the DMHA does not provide community-based restoration services. The director of DMHA authored a paper discussing patients whose competency are unrestorable. Many of these patients have never possessed competency to begin with because of developmental disability or permanent brain damage. Because not all of these patients would otherwise require institutionalization, the director noted that some criminal Ds have remained in the state hospital for years, not due to treatment need, but their legal status.

Here, Thomas and Dausman suffer from mental retardation, which falls under the definition of mental illness. Both are charged with crimes and were found to be incompetent. Thomas, who was living with his mother and has the mental capacity of a five or six-year old, is at Logansport State Hospital receiving competency restoration services, although he will never be competent to stand trial. However, Thomas has been doing well at the hospital, and community-based treatment has not been recommended. Thus, Thomas' claim is not ripe for adjudication. As for Dausman, the DMHA attempted civil commitment, being Dausman's competency was unrestorable. Tr. Ct. determined that Dausman did not meet the statutory requirements for civil commitment, and he was released on bond. Because Dausman is now out on bond, his claim is not ripe for adjudication.

These cases highlight a serious deficiency in the statutory framework for the treatment of the developmentally disabled and the mentally ill in the criminal courts of Indiana. The statutory framework allows courts to recognize the mental illness of a criminal D only in terms of guilt for the crime alleged, rather than as a condition that prevents the D's ability to form a punishable intention to commit the crime alleged in the first instance. Our criminal justice system needs an earlier and intervening procedure to determine competency retroactively to the time of the alleged crime. Perhaps we as a society need to consider the concept of a D being unchargeable because of mental illness, and not just guilty but mentally ill. The commitment proceedings would protect society and best care of the D involved. In limited circumstances, the pendency of criminal charges might also be dispensed with. Held, judgment affirmed.

B. PRETRIAL PROCEEDINGS

B.9. Competence of D to stand trial

B.9.d. Psychiatric examination (Ind. Code 35-36-3-1(a))

TITLE: Beesley v. State
INDEX NO.: B.9.d.
CITE: (1/18/89), Ind., 533 N.E.2d 112
SUBJECT: Competency exam - necessity of
HOLDING: Denial of D's motion for examination regarding his competency to stand trial was not abuse of Tr. Ct.'s discretion. Examination is necessary only when there is evidence before Ct. which creates reasonable & bonafide doubt as to D's competency to stand trial. Brown, 516 N.E.2d 30; Timmons, 500 N.E.2d 1212. Appointment of psychiatrist is required only after Ct. determines reasonable grounds exist for having hearing. Tr. Ct. may base decision on D's demeanor. Timmons, *supra*. Tr. Ct.'s discretion in making that decision is reviewable only for abuse of discretion standard. Brown, *supra*. Tr. Ct. here had no reasonable grounds upon which to question D's ability to understand proceedings, or to assist in his defense. D stated he was competent, understood charges, had spoken with his attorney & with witnesses, & was seen in law library. D was coherent, & responsive to questions. Affirmed.

RELATED CASES: Armour, 948 N.E.2d 810 (Ind. Ct. App. 2011) (where D had been committed by another court and was receiving psychiatric treatment for an extended period, there were reasonable grounds to believe that D lacks the ability to understand and assist in the preparation of a defense; Tr. Ct. abused discretion by denying request for evaluation); Mato, 429 N.E.2d 945 (every occurrence outside norm is not necessarily compelling indicator that D is incompetent & that such occurrence may have cumulative effect); Green, 421 N.E.2d 635 (determination that suggestion of incompetency was insufficient to warrant appointment of two psychiatrists to examine D was not abuse of discretion, as D's "suggestion of incompetency" contained only naked assertion that he was incompetent to stand trial & incapable of assisting in his defense); Duffit, App., 519 N.E.2d 216 (when D fails to provide court of appeals with any evidence presented to Tr. Ct. supporting his claim that Tr. Ct. abused discretion in not appointing psychiatrist for competency evaluation, presumption was that Tr. Ct. properly observed demeanor, & considered evidence when determining D was competent to stand trial); Underwood, 535 N.E.2d 507 (D was not entitled to competency hearing or to psychiatric examination, although he testified during hearing on motion for psychiatric examination that he abused alcohol & drugs, was at times confused & had difficulty understanding events occurring around him, & was on prescribed antidepressants).

TITLE: Estelle v. Smith
INDEX NO.: B.9.d.
CITE: 451 U.S. 454 (1981)
SUBJECT: Competency to stand trial -- rights of D during court-ordered psychological exam
HOLDING: Right to counsel guaranteed by 6th Amendment means that person is entitled to assistance of lawyer at or after time that adversary judicial proceedings have been initiated against him whether by formal charge, preliminary hearing, indictment, information, or arraignment. Kirby, 406 U.S. 682. Here, D's 6th Amendment right to counsel clearly had attached during court-ordered psychological examination at county jail, & interview proved to be critical stage of aggregate proceedings against D. Held, issuance of writ of habeas corpus affirmed.

TITLE: Phelan v. State
INDEX NO.: B.9.d.
CITE: (6/25/80), Ind., 406 N.E.2d 237
SUBJECT: Competency to stand trial -- comments to psychiatrist
HOLDING: If incriminating remarks made to physician during compulsory psychiatric examination are offered to demonstrate mental condition of D, they should be admitted. However, if they are offered to demonstrate guilt, they should not be admitted, over proper objection. In criminal bench trials, there is presumption that court considered only competent evidence in reaching verdict. Here, during bench trial, Tr. Ct. allowed court-appointed physicians to testify to incriminating statements made by D during compulsory psychiatric examinations. Because incriminating statements were admissible as relevant to D's mental condition & other evidence clearly demonstrated D's commission of criminal acts, there was no basis for departing from presumption that Tr. Ct. considered only competent evidence. Held, conviction affirmed.

RELATED CASES: Sims, 601 N.E.2d 344 (violation of D's right against self-incrimination to admit counselor's testimony of what D relayed to him during court-ordered psychological treatment in prior sex offense case); Dickson, 533 N.E.2d 586 (no requirement to warn D of right to remain silent prior to psychiatric evaluations where D filed notice of intent to offer insanity defense).

TITLE: Weedman v. State
INDEX NO.: B.9.d
CITE: (11/26/2014), 21 N.E.3d 873 (Ind. Ct. App. 2014)
SUBJECT: Admission of withdrawn insanity defense did not constitute fundamental error
HOLDING: In aggravated battery prosecution, Tr. Ct. erred in admitting evidence that D had pursued and later withdrew an insanity defense. D asserted self-defense at trial and insanity was not at issue. Where, as here, D withdraws his defense of insanity before trial, the latitude in admitting D's other prior conduct becomes substantially limited. Cardine v. State, 475 N.E.2d 696 (Ind. 1985); see also Taylor v. State, 659 N.E.2d 535 (Ind. 1995) (D's mental condition may be relevant, but State may not misuse its access to D by attempting to prove his guilt through testimony of its physician).

Here, the State was improperly attempting to prove D's guilt through the discussion of his withdrawn insanity defense and the doctors' testimony. D failed to object, and Court could not say that admission of this evidence resulted in fundamental error, because evidence supporting jury's verdict was overwhelming. Held, judgment affirmed.

NOTE: Court recognized that a significant amount of evidence was improperly admitted at trial. "At some point, the cumulative effect of the improper evidence would reach a tipping point and make a fair trial impossible.…However, given the avalanche of evidence of Weedman's excessive force, we conclude that the tipping point was not reached here."

B. PRETRIAL PROCEEDINGS

B.9. Competence of D to stand trial

B.9.e. Procedure for finding incompetence. (See also H.1)

TITLE: Jackson v. State
INDEX NO.: B.9.e
CITE: 406 U.S. 715 (1972)
SUBJECT: Competency to stand trial -- time of pre-trial detention if incompetent
HOLDING: Due process requires that nature & duration of commitment bear some reasonable relation to purpose for which individual is committed. It is violation of due process for State to detain person found unfit to stand trial for longer than reasonable period of time necessary to determine whether there is substantial probability he or she will be fit to stand trial in near future. If no probability of improvement, D must be released unless subject to involuntary commitment under state law. Record of pretrial commitment of criminal D determined to be incompetent to stand trial established that there was little likelihood that D's condition would improve, & that although commitment was "until sane," it was in effect indeterminate. Indefinite commitment of criminal D solely on account of his incompetency to stand trial violated due process clause. Held, reversal of order mandating commitment until sane.

TITLE: State v. Coats
INDEX NO.: B.9.e
CITE: (2/18/2014), 3 N.E.3d 528 (Ind. 2014)
SUBJECT: Competency - Commitment to DMHA
HOLDING: A Tr. Ct. does not have the discretion to refuse to order commitment of an incompetent D to the DMHA, even where it concludes that the D can never be returned to competency. Following a competency evaluation, Ind. Code § 35-36-3-1(b) provides, in pertinent part: "If the court finds that the D lacks [the ability to understand the proceedings and assist in the preparation of the D's defense], it shall delay or continue the trial and order the D committed to the division of mental health and addiction." Within ninety days after the D's admission into a state institution for competency restoration services, the superintendent of the state institution shall certify whether the D has a substantial probability of attaining competency. If there is no substantial probability of attaining competency, regular commitment proceedings must occur. Ind. Code § 35-36-3-3.

Here, D, who was almost seventy years old and diagnosed with Alzheimer's disease, was charged with class D felony sexual battery. Based on doctors' reports regarding their evaluations of D, Tr. Ct. found D incompetent to stand trial, that he could not be restored to competency, and that he was not a public safety risk. The State filed a request to commit D to DMHA for competency restoration, which the Tr. Ct. denied. But, the statutes are clear that the Tr. Ct. determines whether the D is competent to stand trial and the superintendent determines whether the D has a substantial probability of attaining competency within the foreseeable future. The Indiana Legislature's decision to allocate to the DMHA the responsibility to determine whether competency can be restored after a ninety-day evaluation of the D does not violate due process and Indiana case law prohibiting the State from holding a D longer than necessary to restore competency. Held, transfer granted, Court of Appeals' opinion at 981 N.E.2d 1273 vacated; judgment reversed and remanded with an order to commit D to DMHA for competency restoration services.

TITLE: Wallace v. State
INDEX NO.: B.9.e
CITE: (12/6/85), Ind., 486 N.E.2d 445
SUBJECT: Competency to stand trial -- attainment of competency after finding of incompetency
HOLDING: Tr. Ct. had authority & duty to hold hearing to determine D's competency upon notification that D, who previously had been found incompetent to stand trial, had attained ability to understand proceedings & assist in preparation of his defense. When D attains ability to understand proceedings & assist in preparation of his defense, division of mental health, through superintendent of appropriate psychiatric institution, shall certify that fact to proper court, which shall enter order directing sheriff to return D. Held, conviction affirmed.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

TITLE: Kindred v. State
INDEX NO.: B.10
CITE: (6/28/89), Ind., 540 N.E.2d 1161
SUBJECT: Motion to dismiss by D -- summary denial
HOLDING: Summary denial of motion to dismiss was proper where D's motion and sworn statement contained only bald assertion that habitual offender count was selectively brought on basis of gender. Motion was not accompanied by sworn allegations based on personal knowledge or disclosing sources of information and grounds for belief that gender was factor in charging D as habitual offender. Held, summary denial of motion proper.

TITLE: Sappenfield v. State
INDEX NO.: B.10
CITE: (4/18/84), App., 462 N.E.2d 241
SUBJECT: Motion to dismiss by D -- amendments
HOLDING: Once omnibus date is set, neither State nor D can waive it or change it. It remains omnibus date regardless of how many continuances are granted for omnibus hearing. Title "Supplemental Motion to Dismiss" does not bestow any relation back qualities upon second motion to dismiss. It is substantive content of motion to dismiss filed within statutory time limit that governs. Held, judgment affirmed.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.a. Defective information or indictment (Ind. Code 35-34-1-6 and 7) (see, also A.3)

TITLE: Marshall v. State
INDEX NO.: B.10.a.
CITE: (4/21/92), Ind. App., 590 N.E.2d 627
SUBJECT: Motion to dismiss by D -- filing repetitive charges
HOLDING: State has unrestricted discretion to file allegedly repetitive charges. Even though D charged and found guilty, he can only be convicted and sentenced once for same offense. Here, D was charged with robbery, confinement, and intimidation; assuming he was found guilty on all counts, he could have been convicted and sentenced for robbery only because confinement and intimidation were means by which robbery was committed. D did not meet his burden of proving that his guilty pleas were induced by improper "overcharging." Held, denial of post-conviction relief affirmed.

RELATED CASES: Schweitzer, 531 N.E.2d 1386 (when information complies with its statutory requirements, state is required to dismiss repetitive charges; however, Ct. may compel state to elect among various offenses charged); Underwood, 535 N.E.2d 507 (state may allege single offense in more than one count, provided that only single judgment and sentence is imposed); Collins, 521 N.E.2d 682 (D was not prejudiced by being alternatively charged with murder and felony-murder arising out of same incident).

TITLE: Marshall v. State
INDEX NO.: B.10.a.
CITE: (10/27/92), App., 602 N.E.2d 144
SUBJECT: Motion to dismiss by D -- examples of duplicitous counts
HOLDING: It is fundamental tenet of pleading criminal causes that information must set forth "the nature and elements of the offense charged in plain and concise language..." Ind. Code 35-34-1- 2(a)(4). Here, form indictment charging public indecency was bad for duplicity, as State failed to delete inapplicable portion of indictment, and thereby apparently charged D with all four varieties of public indecency. Thus, information could not have withstood attack by timely motion to dismiss. Ind. Code 35-45-4-1(a)(4). However, it could not be said that information was so prejudicial to rights of D that he did not receive fair trial. Held, conviction affirmed.

RELATED CASES: Wiseman, 521 N.E.2d 942 (charges were uttering with intent to defraud, involving seven stolen checks deposited with same deposit slip on same day at same bank; held, one offense; see card at E.11.a); Moritz, 465 N.E.2d 748 (D who received one lump sum bribe for five orders of supplies for city was charged with six bribery counts and convicted of four; Ct. ordered judgment on three counts vacated as duplicitous; there was one transaction, single intent and design; see card at A.6.).

TITLE: Shanholt v. State
INDEX NO.: B.10.a
CITE: (3d Dist. 4/27/83), Ind. App., 448 N.E.2d 308
SUBJECT: Motion to dismiss - defective information; duplicity
HOLDING: Charging information is not duplicitous where statute (criminal confinement) embraces in the disjunctive separate & distinct acts as a crime but information charges in the conjunctive. Troutman v. US (CA10 1938), 100 F.2d 628; see Smith, 168 N.E.2d 199. Here, charging information contained elements of Ind. Code 35-42-3-3(a)(2) & (a)(3), charged in the conjunctive. D contends state attempted to combine elements & create a hybrid offense. Ct. holds information was sufficient for state to prove either removal of children by fraud & enticement from one place to another or their removal to a place outside of IN in violation of a custody order. Held, no hybrid offense was created; information was valid.

TITLE: State v. Palmer
INDEX NO.: B.10.a.
CITE: (4th Dist. 9/3/86), Ind. App., 496 N.E.2d 1337
SUBJECT: Motion to dismiss - information; lack of probable cause affidavit
HOLDING: Probable cause affidavit is not prerequisite to filing information so long as that information does not serve as basis for arrest warrant. Here, Tr. Ct. granted D's motion to dismiss information for lack of probable cause. Lack of probable cause is not proper ground on which to predicate motion to dismiss information. Ind. Code 35-34-1-4(a); Ind. Code 35-34-1-6(a); Gilliam, 383 N.E.2d 297. Probable cause requirement relates to arrest & not to filing of information. Scott, App., 404 N.E.2d 1190. Ct. has option of issuing summons instead of arrest warrant, which occurred in this case. D was not arrested or detained in custody. Held, reversed & remanded for trial.

RELATED CASES: Hicks, 544 N.E.2d 500 (tr. Ct. properly denied D's motion to dismiss information predicated on absence of probable cause sufficient to justify his arrest).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.a.1 Improper form

TITLE: Hestand v. State
INDEX NO.: B.10.a.1.
CITE: (4/23/86), Ind., 491 N.E.2d 976
SUBJECT: Motion to dismiss by D -- incorrect citation to statute
HOLDING: Under Indiana law, prosecution may be initiated by either information or indictment. Ind. Code 35-34-1-1. Although statute under which D was charged was *cited* incorrectly in information, D was not misled to extent entitling him to reversal of his conviction of child molesting, where proper statutory language was set forth as explanation of charge. Held, conviction affirmed.

RELATED CASES: Woodcox, 591 N.E.2d 1019 (allegation in body of information defined crime, not *cited* statute and, thus, fact that information might have mis-cited statute did not mean that D was improperly charged).

TITLE: Layne v. State
INDEX NO.: B.10.a.1
CITE: (6/17/75), Ind., 329 N.E.2d 612
SUBJECT: Motion to dismiss -- alleging several acts for one offense
HOLDING: It is proper to allege in one count several acts, any one of which would constitute alleged crime. Here, conjunctive phrase "touch, beat, strike, cut and would" was used in charging affidavit followed by the word "knife." Words referred to single act. Held, affidavit not subject to dismissal.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.a.3. Statute unconstitutional or invalid (Ind. Code 35-34-1-6(a)(3))

TITLE: Burris v. Farley

INDEX NO.: B.10.a.3.

CITE: 845 F.Supp. 636 (1994), vacated and remanded with directions in Burris v. Parke, 95 F.3d 465 (7th Cir. Ind. 1996)

SUBJECT: Motion to dismiss -- unconstitutional statute

HOLDING: Tr. Ct. properly denied D's motion to dismiss based on constitutionality of statute. D stated that he had due process claim in that judge-based jury instruction for purposes of felony murder on class C robbery; D claimed that robbery statute defined three different crimes. Legislative history behind Indiana criminal statutory scheme governing murder, felony murder, and manslaughter, including inclusion of robbery in felony murder statute, was not so ambiguous as to constitute due process violation. Held, conviction affirmed.

RELATED CASES: Brown, 868 N.E.2d 464 (criminal confinement by fraud or enticement void for vagueness); Reed, App., 720 N.E.2d 431(statute prohibiting possession of drugs within 1000 feet of school held not unconstitutionally vague); Plummer, 414 U.S. 2 (ordinance penalizing use of "fighting words" was vague and invalid on face); Papachristou, 405 U.S. 156 (vagrancy ordinance void for vagueness); Helton, App., 624 N.E.2d 499 (criminal gang activity statute not void for vagueness because it did not vest unfettered discretion in prosecutor to enforce it in arbitrary and discriminatory manner; for group activity to be punishable, statute must establish specific defining criteria).

TITLE: Helton v. State
INDEX NO.: B.10.a.3
CITE: (12/1/93), App., 624 N.E.2d 499
SUBJECT: Motion to dismiss -- unconstitutional statute; overbreadth
HOLDING: Tr. Ct. properly denied D's motion to dismiss based on overbreadth challenge to gang statute. Statutes are not overbroad merely because one may conceive of single impermissible application, but only if they prohibit substantial amount of protected conduct. There must be realistic danger that statute itself will significantly compromise recognized First Amendment rights of parties not before Ct. for it to be facially challenged on overbreadth grounds. Here, D contended that gang statute is unconstitutionally overbroad because it could conceivably interfere with free exercise of others' First Amendment rights and legally permissible conduct such as contact sports. Here, Ct. held that gang statute is not overbroad and does not infringe upon freedom of association in violation of First Amendment when construed and applied so as to reach only active members who have knowledge of gang's criminal advocacy and specific intent to further gang's criminal conduct. Held, conviction affirmed.

TITLE: Matter of Estate of Wilson
INDEX NO.: B.10.a.3.
CITE: (3/10/93), App., 610 N.E.2d 851
SUBJECT: Motion to dismiss -- service on attorney general not required
HOLDING: Party contesting constitutionality of provision of statute is not required to serve notice on attorney general before attacking constitutionality of provision, as long as party does not seek declaratory judgment. Ind. Code 29-1-7-4; 34-4-10-11. Statute which requires anyone seeking to have statute declared void as unconstitutional to serve notice on attorney general is part of Uniform Declaratory Judgment Act and was not intended to apply to other proceedings. Ind. Code 34-4- 10-11. Held, dismissal of complaint challenging will affirmed.

RELATED CASES: Black, App., 380 N.E.2d 1261 (Ds charged with violating county ordinance; when challenging constitutionality of ordinance, not required to serve notice upon attorney general).

TITLE: Newton v. State
INDEX NO.: B.10.a.3.
CITE: (2d Dist. 11/29/83), Ind. App., 456 N.E.2d 736)
SUBJECT: Motion to dismiss - statute unconstitutional
HOLDING: D may not challenge constitutionality of statute defining a crime for first time on appeal; challenge must be by written motion to dismiss filed prior to arraignment & plea. Marchand, App., 435 N.E.2d 284; Salrin, App., 419 N.E.2d 1351. Here, D contends child molesting statute is unconstitutional because it does not require element of mens rea. Ct. finds D's argument untimely & notes omission of words such as "knowingly" & "intent" are not conclusive of whether guilty knowledge is essential element of crime. 22 C.J.S. Criminal Law §30; Gregory, 291 N.E.2d 67. Held, conviction affirmed.

RELATED CASES: Burke, 943 N.E. 2d 870 (Ct. reviewed D's claim that religious worship enhancement in burglary statute violates the Establishment Clause of 1st Amendment, even though D's motion to dismiss raised only state constitutional issue under Ind. Const. Art. I, § 4; "appellate courts have considered challenges to the constitutionality of criminal statutes even when Ds have failed to file motions to dismiss").

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.b. Misjoinder (Ind. Code 35-34-1-4(a)(2)) (see also D.6.b)

TITLE: Estrada v. State
INDEX NO.: B.10.b
CITE: (06-22-12), 969 N.E.2d 1032 (Ind. Ct. App. 2012)
SUBJECT: Successive prosecution does not apply where juvenile court lacks jurisdiction over criminal charges
HOLDING: D's charges of Class B felony robbery and Class C felony conspiracy to commit robbery in adult court were not barred by Indiana's successive prosecution statute, because those charges could not have been brought in juvenile court under Ind. Code 31-30-1-4. Assuming, without deciding, that the successive prosecution statute (Ind. Code 35-41-4-4) applies to juvenile proceedings (i.e., to civil matters that do not result in criminal convictions), D failed to show that the adult counts "should have been charged" in the juvenile delinquency petition pursuant to Ind. Code 35-41-4-4(a)(3). Pursuant to Ind. Code 31-30-1-4(a)(6), juvenile court lacks subject matter jurisdiction over robbery while armed with deadly weapon charges where, as here, D was at least sixteen (16) years of age at the time of the offense. Pursuant to Ind. Code 31-30-1-4(a)(13), D's conspiracy to commit robbery offense is an "offense that may be joined under Ind. Code 35-34-1-9(a)(2)" with the armed robbery charges because it is based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. The conspiracy charge was thus an offense within the ambit of subsection (a)(13) of Ind. Code 31-30-1-4 and therefore outside of the juvenile court's jurisdiction. Held, denial of motion to dismiss affirmed.

NOTE: Court also held that D's conspiracy conviction did not violate double jeopardy, and her twenty-four-year sentence was not inappropriate even though she was only seventeen at the time of these offenses. D "was the driver and did not enter any of the stores. Even so, it is significant that she was the person who asked for help in getting money and she was complicit in crimes of a serious nature...Estrada's character shows disrespect for the judicial process and disregard of the law."

TITLE: Hahn v. State
INDEX NO.: B.10.b
CITE: (12/20/2016), 67 N.E.3d 1071 (Ind. Ct. App. 2017)
SUBJECT: Dismissal not required under successive prosecution statute
HOLDING: The trial court did not abuse its discretion in denying D's motion to dismiss two counts in cause number 40, from which this appeal arises, because D failed to show those counts should have been joined earlier with the charge in cause number 341, which was disposed by guilty plea while cause number 40 was still pending.

D, while intoxicated and accompanied by Renee Ruble, drove to Gene's bar in Muncie. Once they pulled into a parking space and exited their vehicle, D and Ruble got into a shouting match with Doug and Sheila Shaw. The dispute escalated with D eventually striking Doug with a baseball bat. D, still intoxicated, drove away, still accompanied by Ruble. An officer dispatched to the scene located D's car and pursued him as D initially tried to evade the officer; however, he eventually pulled over. The entire incident, starting from when D pulled into the parking lot until he pulled over after fleeing the scene took a few minutes.

The State charged D in cause number 40 with 1) Aggravated Battery, 2) Resisting Law Enforcement, and 3) OWI Endangering a Person. The State later sought, and the trial court granted, dismissal of the OWI charge because it had also been filed in cause number 341, where it was earlier disposed by guilty plea. Thus, D asked the trial court to dismiss the battery and resisting charges in cause number 40, arguing that they were based in the same incident at issue in cause number 341, and thus should have been joined with the OWI charge in cause number 341.

Under the successive prosecution statute, a prosecution is barred if, among other things, the "instant prosecution is for an offense with which the D should have been charged in the former prosecution." Ind. Code § 35-41-4-4(a)(3) (emphasis added). This language should be read in conjunction with the joinder statute, which says, in part, that a "D who has been tried for one offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses . . . ." Ind. Code § 35-34-1-10(c) (emphasis added); see Williams v. State, 762 N.E.2d 1216, 1219 (Ind. 2002). "Neither [statute] has been interpreted to automatically bar successive prosecutions for separate offenses which are committed at the same time or during the same general criminal episode." Seay v. State, 550 N.E.2d 1284, 1288 (Ind. 1990), *reh'g denied*. "To determine whether contemporaneous crimes are part of a single scheme or plan, we examine whether they are connected by a distinctive nature, have a common modus operandi, and a common motive." Williams, at 1220.

Here, if the conduct D pled to in cause number 341 was his act of driving while intoxicated after the fight, then the battery and resisting offenses in cause number 40 arguably should have been filed in cause number 341 because they were so close in time to the OWI. On the other hand, if the OWI at issue in cause number 341 was completed once D pulled into Gene's bar parking lot, before the fight began, then that conduct was more removed in time and arguably distinct from the battery and resisting offenses so joinder was not required, and dismissal of the charges in cause number 40 was not appropriate.

As the Appellant, D carries the burden to supply a record to support his claim that the OWI conduct at issue in cause number 341 was restricted to his driving away from the scene of the fight. D

could perhaps meet that burden by including the charging information or guilty plea transcript from 341 in the record for his appeal. However, he has not supplied this information, so there is no basis to say that the charges from cause number 40 should have been joined with the charge in cause number 341. Held, judgment affirmed.

TITLE: Honeycutt v. State
INDEX NO: B.10.b
CITE: (09-05-12), 974 N.E.2d 525 (Ind. Ct. App. 2012)
SUBJECT: New charges barred by successive prosecution statute - no waiver
HOLDING: Tr. Ct. abused its discretion in denying D's motion to dismiss two operating while intoxicated charges pursuant to Indiana's successive prosecution statute, because the charges came after he pleaded guilty to two other charges relating to the same traffic stop. D was arrested and a few days later pled guilty, without counsel, to marijuana possession and a traffic infraction and was sentenced. A few days later, lab results from the arrest came back showing his blood draw was positive for marijuana. The State then added two operating while intoxicated charges under the same cause number.

D argued that since all four charges were connected, the instant charges should be dismissed because they should have been charged together in the former prosecution under Ind. Code 35-41-4-4. Where two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they should be joined for trial. Williams v. State, 762 N.E.2d 1216 (Ind. 2002). Distinguishing State v. McDonald, 954 N.E.2d 1031 (Ind. Ct. App. 2011), Court concluded that there was probable cause to charge D with the operating charges at the same time as it brought the possession of marijuana and traffic infraction charges. At time of traffic stop, D confessed to smoking marijuana, there was marijuana on him, and officer observed signs of marijuana use. If State believed that lab results were the key piece of evidence it needed to file the operating charges, then it should have completed its investigation, dismissed the initially-filed charges, and filed all four charges at the same time. Despite being warned when he pled guilty that blood draw results were pending and additional charges might be coming, D did not make a valid waiver of his successive prosecution challenge because he was neither aware of the rights he was waiving nor was he represented by counsel. Held, judgment reversed.

TITLE: Robbins v. State
INDEX NO.: B.10.b
CITE: (5/14/76), Ind., 346 N.E.2d 251
SUBJECT: Motion to dismiss by D -- misjoinder
HOLDING: Where separate crimes were all committed by D in single series of events, on same day, involving same person, it is proper to join three separate counts in indictment. Here, D was charged with kidnapping, rape, and commission of felony while armed with deadly weapon involving the same person and occurring on same day. Charge was entirely proper. Held, denial of petition for post-conviction relief affirmed.

TITLE: Schmidt v. State
INDEX NO: B.10.b
CITE: (5/2/2013), 986 N.E.2d 857 (Ind. Ct. App. 2013)
SUBJECT: New charges not barred by successive prosecution statute
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss two Class C felony theft charges filed in Howard County, which he argued were part of a prior Miami County prosecution and "should have been charged" in that prosecution under successive prosecution statute, Ind. Code 35-41-4-4(a)(3). Under Ind. Code 35-34-1-4(a)(7), a D may move to dismiss a prosecution prior to trial if "the prosecution is barred by reason of a previous prosecution." Likewise, Ind. Code 35-34-1-10(d) permits a D who has been sentenced on a guilty plea to move for dismissal of other indictments or charging informations for "a related offense."

Here, D's separate series of distinct thefts against different victims would not have required joinder of charges because they were not part of "a single criminal transaction" identified by "a distinctive nature . . . common modus operandi, and a common motive." Williams v. State, 762 N.E.2d 1216 (Ind. 2002). Police conducted two separate investigations, one involving allegations D had deprived victim of two concrete-crushing machines and sold them to other customers. The other investigation involved D's dealings with bank, where D fraudulently secured several loans using collateral he no longer owned.

Court rejected claim that Ind. Code 35-34-1-10(c) requires the State to join all "potential" charges in a single prosecution whenever joinder "could" occur. This statute does not require State to bring all potential charges in a unified action. Held, denial of motion to dismiss affirmed.

TITLE: State v. Reichert
INDEX NO.: B.10.b
CITE: (4/22/48), Ind., 78 N.E.2d 785
SUBJECT: Motion to dismiss by D -- misjoinder of offenses
HOLDING: If affidavit shows upon its face that separate offenses relating to different transactions are improperly joined in different counts, then affidavit may be quashed. Rokvic, 143 N.E.2d 357. Here, indictment alleged that D received money on June 17, 1945 from Alvin R. Brown; October 12, 1946 from Alvin R. Brown; and May 1, 1946 from Benjamin H. Bartlett and Clarence Coogan. These were three distinct and separate charges which were improperly joined in same indictment. Held, judgment sustaining motion to quash affirmed.

TITLE: State v. Wiggins
INDEX NO.: B.10.b.
CITE: (2nd Dist., 2-22-96), Ind. App., 661 N.E.2d 878
SUBJECT: Tr. Ct.'s authority to dismiss successive prosecution
HOLDING: Tr. Ct. has discretionary authority under Ind. Code 35-34-1-10(c) to dismiss charges which could have been joined in earlier prosecution, even where double jeopardy principles do not apply. Statute allows D who has been tried for one offense to thereafter move to dismiss offense which could have been joined for trial of prior offenses. Where Tr. Ct. orders joinder of offenses under Ind. Code 35-34-1-10(a) or (b) & State elects to dismiss one of the offenses ordered joined, Ind. Code 35-41-4-4(a)(3) bars subsequent attempt to reprosecute that offense. State v. Burke, 443 N.E.2d 859 (Ind. Ct. App. 1983). Here, D was charged with & acquitted of two counts of dealing cocaine tried at one trial. Third charge of conspiracy to deal cocaine on different occurrence date was filed on trial's first day, which prevented opportunity to move for joinder. Ct. noted that dismissal of third charge was proper because Tr. Ct., if afforded opportunity would have been required to join it with first two charges under Ind. Code 35-34-1-10(b). In this sense, therefore, prosecution of conspiracy charge was barred under Ind. Code 35-41-4-4 because it should have been joined in former prosecution which ended in acquittal. Neither D nor Tr. Ct. had opportunity to move for joinder in this case because of State's delay in filing third charge. Regardless of whether Ind. Code 35-34-1-10(b) is triggered, however, Tr. Ct. has authority to protect D from burden of additional prosecutions which Tr. Ct. determines "should have" or "could have" been disposed of in earlier prosecution. Held, judgment affirmed.

RELATED CASES: Williams, 762 N.E.2d 1216 (because charges in two Cts. were based on series of acts so connected that they constituted part of single scheme or plan, they should have been charged in single prosecution); Moore, App., 697 N.E.2d 1268 (subsequent prosecution for felony murder was not barred by earlier prosecution for robbery based on same criminal episode).

TITLE: Williams v. State
INDEX NO: B.10.b.
CITE: (2-15-02), Ind., 762 N.E.2d 1216
SUBJECT: New charges barred by successive prosecution statute
HOLDING: Indiana's joinder statute, Ind. Code 35-34-1-10(c), provides that, where two or more charges are based on same conduct or on a series of acts constituting parts of a single scheme or plan, they should be joined for trial. Successive prosecution statute, Ind. Code 35-41-4-4(a)(3), provides that prosecution is barred by reason of former prosecution if offense charged should have been charged in former prosecution. This statutory scheme provides check upon otherwise unlimited power of State to pursue successive prosecutions. Wiggins, App., 661 N.E.2d 878. Where State chooses to bring multiple prosecutions for series of acts constituting parts of single criminal transaction, it does so at its own peril.

Here, undercover police officer bought drugs from D, then allowed him to depart, & radioed nearby uniformed officers to arrest him. D fled into nearby vacant apartment. Officers arrested him there, finding more drugs in his possession. State charged D with breaking into apartment & possessing cocaine there & struck plea agreement. Before judgment of conviction was entered but after plea agreement was negotiated on possession charge, different prosecutor in different Ct. filed dealing charges against D based on the undercover buy. Because charges in two Ct.'s were based on series of acts so connected that they constituted part of single scheme or plan, they should have been charged in single prosecution. Thus, dealing charges were barred by Ind. Code 35-41-4-4(a). Held, conviction reversed.

RELATED CASES: Honeycutt, 974 N.E.2d 525 (Ind. Ct. App. 2012) (Tr. Ct. erred in denying D's motion to dismiss operating while intoxicated charges which should have been filed at same time as marijuana possession and infraction charges; if State believed that lab results were the key piece of evidence it needed to file the operating charges, then it should have completed its investigation, dismissed the initially-filed charges, and filed all four charges at the same time; see full review, this section); Thompson, 966 N.E.2d 112 (Ind. Ct. App. 2012) (while better practice might have been for State to join all the charges, dismissal under successive prosecution statute not required because there was no evidence that D's driving while suspended offense was part of a single scheme or plan with the drug offenses in this case); Allen, 956 N.E.2d 195 (Ind. Ct. App. 2011) (prosecuting D for Class A felony dealing in heroin after he pled guilty to Class B misdemeanor visiting a common nuisance was barred under Ind. Code 35-41-4-4; it is reasonable to assume that D went to apartment with intention to sell heroin as well as to visit a common nuisance); McDonald, 954 N.E.2d 1031 (Ind. Ct. App. 2011) (where new evidence that D molested his son was discovered after D had been investigated for molesting all of his children, charged with neglect of all the children and molest of his daughter and pled guilty to a lesser charge, the subsequent prosecution of D for molest of his son was not prohibited; because probable cause of molestation of D's son did not exist at time of original charges, such charge should not have been joined); Dixon, 924 N.E.2d 1270 (Ind. Ct. App. 2010) (where D was charged with criminal recklessness after he pled guilty to OWI, Tr. Ct. abused its discretion by granting motion to dismiss criminal recklessness charge; criminal recklessness charge, which was based on D having gun in cell day after he was arrested for the OWI, was not part of a single scheme or plan requiring joinder of charges); Haywood, App., 875 N.E.2d 770 (D's offenses charged in City Court occurred within a short period of time & in a limited locale, & thus were part of a "single scheme or plan" such that they should have been joined in the initial prosecution); Hamer, App., 771 N.E.2d 109 (successive prosecution upheld because D did not object prior to start of second trial, but at close of evidence).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.c. Defective grand jury proceeding (Ind. Code 35-34-1-4(a)(3))

TITLE: Ajabu v. State
INDEX NO.: B.10.c
CITE: (1st Dist., 2-28-97), Ind. App., 677 N.E.2d 1035
SUBJECT: Grand jury (GJ) proceeding - effect of improper jury instruction
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss GJ indictment alleging that jury was erroneously instructed. Dismissal of action is proper when grand jury proceedings are defective. Ind. Code 35-34-1-4(a)(3); Sparks v. State, 499 N.E.2d 738 (Ind. 1986). GJ is exclusive judge of facts with respect to any matter before it. Ind. Code 35-34-2-4(j). Because GJ proceedings are investigative rather than adjudicative, instructions to GJ require less precision than those to petit jury. However, instruction that invades province of GJ to determine whether facts establish probable cause violates Ind. Code 35-34-2-4(j) & may warrant dismissal of indictment. Erroneous instruction will not invalidate indictment absent showing of prejudice. To show prejudice, instructions in their entirety must be so misleading or deficient that fundamental integrity of indictment process is compromised. Sparks v. State, 499 N.E.2d 738 (Ind. 1986); State v. Inthavong, 402 N.W.2d 799 (Minn. 1987). Here, GJ was instructed to hear evidence & take such further action as they deem advisable & "to present their Report & Indictment to the Ct." D argued that instruction required GJ to return indictment. Ct. noted that to extent instruction appeared to mandate return of indictment, it infringed upon province of GJ. However, entirety of information presented to GJ by judge & special prosecutor properly advised GJ of its responsibility, & questions from jury indicated clear understanding of its independent responsibility to weigh facts. Therefore, D failed to show that he was prejudiced by improper GJ instruction. Held, judgment affirmed.

TITLE: Averhart v. State
INDEX NO.: B.10.c
CITE: (10/29/82), Ind., 470 N.E.2d 666
SUBJECT: Motion to dismiss - defective grand jury (GJ) proceedings
HOLDING: Where D's only allegation is that certain evidence was irrelevant/prejudicial/led to lack of impartiality on part of GJ, D's motion to dismiss was properly denied. (Motion also properly denied because untimely filed, see B.11.a). Even if true, claim is not ground for dismissal of indictment, disqualification of jury or grounds for finding GJ illegally constituted. Jones, 385 N.E.2d 426; Stevens, 354 N.E.2d 727, *reh. granted* 357 N.E.2d 245; Jarver, 356 N.E.2d 215. Here, Ct. also rejects D's allegation that prosecutorial misconduct before GJ denied him due process. Dismissal of indictment is required only in flagrant cases in which misconduct affects independent judgment of GJ. US v. Cederquist, (CA9 1981), 641 F.2d 1347; other citations omitted. Ct. finds no evidence of prosecutorial misconduct. Held, no error.

TITLE: Daugherty v. State
INDEX NO.: B.10.c
CITE: (1st Dist. 7/18/84), Ind. App., 466 N.E.2d 46
SUBJECT: Motion to dismiss - grand jury commissioners
HOLDING: Tr. Ct. did not err in refusing to dismiss indictments. Here, D argues untimely appointment of jury commissioners, in violation of Ind. Code 33-4-5-2, requires dismissal. Statute requires annual appointment in November. Commissioners were appointed in November, but didn't take oath until 12/2. Technical defects in jury selection process do not require reversal. Hasselbring, 441 N.E.2d 514. Any defect here was technical rather than substantive. D shows no prejudice. Held, no error.

TITLE: Robinson v. State
INDEX NO.: B.10.c.
CITE: (5/22/85), Ind., 477 N.E.2d 883
SUBJECT: Motion to dismiss -- unauthorized persons present during grand jury proceedings
HOLDING: In Indiana, there is no per se rule presuming prejudice when unauthorized persons appear before grand jury, or even when those persons participate in interrogation of witnesses. Fair, 364 N.E.2d 1007. D is not entitled to reversal by reason of presence of outsiders in grand jury room while grand jury is hearing testimony, unless D can demonstrate prejudice. Here, fact that attorney for murder victim's mother was allowed to question her during grand jury proceedings, with result that murder charge against her was dismissed and charge of child neglect was lodged instead, was insufficient to establish prejudice against party who was ultimately charged and convicted of child's murder. Held, conviction affirmed.

RELATED CASES: Hardy, 406 N.E.2d 313 (dismissal of indictment was justified on basis of presence and active participation of elected prosecuting attorney in grand jury proceedings after granting of motion for appointment of special prosecuting attorney).

TITLE: Snyder v. State
INDEX NO.: B.10.c
CITE: (8/30/79), Ind. App., 393 N.E.2d 802
SUBJECT: Motion to dismiss -- grand jury; target served with defective subpoena
HOLDING: In order to protect grand jury witness' right against self-incrimination, every witness must be advised of general nature of grand jury inquiry and if witness is subject of investigation (target), he must also be advised of this fact by way of subpoena. Pollard, 329 N.E.2d 573. Here, D claimed subpoena issued by grand jury was defective because it did not inform him of nature of investigation and did not inform him that he was target. Although subpoena issued was defective because it failed to inform him of these things, and was thus subject to motion to dismiss, tr. ct.'s denial of motion to dismiss constituted harmless error in light of fact that D was well aware of general nature of investigation and was also aware that he was subject under investigation. Held, conviction affirmed.

TITLE: Sparks v. State
INDEX NO.: B.10.c
CITE: (11/6/86), Ind., 499 N.E.2d 738
SUBJECT: Motion to dismiss by D -- defective grand jury proceeding
HOLDING: Ind. Code 35-1-15-11 (Burns 1975) provides that individual held to answer charge for offense may challenge any individual grand juror, before jury is sworn, because juror is witness for prosecution. Motion to dismiss is proper when grand jury proceeding is defective; grand jury proceeding is defective when grand jury was illegally constituted or when any other ground exist which would have been cause for abatement of action. However, freedom from personal bias is not legal qualification for grand juror. Presence of biased grand juror does not render grand jury illegally constituted and does not subject indictment to motion to dismiss. Here, although one grand juror was also emergency medical technician at crime scene and therefore witness, grand jury proceeding was not defective as to warrant dismissal of cause. Held, denial of D's petition for post-conviction relief affirmed.

TITLE: State v. Crecelius
INDEX NO.: B.10.c.
CITE: (1st Dist. 12/20/88), Ind. App., 531 N.E.2d 540
SUBJECT: Scope of grand jury inquiry - does not limit scope of indictment
HOLDING: Tr. Ct. erred in dismissing D's indictment for promoting prostitution on ground that D had not been informed that grand jury was investigating this additional subject. D received subpoena informing him he was subject of grand jury investigation into receipt of stolen property by firefighters. D was later indicted on several counts, including promoting prostitution. Tr. Ct. granted D's motion to dismiss this count on ground that state was required to indicate on record that it was investigating this additional subject. Grand jury target witness must be advised of general nature of grand jury inquiry. State ex rel. Pollard v. Criminal Ct. of Marion County, (1975), 325 N.E.2d 573; Ind. Code 35-34-2-5(a). D argues that he should have been informed that promoting prostitution was additional area of inquiry, *citing* Fields, App., 527 N.E.2d 218 (card at K.5.g). Like Pollard & Ind. Code 35-34-2-5(a), Fields requires that grand jury target be advised of general subject of inquiry, privilege against self-incrimination, & right to counsel. Purpose is to prevent witness from being trapped into perjury or self-incrimination. Ct. App. held in Fields that unless witness is advised of additional subject of inquiry, perjury charge on that subject will not lie. However, failure to so advise witness does not bar indicting him/her on charge not included within general area of inquiry. Here, D was indicted on testimony of others. Held, Tr. Ct. reversed & remanded.

TITLE: State ex rel. Pollard v. Criminal Court of Marion County, Division One
INDEX NO.: B.10.c.
CITE: (6/11/75), Ind., 329 N.E.2d 573
SUBJECT: Grand jury -- special rights of target
HOLDING: If foreman or prosecutor intentionally fails to advise target of target status, indictment is subject to dismissal. Held, remanded. Alternate writs of prohibition dissolved and request for permanent writ denied.

RELATED CASES: Porter, 391 N.E.2d 801, disapproved on other grounds by Fleener, 412 N.E.2d 778 (failure to request right to appear waives error in non-appearance, if person knew that he was target).

TITLE: Youngblood v. State
INDEX NO.: B.10.c.
CITE: (11/24/87), Ind., 515 N.E.2d 522
SUBJECT: Grand jury -- prosecutor's authority to amend indictment
HOLDING: State could proceed on amended grand jury indictment when only changes made by prosecutor were addition of several witnesses and excising of language in original charge of carrying handgun without permit. Deleted language stated that D had previously been convicted of felony. Although prosecuting attorney had option to submit charges to grand jury, he was not required to do so, but was authorized to file charges by information, and amended charges were properly endorsed by prosecuting attorney.

RELATED CASES: Mounts, Ind. 496 N.E.2d 37 (after grand jury issues no bill, prosecutor may charge by information only upon newly discovered, material evidence).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.d. Lack of specificity (Ind. Code 35-34-1-4(a)(4))

TITLE: Fadell v. State
INDEX NO.: B.10.d
CITE: (4th Dist. 6/21/83), Ind. App., 450 N.E.2d 109
SUBJECT: Motion to dismiss - lack of specificity
HOLDING: Tr. Ct. erred in failing to dismiss indictment for theft by deception; indictment was insufficient because it did not identify "deputies & employees" to whom D induced county to pay compensation. Here, Ct. finds names were essential to proper description of crime charged. Robinson, 112 N.E.2d 861. As township assessor, D was required to request funds to pay his legitimate employees. Not all of D's employees were alleged to be ghost employees in other counts of indictment. Indictment's failure to specify names left D unable "to anticipate the proof which would be adduced against him" (Bickel, App. 375 N.E.2d 274) & unable to protect himself from double jeopardy because it did not specify which of many appropriations made by D gave rise to theft charge. Held, D's conviction for theft by deception reversed; other convictions affirmed.

TITLE: Gebhard v. State
INDEX NO.: B.10.d.
CITE: (1st Dist. 1/23/84), Ind. App., 459 N.E.2d 58
SUBJECT: Motion to dismiss - lack of specificity
HOLDING: Tr. Ct. erred in overruling D's motion to dismiss amended information (Count III - "tumultuous conduct") for failure to state facts/circumstances with sufficient precision so as to apprise D of charge against him. Information must be specific enough to enable D to prepare defense & assure he/she will not be put in jeopardy twice for same crime. Blackburn, 291 N.E.2d 686. Usually information is sufficient if it tracks language of statute defining offense. However, if statute defines crime in general terms, then information must specify facts/circumstances to inform D of particular offense. Hamling v. US, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). See Griffin, 439 N.E.2d 160 (information charging receiving stolen property was inadequate; it neither described property nor named owners). Information in this case does not specify whether D's conduct endangered person/property or indicate which of his activities on 11/2 fell within range of prohibited conduct. "Tumultuous conduct" is precisely type of charge requiring additional facts/circumstances in order to fully apprise D of nature of offense charged. State v. Bridgewater, (1908) 171 Ind. 1. Where inadequate information poses risk of double jeopardy, prejudice & inability to prepare defense are demonstrated. (Citations omitted.) Held, reversed, remanded (set aside conviction, dismiss charge).

RELATED CASES: Moran, App., 477 N.E.2d 100 (indictment charging official misconduct (improper sale/exchange of property & granting of contracts) lacked specificity).

TITLE: Greer v. State
INDEX NO.: B.10.d.
CITE: (9/26/89), Ind., 543 N.E.2d 1124
SUBJECT: Motion to dismiss by D -- failure to name victim, witnesses
HOLDING: Purpose of statute requiring witnesses to be listed in information is to inform D of witnesses against him or her and serves as method of discovery; effect of not complying with statute is to prevent absence of unlisted witnesses. Ind. Code 35-34-1-2(c). Here, State's failure to list names of its witnesses in its amended information did not require dismissal of charges against D where D was able to obtain names and State had difficulty in locating some of witnesses. Held, conviction affirmed.

RELATED CASES: Kindred, 524 N.E.2d 279 (State's failure to specifically name defrauded parties in indictment charging uttering forged instrument was not defective because identity of parties was clearly ascertainable in attached photographic copies of two instruments involved).

TITLE: Hamling v. United States
INDEX NO.: B.10.d.
CITE: 418 U.S. 87 (1974)
SUBJECT: Motion to dismiss by D -- lack of specificity
HOLDING: Indictment is sufficient if it contains elements of offense charged, fairly informs D of charge against which he must defend and enables him to plead acquittal conviction in bar of future prosecutions for same offense. Hagner, 285 U.S. 427. It is generally sufficient that indictment set forth offense in words of statute itself, as long as those words set forth all elements necessary to constitute offense without any uncertainty or ambiguity. Carll, 105 U.S. 611. Here, D charged with violation of 18 U.S.C. 1461 which prohibits mailing of obscene materials. Indictment was sufficient to adequately inform Ds of charges against them because various component parts of constitutional definition of obscenity need not be alleged in indictment in order to establish its sufficiency. Held, conviction affirmed.

RELATED CASES: Flores, 485 N.E.2d 890 (when possible, indictment or information must name or describe property charged to have been stolen; these cases are fact sensitive).

TITLE: Jones v. State
INDEX NO.: B.10.d.
CITE: (11/19/91), App., 581 N.E.2d 1256
SUBJECT: Motion to dismiss -- specificity; child molesting prosecutions
HOLDING: Ind. Code 35-34-1-2(a)(5) states that indictment or information shall allege commission of offense by stating date of offense with sufficient particularity to show offense was committed within period of limitations applicable to that offense, and by stating time of offense as definitely as can be done if time is of essence of offense. Here, indictment alleging D sexually molested adoptive daughter during 1988 and 1989 was sufficiently specific to inform D of charges against him and permit presentation of any available defenses. Held, conviction reversed on other grounds.

RELATED CASES: Hillenburg, App., 777 N.E.2d 99 (time is not of essence in information alleging child molesting unless age of victim serves to elevate charged offense).

TITLE: Moran v. State
INDEX NO.: B.10.d
CITE: (4/18/85), App., 477 N.E.2d 100
SUBJECT: Motion to dismiss by D -- specificity lacking
HOLDING: Accused has right to require that allegations contained in charging instrument state crimes charged with sufficient certainty to enable him to anticipate evidence adduced against him at trial, thereby enabling him to marshal evidence in his defense. Harwei, App., 459 N.E.2d 52. Indictment must state crime charged in direct and unmistakable terms. Garcia, App., 433 N.E.2d 1207. Any reasonable doubt as to offense charged must be resolved in favor of accused. Here, indictment charged D with conduct which contravenes certain statutes that set forth procedures for awarding public contracts. However, each statute contained many different procedures that someone awarding contract must follow. Because indictment alleged D's conduct was in violation of certain statutes without stating what particular procedure D failed to follow, indictment dismissed for lack of sufficient specificity to enable D to defend him.

TITLE: Smith v. State
INDEX NO.: B.10.d.
CITE: (7/12/84), Ind., 465 N.E.2d 702
SUBJECT: Motion to dismiss - lack of specificity
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss charging information which he alleged did not adequately set out necessary elements of murder. Here, D was charged with attempted murder (AM). Because information did not state acts were done with in-tent to kill, D argues essential element of murder is omitted. Ct. finds words "murder" & "by knowingly" cover intentional element. Information set out specific acts which were substantial steps necessary to prove AM. D does not show he was actually misled. Language in information was sufficient to charge D with AM & did inform D of nature/cause of charge against him. Prentice CONCURS IN RESULT.

RELATED CASES: Kerlin, App., 573 N.E.2d 445 (absence of detail in information is fatal only if phraseology misleads D or fails to give D notice of charges against him or her); Burris, 465 N.E.2d 171 (felony-murder information charging murder while in commission of robbery was sufficiently certain even though it failed to allege that D knowingly or intentionally took money from victim). Phillips, App., 499 N.E.2d 803 (Indict 87(2); Ct. rejects D's challenge to amendment to indictment adding count charging child molest occurred between 2/15 & 3/1/85; D argued amendment was vague & nonspecific date subjected him to DJ); Hoehn, App., 472 N.E.2d 926 (Indict 87(7); held, information stating offense occurred in May or June, 1983, was not subject to dismissal, *citing* Ind. Code 35-34-1-5(a).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.e. No offense stated (Ind. Code 35-34-1-4(a)(5))

TITLE: Gutenstein v. State
INDEX NO.: B.10.e
CITE: (8/31/2016), 59 N.E.3d 984 (Ind. Ct. App. 2015)
SUBJECT: OWI Causing Death charge not dismissed despite D not driving when victim struck
HOLDING: On interlocutory review, Court found no error in denying D's motion to dismiss Count I, Operating While Intoxicated Causing Death, even though D was not driving his vehicle at the time of the accident, because the victim's death was caused by D's operation of the vehicle while he was intoxicated.

D was driving haphazardly along I-94 in LaPorte County. He slowed down to 25 miles per hour and then eventually stopped in the right lane. D exited his car and was walking aimlessly along the right lane and shoulder. George Leeth, a semi-truck driver, had been following D and stopped just behind him and activated his hazard lights. A semi driven by Steve Lunn struck Leeth's semi. Lunn later died at the scene. D's BAC was .13%. In a motion to dismiss, D claimed the charge was legally insufficient because it did not allege that he was operating the vehicle when Lunn crashed.

Court looked to another jurisdiction to resolve the issue, stating that "operating" should be defined according to the danger that operating under the influence seeks to prevent: the collision of a vehicle operated by a person under the influence with other persons or property. See People v. Wood, 538 N.W.2d 351, 353 (Mich. 1995). Once a person using a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of collision, that person continues to operate it until the vehicle is returned to a position creating no such risk. Id. The OWI statute does not require that a D's vehicle be in motion at the time of the accident, but rather that the victim's death be caused by the D's operation of the vehicle while intoxicated. People v. Lechleitner, 804 N.W.2d 345, 347-348 (Mich. Ct. App. 2010).

Here, D's operation of his vehicle while intoxicated resulted in him parking his car and leaving it unattended on a busy interstate highway. Thus, Count I is legally sufficient, and Tr. Ct. did not err in not dismissing it. Held, judgment affirmed.

TITLE: Gutenstein v. State
INDEX NO.: B.10.e
CITE: (8/31/2016), 59 N.E.3d 984 (Ind. Ct. App. 2015)
SUBJECT: Charging information not facially deficient
HOLDING: On interlocutory review, Court found no error in denying D's motion to dismiss Count I, OWI Causing Death, and Count II, Reckless Homicide, because the counts are not facially deficient as they allege facts that do, in fact, constitute offenses. See Ind. Code § 35-34-1-4(a)(5); Ind. Code § 35-34-1-2(d).

Count I was not facially deficient, even though it did not specify the time at which D allegedly drove while intoxicated, because the probable cause affidavit attached to the charging instrument did specify the time. Count II was not facially deficient because it tracked statutory language in saying that D drove his vehicle at a certain time, in a certain location, inexplicably stopped his vehicle, which led to an accident that caused the death of another person. Held, judgment affirmed.

TITLE: Kemp v. State

INDEX NO.: B.10.e.

CITE: (1st Dist., 7-24-01), Ind. App., 753 N.E.2d 47

SUBJECT: Attempted child molesting & child solicitation - failure to state offense; police posing as child victims on Internet

HOLDING: Tr. Ct. properly granted D's motion to dismiss two counts of attempted child molesting & one count of child solicitation that had been filed against D, because facts set forth in charging informations failed to establish criminal offense. Charges were filed as result of police officers posing as 14-year old girl on Internet, agreeing to meet with D in parking lot near motel. D drove to parking lot, brought condoms with him, & was arrested. Ct. held that facts alleged in information did not reach level of overt act leading to commission of child molesting. At most, such allegations only reach level of preparing or planning to commit offense. As to child solicitation charge, which requires urging immediate commission of crime & cooperation or submission of person solicited, Ct. noted that any "urging" in this case was contemplated by police officer posing as 14-yearold girl -- not D. Moreover, although D asked number of sexually explicit questions & made number of explicit comments, it was officer posing as 14-year old girl who sought out D. Charging information did not sufficiently allege that D urge fictitious child victim to do anything. Moreover, there was nothing to demonstrate that offense was to be "immediately committed" as required by child solicitation statute, Ind. Code 35-42-4-6. Held, judgment affirmed.

RELATED CASES: LaRose, App., 820 N.E.2d 727 (child solicitation statute is constitutional; see full review at K.3.e.7); Laughner, App., 769 N.E.2d 1147 (crime of attempted child solicitation is established in case of one who engages in overt act that constitutes a substantial step toward soliciting someone believed to be a child under fourteen to engage in sexual activity, even if it turns out solicited person is an adult).

TITLE: State v. Morgan
INDEX NO.: B.10.e
CITE: (8/16/2016), 60 N.E.3d 1121 (Ind. Ct. App. 2015)
SUBJECT: Erroneous grant of motion to dismiss drug charges - nurse issuing invalid prescriptions
HOLDING: Tr. Ct. abused its discretion in granting D's motion to dismiss charges of corrupt business influence, conspiracy and aiding dealing in schedule III controlled substances against her. D worked as a registered nurse at a drug addiction recovery clinic, allegedly participating with clinic physician in the ongoing delivery of invalid prescriptions for Suboxone. She successfully sought dismissal of charges against her in Tr. Ct. on basis that it was impossible for her to have known, as a non-physician, whether her actions were outside the usual course of professional medical practice.

Court of Appeals disagreed, holding that the question is one of fact for the jury, not appropriately addressed in a motion to dismiss. D cited no authority for the proposition that a non-physician can never know whether certain conduct is outside the usual course of professional medical practice. Court also rejected D's claim that the criminal statutes in question are void for vagueness as applied to her. A person of ordinary intelligence would easily understand that agreeing with or assisting a physician to distribute prescriptions for controlled substances that the person knows to be invalid is proscribed conduct. Held, judgment reversed and remanded with instructions to reinstate criminal charges against D.

TITLE: State v. Pickett
INDEX NO.: B.10.e.
CITE: (7/30/81), App., 424 N.E.2d 452
SUBJECT: Motion to dismiss by D -- facts stated do not constitute offense
HOLDING: Information need only state crime charged in language of statute or in words with similar meaning. Carson, 391 N.E.2d 600. However, information must state crime which it was intended to charge and not some other act which is not prohibited by statutory provision underlying charge. Here, State based its charges of malconduct and misfeasance on Ds' alleged violations of Ind. Code 18-1-6-13 and Ind. Code 18-2-1-10 without stating criminal offenses. Held, dismissal of counts on ground that facts alleged did not constitute stated criminal offenses affirmed.

RELATED CASES: Gotwals, App., 330 N.E.2d 766 (information charged D with selling marijuana, which was "statutory offense," when at time of filing it was not statutory offense; motion to dismiss properly sustained).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.f. D granted immunity (Ind. Code 35-34-1-4(a)(6))

TITLE: Abner v. State
INDEX NO.: B.10.f
CITE: (6/25/85), Ind., 479 N.E.2d 1254
SUBJECT: Immunity agreements
HOLDING: Immunity agreement which purported to grant D transactional immunity in fact granted only use immunity or was void. Here, D agreed to cooperate with police in investigation of her father's murder, to give statements, & to testify against her co-conspirators. In exchange, prosecutor gave D "immunity from prosecution on a case involving any conspiracy to commit murder." After D was arrested, she moved to dismiss charges upon basis that she had been granted immunity. There are 3 types of immunity: (1) transactional immunity which prohibits state from criminally prosecuting witness for any transaction concerning that to which witness testifies; (2) use immunity where testimony compelled of witness may not be used at subsequent criminal proceeding; & (3) derivative use immunity whereby any evidence obtained as result of witness' compelled testimony may not be admitted against him/her in subsequent criminal prosecution. In Re Caito, 459 N.E.2d 1179. Immunity statute in effect at time of D's agreement permitted only granting of use immunity. In Re Contempt Findings against Schultz, App., 428 N.E.2d 1284. Ct. finds if prosecutor attempted to grant D transactional immunity, it was beyond his authority to do so. Ct. also rejects D's contention that because state benefited from her cooperation, it was estopped from denying that it had granted her transactional immunity. General rule is that one may not premise an estoppel upon acts done by public officers in excess of their authority. [Citations omitted.] Held, conviction affirmed.

TITLE: Everroad v. State
INDEX NO.: B.10.f.
CITE: (5/22/91), Ind., 571 N.E.2d 1240
SUBJECT: Motion to dismiss -- no proof of grant of immunity
HOLDING: Here, during murder investigation, D gave ten inconsistent statements to police. Tr. Ct.'s failure to dismiss murder charges and to suppress D's ten statements given to police during course of investigation did not constitute reversible error because D failed to demonstrate how admission of statements inculpated him or otherwise worked to his detriment, despite contention that admission of statements violated Fifth Amendment right to avoid self-incrimination and breached alleged immunity agreement. D contended that he gave statements pursuant to oral immunity agreement; however, State contended that it agreed only to provide protection to D in return for statement. Because Court agreed with State that agreement was for protection and that D did not show he was harmed by admission of statements, admission of statements was not error. Held, conviction affirmed. (Per Givan, J., with Chief Justice concurring and two Justices concurring in result).

RELATED CASES: Bullock, App., 397 N.E.2d 310 (D entered agreement that if she testified before grand jury against target, charge of shoplifting would be dismissed; because D was never called to testify and case against target was dismissed, Tr. Ct. properly denied dismissal of subsequent charge of shoplifting although D was available to testify).

TITLE: Fox v. State
INDEX NO.: B.10.f
CITE: (10/28/2013), 997 N.E.2d 384 (Ind. Ct. App. 2013)
SUBJECT: Motion to dismiss - immunity; D did not fulfill obligations
HOLDING: Tr. Ct. did not abuse its discretion by denying D's motion to dismiss based on his agreement with the prosecutor. The court may grant a D's motion to dismiss if, among other grounds, the D has immunity with respect to the crimes at issue. The court must enforce an agreement between the prosecution and the D either if the State has materially benefitted from the terms of the agreement or if the D has relied on the terms of the agreement to his substantial detriment.

Here, during D's interrogation, D claimed he was the "look out" during a robbery that resulted in murder. After his confession, a deputy prosecutor said on the record that in exchange for information, the State would not charge D with murder if: (1) he was truthful, (2) he testified for the State against other individuals, if called upon, (3) he was not the shooter, and (4) he did not carry a gun during the crime. The State eventually charged D with the murder. During a hearing on D's motion to dismiss, a co-D testified that D tried to rob the victim, carried a handgun, wore a mask and was the shooter. Further, the co-D testified that he had known D for several years prior to the shooting, contrary to the information D gave in his interrogation. The Tr. Ct. determined that D did not keep his end of the bargain by being untruthful. Moreover, the State had not materially benefitted from the agreement because the State believed the information was false and of no value. D did not rely on the agreement to his detriment because he already admitted involvement in the robbery and murder before the agreement was reached. Finally, the jury acquitted D of murder, but convicted him of felony murder. Even if the jury determined that D was not the shooter, they still could have determined that D was lying in his interrogation and that he carried a gun on the night of the crimes. Thus, neither the agreement nor the acquittal require dismissal of the case. Held, judgment affirmed.

TITLE: Matter of Mann
INDEX NO.: B.10.f
CITE: (2/22/79), Ind., 385 N.E.2d 1139
SUBJECT: Motion to dismiss -- grant of use immunity and subsequent attorney disciplinary proceeding
HOLDING: Immunity granted under Ind. Code 35-6-3-1 has no application in attorney disciplinary proceeding. Intent of legislature in enacting this statute was to provide for immunity in criminal matters, not attorney discipline. Here, attorney was being charged in discipline case. Thus, motion to dismiss disciplinary action was properly denied. Held, disbarment ordered.

TITLE: State v. I.T.
INDEX NO.: B.10.f
CITE: (3/12/2014), 4 N.E.3d 1139 (Ind. 2014)
SUBJECT: Protection against self-incrimination - Juvenile Mental Health Statute confers use and derivative use immunity
HOLDING: Juvenile Mental Health Statute, Ind. Code § 31-32-2-2.5(b), bars a child's statement to a mental health evaluator from being admitted into evidence to prove delinquency, except for purposes of a probation revocation proceeding or a modification of disposition decree. Here, during course of treatment ordered as a condition of probation, I.T. revealed additional delinquent behavior that would be Class B felony child molesting if committed by an adult, and those admissions were used by the State to file additional allegations of delinquency.

Court held that evidence derived from I.T.'s statements was protected by use immunity and derivative use immunity to encourage the child to participate "openly in treatment to reduce their likelihood of reoffending." By participating in treatment, the juvenile may reveal previously unknown victims, and the statutory reporting requirements (to the Indiana Department of Child Services for investigation) enable victims to receive treatment as well. Moreover, the juvenile's statements may be used for purposes other than proving delinquency, such as at a CHINS hearing, at an expungement hearing, or at a Sex-Offender Registry hearing. And the Juvenile Mental Health Statute does not prevent the State from introducing evidence of a juvenile's delinquency, if it can "affirmative[ly] . . . prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Thus, Tr. Ct. properly granted I.T.'s motion to dismiss the State's new delinquency petition, because Juvenile Mental Health Statute prohibited using I.T.'s statements to evaluator or evidence derived from those statements. Held, transfer granted, Court of Appeals' opinion at 986 N.E.2d 280 vacated, judgment affirmed.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.g. Prosecution barred (Ind. Code 35-34-1-4(a)(7))

TITLE: Corley v. State
INDEX NO.: B.10.g
CITE: (11/23/83), Ind., 455 N.E.2d 945
SUBJECT: Motion to dismiss - prosecution barred; double jeopardy
HOLDING: Where no manifest necessity existed for granting motion of prosecutor to take deposition of surprise witness & discharging jury, subsequent trial of D on same charges violates double jeopardy. Here, during D's trial on drug charges, state trooper testified she had no physical involvement with any drug arrestee. Bom, attorney for Allison, told D's attorney that Allison could testify that trooper lied about physical involvements. Allison's name was given to prosecutor as potential witness. Prosecutor & D's attorney met with Bom & Allison. Prosecutor filed motion in limine re evidence of sexual activity. Out of jury's presence, defense called Bom. Prosecutor claimed surprise & was allowed to question Bom (for 26 transcript pages). Tr. Ct. excluded testimony of Bom & Allison re trooper or prosecutor's conduct ("threats" to Allison, who had recently accepted plea bargain). Prosecutor asked to depose Bom & consented to discharge of jury. Trial was rescheduled. D's motion to dismiss charge was denied. D took interlocutory appeal. Ct. rejects state's contention D waived double jeopardy issue. Ct. holds there was no manifest necessity for discontinuing trial after jeopardy attached. IL v. Somerville, (1973) 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425; US v. Perez, (1824) 9 Wheat. 579, 6 L.Ed. 165. Held, reversed & remanded, Tr. Ct. to grant D's motion to dismiss & to discharge D.

TITLE: Hoover v. State
INDEX NO.: B.10.g.
CITE: (5th Dist., 12-31-09) (Ind. Ct. App. 2009) 918 N.E.2d 724
SUBJECT: Retrial of greater offense after hung jury is barred by conviction on lesser included offense
HOLDING: The State is barred from retying D on a greater charge on which the jury deadlocked when D was convicted of the lesser charge. "A prosecution is barred if there was a former prosecution of the D based on the same facts and for commission of the same offense and if . . . the former prosecution resulted in an acquittal or a conviction of the D (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.) . . . ." Ind. Code 35-41-4-3(a).

Here, D was charged with murder, robbery as a Class A felony, and felony murder with robbery as the predicate. The jury acquitted D of murder, convicted D of robbery and was unable to reach a decision on felony murder. Federal double jeopardy principles do not bar retrial of a greater, mistried offense when the D was convicted of a lesser offense. However, although Ind. Code 35-41-4-3(a) is silent with respect to the hung-count situation presented here, by its plain language, the statute bars any retrial on a greater offense when the D has been convicted of the lesser-included, even where a first jury considered but deadlocked on the greater charge. The conviction on the lesser-included robbery offense constitutes an acquittal on the greater felony-murder charge, notwithstanding the jury's express deadlock. The State is therefore barred from retrying D for felony murder. Held, judgment affirmed, but remanded to Tr. Ct. with instructions to dismiss the felony-murder count with prejudice.

TITLE: State v. Hancock
INDEX NO.: B.10.g
CITE: (1st Dist. 10/24/88), Ind. App., 530 N.E.2d 106
SUBJECT: Motion to dismiss - not available under Ind. Code 35-41-5-3(a)
HOLDING: Statute barring convictions for both attempt & conspiracy to commit same underlying offense does not bar prosecution for both. D was charged with attempted theft & conspiracy to commit theft, based on same acts. Tr. Ct. granted D's motion to dismiss based on Ind. Code 35-41-5-3(a), which bars convictions for both attempt & conspiracy. State appeals, arguing that while statute bars double convictions, it does not bar double prosecutions. Conviction is same as judgment, which embodies sentencing of D. Carter, 361 N.E.2d 145. Therefore, only action prohibited by statute is sentencing on guilty verdicts on both attempt & conspiracy with respect to same underlying crime. Expanding this prohibition to indictment & prosecution would unduly take charging discretion from prosecutor. See Commonwealth v. Hassina, (PA. Super. 1985), 490 A.2d 438. Held, reversed & remanded.

TITLE: State v. Keith
INDEX NO.: B.10.g
CITE: (9/11/85), Ind. App. 482 N.E.2d 751
SUBJECT: Motion to dismiss -- double jeopardy
HOLDING: Tr. Ct. correctly dismissed charges against D due to double jeopardy violation. Once court of competent jurisdiction accepts D's guilty plea after determination of factual basis and voluntariness, jeopardy attaches. Absent waiver of jeopardy rights, subsequent trial on same charge is prohibited. Stowers, 363 N.E.2d 978. Reasoning is that, after guilty plea has been entered and accepted by court, D is "in precisely the same jeopardy as if a jury had returned a verdict of guilty." Boswell, 11 N.E.2d 788. Here, Tr. Ct. accepted D's guilty plea to various misdemeanor charges after determination of factual basis and voluntariness, jeopardy attached and second prosecution on same charges was prohibited. Thus, subsequent felony charges brought by State based on same conduct as was misdemeanor charges were barred by double jeopardy. Held, dismissal with prejudice of felony charges of criminal recklessness and operation of vehicle while intoxicated resulting in serious bodily injury affirmed.

TITLE: State v. Moore
INDEX NO.: B.10.g
CITE: (2d Dist. 4/25/90), Ind. App., 553 N.E.2d 199
SUBJECT: Dismissal on merits - bar to refiling
HOLDING: Tr. Ct.'s granting of D's motion for dismissal due to lack of specificity barred state from simply re-filing same information. D was charged with false informing & assisting criminal, & Tr. Ct. granted motion to make more specific. State did not amend Count II, & Tr. Ct. granted D's motion to dismiss. State then re-filed same indictment & probable cause affidavit as to Count II. Tr. Ct. rejected affidavit on double jeopardy grounds, *citing* previous dismissal on merits. State then filed information in new action based on same probable cause affidavit. D again moved to dismiss, & Tr. Ct. dismissed, again *citing* double jeopardy bar. State now appeals Tr. Ct.'s dismissal of second action. State contends it may always refile charges absent showing of prejudice to D's substantial rights. State *cites* Dennis, App., 412 N.E.2d 303, which relied on Ind. Code 35-3.1-1-4 (now Ind. Code 35-34-1-4), providing that dismissal does not, of itself, bar subsequent prosecution. However, Dennis did not involve dismissal based on merits of charge. Here, original charge was dismissed for lack of specificity. Neither Dennis nor Ind. Code 35-34-1-4 allow state to continue filing charges already judicially determined to be defective. State also contends that Tr. Ct. erred because jeopardy had not yet attached. State is attempting to collaterally attack Tr. Ct.'s determination. Where, as here, state elects to stand on charges as filed, time for filing appeal begins to run from time charges are dismissed, whether that ruling is characterized as final judgment or not. State v. Flater, 244 N.E.2d 223. State failed to file timely appeal, & dismissal became law of case. Held, dismissal affirmed. Sullivan, J., CONCURS IN RESULT.

TITLE: Worthington v. State
INDEX NO.: B.10.g.
CITE: (7/17/79), App., 391 N.E.2d 1164
SUBJECT: Motion to dismiss -- compelled testimony; subsequent prosecution not barred
HOLDING: Fifth Amendment requires only that testimony elicited under grant of immunity and any evidence derived from such testimony not be used in subsequent prosecution. It does not bar subsequent prosecution. Once immunity is granted, State has affirmative burden to prove that evidence used in subsequent prosecution is derived from source wholly independent of compelled testimony. Here, D contended that scope of immunity granted was insufficient to protect D from any subsequent prosecutions, and thus D refused to testify in criminal prosecution after he was granted immunity. Held, adjudication of D in contempt for refusing to testify affirmed.

RELATED CASES: Brown, 725 N.E.2d 823 (oral argument of counsel was insufficient to establish that evidence used against D was obtained wholly through independent sources & not through any of his immunized testimony; see full review at O.5.c); Jorgensen, App., 567 N.E.2d 113, modified on other grounds by Jorgensen, 574 N.E.2d 915 (because State had already been aware of evidence indicating that D had engaged in target practice and that she had been abused by her husband, who was victim of charged murder, State's use of evidence was not product of immunized testimony).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.h. Prosecution is untimely brought (Ind. Code 35-34-1-4(a)(8))

TITLE: Dvorak v. State
INDEX NO.: B.10.h
CITE: (5/17/2017), 78 N.E.3d 25 (Ind. Ct. App. 2017)
SUBJECT: Statute of limitations - tolling requires positive act of concealment
HOLDING: Tr. Ct. erred by denying Defendant's motion to dismiss the July 2007 counts of offer or sale of an unregistered security and acting as an unregistered agent because the charges were filed outside the five-year statute of limitations. The period within which a prosecution must be commenced does not include any period in which the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercising due diligence. Ind. Code § 35-41-4-2(h)(2). The concealment-tolling provision is limited to only positive acts that conceal that an offense has been committed and not just concealment of any evidence of guilt. Study v. State, 24 N.E.3d 947 (Ind. 2015).

Here, Defendant did not engage in any positive act calculated to conceal the fact that he was not registered and the security was not registered with the Secretary of State. Held, judgment reversed and remanded.

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

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

TITLE: Heitman v. State
INDEX NO.: B.10.h
CITE: (1/18/94), App., 627 N.E.2d 1307
SUBJECT: Motion to dismiss -- prosecution untimely brought; no concealment
HOLDING: Statute of limitations exists primarily to insure against inevitable prejudice and injustice to D that delay in prosecution creates. Statute of limitations strikes balance between individual's interest in repose and State's interest in having sufficient time to investigate and build its case. Scott, App., 461 N.E.2d 141. Statute of limitations tolls when accused does not live in Indiana or so conceals himself that process cannot be served on him. Ind. Code 35-41-4-2(g)(1). Here, because D, who resided in Pennsylvania, remained in constant contact with Indiana authorities and paid for detective to travel to Pennsylvania to investigate allegation, State had no difficulty in locating or investigating D. Statute of limitations not tolled because D did not avoid service of process and fully cooperated with authorities. Charges against D were barred because State filed charges three months after statute of limitations expired. Held, convictions vacated and D released from custody.

TITLE: Johnson v. State

INDEX NO.: B.10.h.

CITE: (08-22-22), 194 N.E.3d 98 (Ind. Ct. App. 2022)

SUBJECT: Partial reversal for defendant on motion to dismiss charges filed outside the statute of limitations in case pending for eight years

HOLDING: In this interlocutory appeal, Defendant appealed the denial of his motion to dismiss 17 Class C felony securities-related charges filed against him and an order allowing the State to amend the charges late. In 2016, Johnson moved to dismiss nine of the counts because they were filed outside the statute of limitations. In 2018, he renewed his statute of limitations objection and moved to dismiss all of the counts, arguing they failed to state the offenses with sufficient clarity and further that the financial instruments at issue were not securities, Defendant was not a broker-dealer, and the transactions were exempt as limited offerings. In 2021, after a series of continuances by both parties and the court, substitution of counsel, retirement of the original judge, and appointment of a special judge, the State responded to all of Defendant's arguments. The State also requested leave to amend the charges against Defendant. After a hearing, the trial court granted the State leave to amend the charges and denied Defendant's motion to dismiss. On appeal, the Court of Appeals reversed the denial of the motion to dismiss two of the nine charges alleged to have been filed outside the statute of limitations. The Court held that the State failed to allege positive acts of concealment to put Defendant on notice that the State intended to prove Defendant's actions made the charges timely. The Court affirmed the denial of the motion to dismiss seven other charges because the State alleged Defendant committed multiple positive acts of concealment that, if proved, could have told the statute of limitations. The Court rejected Defendant's claim that the offenses were not stated with sufficient clarity when they failed to identify with direct and unmistakable terms the alleged security violation at issue, failed to specify whether the alleged security was merely offered or sold, and failed to state the date of the offense with clarity. The Court explained that the probable cause affidavits allege specific amounts the alleged victims indicated they invested with Defendant, how they came to invest with him, what Defendant told them, and how they eventually discovered Defendant's alleged crimes. Further, each charge pled has a date range in which the alleged crimes were committed, and the probable cause affidavit contains additional dates which are sufficient to put Defendant on notice regarding the timeframe in which the crimes for which he is charged allegedly occurred. The Court also observed Defendant was able to defend himself against the charges "as he proffered defenses to the crimes in his motion to dismiss and in his brief on appeal." The Court did not address Defendant's remaining arguments, finding they were inappropriate for a motion to dismiss because they involved factual allegations to be determined at trial. Lastly, the Court found no abuse of discretion in allowing the State to amend the charges late even though the amendments were of substance. The Court opined: "This case has been pending for over eight years, and both parties have been active participants in the delays. This is not a situation where [the] prosecution has been unnecessarily delayed or where the State has added charges late in the proceedings. These amendments formalize what Johnson has had notice of for the majority of the case; something he could easily, and likely did, glean from the information in the probable cause affidavits. To argue now, after knowing the charges against him for over five years, that he is prejudiced by allowing the State to add language that was always assumed is disingenuous." Held: affirmed in part, reversed in part, and remanded.

TITLE: Sloan v. State
INDEX NO.: B.10.h
CITE: (06-01-11), 947 N.E.2d 917 (Ind. 2011)
SUBJECT: Statute of limitations - end of tolling after D's acts of concealment
HOLDING: Period in which prosecution must be commenced does not include any period in which D conceals evidence of offense, and evidence sufficient to charge him with that offense is unknown to prosecuting authority and could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2(h)(2). Here, D regularly molested his step-niece between the ages of six to thirteen. D told complaining witness (CW) after every occurrence that if she told anyone she would go to jail. CW revealed the molestations at the age of thirty and D moved to dismiss the Class C felony charge on grounds it was filed well after the applicable five-year statute of limitations. Court disagreed with Court of Appeals' conclusion that concealment by means of threats not to tell ended when the molestations ceased. The relevant inquiry is when the prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the D. See Crider v. State, 531 N.E.2d 1151 (Ind. 1988). This is when tolling ends and the limitations period begins to run. Until the Legislature speaks on the issue, public policy and a strict reading of the statute favor the prosecution of alleged crimes over the protection of Ds who have intimidated victims or otherwise concealed evidence. Held, transfer granted, Court of Appeals' opinion at 926 N.E.2d 1095 vacated, denial of motion to dismiss affirmed. Sullivan and Rucker, JJ. dissenting, do not agree that statute begins to run when D ceases threats, but thinks tolling period should cease when victim no longer reasonably fears material retaliation for reporting crimes.

TITLE: State v. Lindsay
INDEX NO.: B.10.h.
CITE: (1st Dist., 03-09-07), Ind. App., 862 N.E.2d 314
SUBJECT: Corrupt business influence charge barred by statute of limitations
HOLDING: Tr. Ct. properly dismissed charge of corrupt business influence (RICO) against D. State argued that given the ongoing nature of a RICO offense, the class C felony RICO charge was filed within the applicable five-year statute of limitation. "Racketeering activity" means to commit any of the crimes listed in Ind. Code 35-45-6-1, including official misconduct, perjury, obstruction of justice, or intimidation. State re-characterized D's 2003 & 2004 false informing offenses as "official misconduct" in order to bring the offenses within the purview of the predicate offenses required to establish a continuation of the pattern of racketeering activity. However, conduct giving rise to false informing charges, i.e., D's alleged false statements in 2003-2004 concerning 1988 murders, were not related to D's performance of his official duties as a federal police officer working in Florida, which is required to constitute offense of official misconduct. There was no other conduct which would support a charge of official misconduct or any of the other offenses which could be deemed to be a continuation of a pattern of racketeering activity.

Simple fact that D moved to Florida in 1996 is not indicative of an intent to avoid service of process & did not constitute an act of concealment so as to toll the statute of limitations. Heitman v. State, 627 N.E.2d 1307 (Ind. Ct. App. 2007). Even assuming allegations of D's repeated threats & acts of intimidation directed toward witnesses are true, the statute of limitation would have ceased to be tolled at the latest, after he moved to Florida in 1996 & no longer had contact with those witnesses. Thakkar v. State, 613 N.E.2d 453 (Ind. Ct. App. 1993). Thus, five-year statute of limitation was not tolled by acts of concealment. Held, judgment affirmed.

TITLE: Stuckey v. State
INDEX NO.: B.10.h.
CITE: (9/27/90), App., 560 N.E.2d 88
SUBJECT: Motion to dismiss -- statute of limitations; bribery or theft by public officer
HOLDING: Statute tolling application of five year statute of limitations is applicable to bribery while accused occupies "public office." Here, it did not apply to D who worked for Indiana State Fair Board as superintendent of buildings and grounds because position did not make D "public officer," but merely employee of Fair Board. Held, dismissal of bribery count because of untimeliness affirmed.

TITLE: State v. Sturman
INDEX NO.: B.10.h
CITE: (7/14/2016), 56 N.E.3d 1187 (Ind. Ct. App. 2015)
SUBJECT: Reckless homicide SOL runs on date of death, not date of act
HOLDING: In an issue of first impression, the Tr. Ct. abused its discretion in dismissing D's reckless homicide charge on statute-of-limitation grounds because it erroneously determined the statute began to run on the date D committed the act that led to the person's death, not the date the person died.

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

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

TITLE: Umfleet v. State
INDEX NO.: B.10.h.
CITE: (1st Dist. 7/11/90), Ind. App., 556 N.E.2d 339
SUBJECT: Statute of limitations - concealment
HOLDING: Tr. Ct. erred in denying D's motion to dismiss where prosecution was not commenced within 5-year statute of limitations. Statute of limitations provides that limitations period does not include any period in which accused person conceals evidence of offense & evidence sufficient to convict him/her is not known to prosecutor & could not have been discovered by exercise of due diligence. Ind. Code 35-41-4-2. Exception must be construed narrowly & in favor of accused. Holmes, App., 393 N.E.2d 242. Concealment must result from D's positive acts. Id. In denying D's motion to dismiss, Tr. Ct. referred to fact that victim did not recognize that acts were wrong, & that when she did, she was afraid that D would get in trouble & lose his job. However, there was no indication that D had told her that his conduct was not wrong or that she should not tell anyone about it. Tr. Ct. also mentioned D's continual denial that any molestation took place, but D's denial of involvement in any abuse was not positive act to conceal fact that offense had been committed. Record does not reveal any conduct on D's part that could be considered positive act to conceal fact that crime was committed. Held, denial of motion to dismiss reversed.

NOTE: In 1 count, D was charged with act of fondling within 18-month period that fell only partly inside limitations period. Ct. App. found that, because state failed to prove that alleged act took place within limitations period, charge should have been dismissed.

RELATED CASES: Sloan, 947 N.E.2d 17 (Ind. 2011) (to extent Umfleet may be interpreted as contrary to Ct's holding, it is expressly disapproved); Kifer, App., 740 N.E.2d 586 (D's alteration & disposal of his car did not amount to concealment of fact that crime had been committed but was only concealment of his guilt); Crider, 531 N.E.2d 1151 (statute did not run until victim made disclosure to authorities; D had successfully concealed fact of his crimes by positive acts of intimidation of victims).

TITLE: Wallace v. State
INDEX NO.: B.10.h.
CITE: (8-16-01), Ind., 753 N.E.2d 568
SUBJECT: Statute of limitations - child molesting
HOLDING: Child molesting convictions first charged in 1998 for alleged acts done in 1988-89 were barred by five-year statute of limitations that was in effect in 1998. Ind. Code 35-41-4-2(a)(1) (1998). Here, between date of alleged offenses & time D was charged, the statute of limitations was amended to allow prosecution for certain classes of child molesting to be commenced at any time before alleged victim reaches 31 years of age. Ind. Code 35-41-4-2-(c)(1). The applicable statute of limitations is that which was in effect at the time the prosecution was initiated. Patterson v. State, 532 N.E.2d 604 (Ind. 1988). Further, D was convicted of child molesting under Ind. Code 35-42-4-3(c) (sexual conduct with child between ages of twelve & fifteen) which was subject to the then-existing five-year statute of limitations, which was obviously not met in this case. Held, transfer granted, convictions reversed; Boehm, & Dickson, JJ. dissenting, argued that while the five-year statute of limitations was applicable D waived issue by not raising it with Tr. Ct.).

RELATED CASES: Jewell, App. 877 N.E.2d 864, summ. *aff'd* at 887 N.E.2d 939 (Ind. 2008) (Even though D did not raise a statute of limitations defense at trial, State was barred from prosecuting him for sexual misconduct with a minor as a Class D felony, because State filed information for this count after expiration of the five-year limitations period).

TITLE: Woods v. State

INDEX NO.: B.10.h.

CITE: (12/27/2012), 980 N.E. 2d 439 (Ind. Ct. App. 2012)

SUBJECT: Where Statute of Limitations is Basis for Motion to Dismiss, Tr. Ct. May Consider Charging Information & PC Affidavit

HOLDING: Tr. Ct. properly dismissed D's Motion to Dismiss charges of filing fraudulent healthcare claims, where probable cause affidavit and charging information together put her on notice state would argue concealment theory to bring alleged offenses within statute of limitations (SOL). D was charged with filing fraudulent claims, mixed in with legitimate claims, between 2002 and 2007. State did not learn of the alleged offenses until March, 2006, when D's claims were audited due to their unusually high volume. Charges were filed in February 2011. D moved to dismiss, alleging that charges before February 2006 were outside 5-year SOL period, and that charging information does not contain sufficient facts to allege concealment so as to toll SOL. Ct. App. holds that PC affidavit, taken together with charging information, contains sufficient facts to allege concealment. Cf. Reeves v. State, 938 N.E.2d 10, 15-16 (Ind. Ct. App. 2010) (Where sufficient facts regarding SOL were alleged in PC affidavit, Ct. App. remands to trial ct. to determine whether State could cure problem through amendment of charging information.) Since the PC affidavit and charging information are filed together, they should be viewed together to determine if they satisfy the goal of putting D on notice of crimes charged during applicable SOL period.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.j. Jurisdictional impediment (Ind. Code 35-34-1-4(a)(10))

TITLE: Adams v. State
INDEX NO.: B.10.j
CITE: (7/24/91), Ind., 575 N.E.2d 625
SUBJECT: Motion to dismiss -- concurrent jurisdiction
HOLDING: Where act constitutes violation of both federal and state law, both can proscribe act and have concurrent jurisdiction over it. Here, State of Indiana retained concurrent jurisdiction over land ceded to United States under Flood Control Act and had jurisdiction to prosecute murder committed on land. 33 U.S.C.A. 701(b)-708. Thus, D's motion to dismiss for lack of jurisdiction was properly denied. Held, conviction affirmed in part and reversed in part on other grounds.

TITLE: An-Hung Yao v. State
INDEX NO: B.10.j
CITE: (09-13-12), 975 N.E.2d 1273 (Ind. 2012)
SUBJECT: Motion to dismiss - lack of territorial jurisdiction
HOLDING: Tr. Ct. did not abuse its discretion by denying sub silento D's Motion to Dismiss for lack of territorial jurisdiction. A person may be convicted under Indiana law of an offense if either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana. Ind. Code 35-41-1-1(b). Territorial jurisdiction is treated as though it were an element of an offense, and the State must prove this element beyond a reasonable doubt.

Here, Ds, who ran a company in Texas, sold over the internet to investigators in Indiana toy airsoft guns that were designed like the rifles sold and trademarked by H & K. The State charged Ds with theft, corrupt business influence and counterfeiting of the trademark, markings or symbols of identification from H & K. In order to prove theft, the State must prove that Ds exerted control over the trademarks, markings or symbols in Indiana. Exert control means to "obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property." Ind. Code 35-43-4-1. If at trial the State fails to prove beyond a reasonable doubt that the Ds, in Indiana, engaged in any one or more of these several forms of exerting control over the property, the Ds will be entitled to acquittal, or perhaps judgment on the evidence. Likewise, if the State fails to show that D made or uttered a written instrument, i.e., the design of the guns, under the counterfeiting statute in Indiana, Ds will be entitled to acquittal. But this is a sufficiency of evidence determination. The fact that criminal territorial jurisdiction may be broader than civil territorial jurisdiction does not matter. Criminal jurisdiction is for the most part a creature of expansive state statutes designed in part to permit prosecution for consequences felt within a state resulting from criminal acts occurring outside a state. Held, transfer granted, judgment affirmed in part and reversed in part, and Court of Appeals' opinion at 953 N.E.2d 1236 vacated.

TITLE: Benham v. State
INDEX NO.: B.10.j.
CITE: (6/30/94), Ind., 637 N.E.2d 133
SUBJECT: Motion to dismiss -- jurisdictional impediment
HOLDING: State of Indiana is authorized by its constitution to exercise concurrent criminal jurisdiction over Ohio River. However, Ind. Code 35-41-1-1(a)(1) does not authorize concurrent criminal jurisdiction for offenses committed on parts of Ohio River outside Indiana's established territorial limits. Indiana's southernmost territorial boundary along Ohio River is established by low-water line on northern side of river. D was charged with two counts of reckless homicide, two counts of involuntary manslaughter, two counts of operating watercraft while intoxicated causing death, and one count of operating watercraft while intoxicated. Because of D's failure to establish that all of charged criminal conduct necessarily occurred on Kentucky side of Indiana's southern territorial boundary so as to demonstrate jurisdictional impediment to conviction, Court held that denial of D's motion to dismiss was not erroneous. Held, affirmed.

RELATED CASES: Brehm, App., 558 N.E.2d 906 (Indiana court had jurisdiction of prosecution of D for intimidation and harassment arising out of telephone calls made to his ex-wife and to his daughter, who were Indiana residents, even though calls were made from Michigan; D's threatening messages were recorded and received in Indiana and calls produced intimidation in Indiana).

TITLE: Bruce v. State
INDEX NO.: B.10.j.
CITE: (4/19/78), Ind., 375 N.E.2d 1042
SUBJECT: Motion to dismiss by D -- jurisdictional impediment
HOLDING: Ind. Code 35-3.1-1-8(e)(1) (now Ind. Code 35-34-1-8) authorizes Tr. Ct. to deny motion to dismiss without hearing when, accepting facts asserted by motion as true, Tr. Ct. can nonetheless find as matter of law that movant is not entitled to dismissal. 16 U.S.C. 460u (1970) establishes Indiana Dunes National Lakeshore and provides that nothing in statute shall deprive Indiana of its criminal jurisdiction over persons found, acts performed, and offenses committed within boundaries of Indiana Dunes National Lakeshore. Assuming that victim's residence was located on federal property within Indiana Dunes National Lakeshore, tr. Ct. nonetheless had jurisdiction over prosecution. Held, summary denial proper.

TITLE: Johnson v. State
INDEX NO.: B.10.j
CITE: (6/20/79), Ind., 390 N.E.2d 1005
SUBJECT: Motion to dismiss -- improper method of bringing D within jurisdiction
HOLDING: Tr. Ct.'s jurisdiction is not affected by impropriety of method used to bring D within its jurisdiction. Frisbie, 342 U.S. 519. Although D may not attack his conviction solely upon basis that he was forcibly abducted from another state and brought to Indiana, he may challenge admissibility of any evidence which was obtained as result of such arrest. Here, however, D waived any objection to use of his fingerprints at trial based on fact they were obtained as result of arrest because he failed to object to their admission at trial. Ortiz, 356 N.E.2d 1188. Held, conviction affirmed.

TITLE: McKinney v. State
INDEX NO.: B.10.j.
CITE: (5/3/90), App., 553 N.E.2d 860
SUBJECT: Motion to dismiss by D -- jurisdiction; homicide
HOLDING: Indiana has jurisdiction to prosecute homicide case if wound or injury was received, victim died, or D acted in Indiana. For purposes of territorial jurisdiction, it is to be presumed that homicide victim, whose body is found in Indiana, has been murdered in state. Here, for purposes of motion to dismiss, Indiana had territorial jurisdiction to prosecute D for murder of Ohio resident whose body was found in State of Indiana, even though victim was not killed where body was found and there was no evidence other then hearsay to indicate that victim died or was wounded in Ohio. Ind. Code 35-41-1-1(a)(1), (b). Held, conviction reversed and remanded for new trial on other grounds. Hoffman, P.J., concurring.

TITLE: Pollard v. State
INDEX NO.: B.10.j.
CITE: (4/25/79), Ind., 388 N.E.2d 496
SUBJECT: Motion to dismiss -- jurisdiction proper where crime commenced in Indiana and completed out of state
HOLDING: Tr. Ct. properly denied D's motion to dismiss for lack of jurisdiction because crime commenced in Indiana. Ds stabbed victim while in Indiana and then transported him to Kentucky where he was fatally shot. Wording of charge of premeditated murder of victim by means of stabbing him while in Vanderburgh County and then transporting him to Kentucky where fatal gunshot wound was inflicted was intended to show integral relationship between assault, abduction and murder of victim. Thus viewed, assault and abduction provided adequate jurisdictional basis for conviction of murder in Indiana. Held, convictions affirmed.

TITLE: State v. Taylor
INDEX NO.: B.10.j.
CITE: (12/27/93), App., 625 N.E.2d 1334
SUBJECT: Motion to dismiss -- proper jurisdiction when nonperformance of duty
HOLDING: Support of child is duty which is to be performed in county where child resides; nonsupport is omission which also occurs in county where child resides. Ind. Code 35-41-1-1, 35-46-1- 5. Nonresident parent could be prosecuted in Indiana for criminal offense of non-support of his children living in Indiana even though there had been no support order issued by Indiana Ct. and parent had never visited his children living in state. Held, grant of motion to dismiss reversed.

RELATED CASES: Abrahamson, App., 516 N.E.2d 87 (interpreting phrase in Ind. Code 35-41-1-1(a)(1) "the result that is an element" of offense in Indiana, Court held that result of mother's violation of custody order by failing to return children was within jurisdiction of Indiana for purpose of criminal confinement prosecution brought against mother, notwithstanding fact that custody order granting custody to father and authorizing children to live in Indiana was obtained in Oklahoma and mother's actions in failing to return children after visiting and taking children to Texas did not occur within Indiana).

TITLE: State ex rel. Kelley v. Marion County Criminal Court, Div. III
INDEX NO.: B.10.j.
CITE: (7/25/78), Ind., 378 N.E.2d 833
SUBJECT: Motion to dismiss -- Tr. Ct.'s lack of jurisdiction after judgment
HOLDING: Trial Rule 59 states that motion to correct errors shall be filed no later than sixty days after entry of judgment. Here, respondent Ct. sentenced D on April 7, 1977. One hundred sixty-two days later, on September 16, 1977, Tr. Ct. granted new trial on its own motion. This action was beyond authority to exercise jurisdiction pursuant to Trial Rule 59. Held, temporary writ of mandate and prohibition contesting order of criminal Ct. granting new trial on its own motion made permanent.

RELATED CASES: Pettiford, App., 504 N.E.2d 324 (vacating judgment granting post-conviction relief petition after ninety days was error because Court no longer had jurisdiction over matter); Wilson, App., 472 N.E.2d 932 (until appellate decision remanding case is certified, Tr. Ct. has no jurisdiction; Tr. Ct.'s attempt to reset case for trial only five days after reversal was void).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.k. Discriminatory/selective prosecution

TITLE: Dix v. State
INDEX NO.: B.10.k
CITE: (1st Dist., 08-30-94), Ind. App., 639 N.E.2d 363
SUBJECT: No selective prosecution (SP) found
HOLDING: State did not engage in improper SP in charging D with professional gambling & theft. D collected money, kept books, & paid employees of bingo operation that fraudulently indicated it was raising funds for Muncie FOP. SP claim is judged according to equal protection standards, requiring D to show State's gambling enforcement policy had discriminatory effect & was motivated by discriminatory purpose. When selection of D is not shown to be based on unjustifiable standard (e.g., race) or done in effort to restrict fundamental constitutional right, exercise of some selectivity, within limits of chargeable offenses, is not in itself federal constitutional violation. SP claimant must show 1) other similarly situated violators are generally not prosecuted; 2) selection of claimant for prosecution was intentional & purposeful; & 3) selection of claimant was pursuant to arbitrary classification, Pruitt, App., 557 N.E.2d 684, *trans. denied*. If claimant fails to set out in pretrial motion facts sufficient to make prima facie claim, summary dismissal may result. Although D argued that persons associated with bingo operation were prosecuted because of their non-caucasian races, he did not allege or offer evidence he was member of cognizable class of such persons, that he was being purposely prosecuted because of his race, or that State's enforcement had discriminatory effect of singling out members of his race. D failed to meet prima facie burden of proof and failed to show whether others were being prosecuted & whether they were similarly situated. Having failed to bring himself within suspect classification, State only required to show enforcement criteria were rationally related to legitimate law enforcement objective of concentrating on more serious violations as means of deterring others. D exercised operational control over enterprise and his involvement was more serious. Held, conviction affirmed.

TITLE: Love v. State
INDEX NO.: B.10.k.
CITE: (9/27/84), Ind., 468 N.E.2d 519
SUBJECT: Selective prosecution - raise & resolve issue pretrial
HOLDING: Tr. Ct. did not err in granting state's motion in limine preventing D from presenting evidence re selective prosecution or in refusing D's tendered instruction. Selective prosecution is question of law, not of fact; thus jury is not entitled to hear evidence of selective prosecution. See 2 LaFave & Israel, Criminal Procedure §13.4 (1984). Here, D argued he was being selectively prosecuted for taking hostages at IN state prison & that equally culpable white inmates were not prosecuted. Ct. finds D was afforded full/exhaustive evidentiary hearing out of jury's presence to determine whether D was selectively prosecuted based on impermissible classification of race. LaFave contends selective prosecution is not a defense. Claim should be treated as application for dismissal/quashing of prosecution, decided by Tr. Ct. in pretrial setting. Ct. "wholeheartedly ascribe[s]" to LaFave's view. Held, no error.

RELATED CASES: Albright, App., 501 N.E.2d 488 (Crim L 671; Ct. establishes procedure for raising selective prosecution at trial: (1) D must file written motion revealing on its face basis for claim; & (2) hearing must be held outside presence of jury & both D & prosecutor must have opportunity to present evidence; Ct. notes that findings of Tr. Ct. are then subject to appellate review; here, Ct. finds D failed to follow procedure, thus, claim of unfair charge is without merit).

TITLE: United States v. Bass
INDEX NO.: B.10.k.
CITE: 536 U.S. 862, 122 S. Ct. 2389 (2002)
SUBJECT: Discovery, selective prosecution, discriminatory effect, racial bias
HOLDING: A D who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory intent and discriminatory effect. The D in this federal prosecution alleged that the Government had sought the death penalty against him because of his race, and sought dismissal of the death penalty notice and, in the alternative, discovery of information relating to the Government's capital charging practices. The Tr. Ct. granted the discovery request and, after the Government notified the court that it would not comply with the discovery order, dismissed the death penalty notice. Held, the discriminatory effect evidence produced by the D, raw statistics regarding overall charges, say nothing about charges brought against similarly situated Ds. The D was not entitled to discovery or to dismissal of the death penalty notice.

TITLE: Young v. State
INDEX NO.: B.10.k.
CITE: (3d Dist. 3/23/83), Ind. App., 446 N.E.2d 624
SUBJECT: Selective prosecution - right to instruction
HOLDING: Tr. Ct. did not err in refusing D's instruction concerning denial of equal protection because of selective prosecution. See Taylor, 420 N.E.2d 1231 (no error in refusal to instruct regarding constitutionality of statute). Here, D was charged with prostitution as a result of an undercover investigation. D contended that prosecutor's failure to charge patron (who police equipped with tape recorder & money) denied her equal protection. Ct. finds no equal protection violation in prosecutor's decision to prosecute her but not her patron. Failure to prosecute one who may be violating a law does not excuse a violation by another, absent a showing of "bad faith or evil design." Highland Sales Corp. v. Vance, 186 N.E.2d 682; Lee, App., 397 N.E.2d 1047. Held, no basis in record for issuing instructions, thus no error.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.l. Vindictive prosecution

TITLE: Bowers v. State
INDEX NO.: B.10.l.
CITE: (11/25/86), Ind., 500 N.E.2d 203
SUBJECT: Motion to dismiss -- vindictiveness; prosecutor's repudiation of agreement
HOLDING: It is well-settled that decision whether to prosecute lies within prosecutor's discretion so long as prosecutor has probable cause to believe that accused has committed offense, but public may benefit substantially from prosecutor's decision to withhold prosecution of one in exchange for information leading to arrest and conviction of another more dangerous to society. Substantial harm could result if prosecutor's promise is perceived to be unreliable. Here, D and chief deputy prosecuting attorney entered into oral agreement whereby prosecutor would "dismiss" charges related to D's arrest if D would provide information sufficient to obtain search warrant for residence of another person. D supplied requested information which proved fruitful for chief deputy prosecuting attorney. Two days later, State filed information against D. By reneging on his promise to abate criminal proceedings, prosecutor's conduct impaired reliability and usefulness of important prosecutorial tool and tended to undermine integrity and credibility of criminal justice system to extent compelling reversal. Held, denial of D's motion to dismiss reversed.

RELATED CASES: Kilgore, 922 N.E.2d 114 (Ind. Ct. App. 2010) (charging D with escape instead of unauthorized absence from home detention did not violate his due process rights, even though pretrial home detention agreement said D would be charged with unauthorized absence if he was outside his residence without prior approval).

TITLE: Huffman v. State

INDEX NO.: B.10.l

CITE: (9/7/89), Ind., 543 N.E.2d 360, *overruled* on other grounds by Street v. State, 567 N.E.2d 102 (Ind. 1991)

SUBJECT: Motion to dismiss -- vindictive prosecution; filing death penalty request

HOLDING: Tr. Ct. did not err in denying D's motion to dismiss death penalty charge which was filed after D refused plea offer. Prosecutorial vindictiveness may be presumed in certain cases in which D is punished for doing something law plainly allowed him or her to do. Here, D refused plea agreement in murder, conspiracy and robbery case. He asserted that prosecutor filed request for death penalty to punish him for refusing plea agreement. However, D's counsel was notified that as soon as case was filed D was being considered for death penalty and that death penalty request had already been filed against co-D. Held, imposition of death penalty affirmed.

NOTE: This case was *overruled* on other grounds by Street, 567 N.E.2d 102.

TITLE: Kenney v. State
INDEX NO.: B.10.l.
CITE: (3d Dist. 2/13/90), Ind. App., 549 N.E.2d 1074
SUBJECT: Prosecutorial vindictiveness - charge added
HOLDING: D failed to establish that prosecutor's substitution of more serious charge before trial was vindictive. D was initially charged with 2 counts of possessing cocaine, but before trial, prosecutor dismissed one count & added dealing charge. D moved to dismiss dealing charge, alleging that it was added in retaliation for his filing of motion to suppress. At hearing in Tr. Ct. state argued that dealing charge was added after D's counsel inadvertently alerted prosecution to previously unnoted police report allegedly detailing circumstances of D's arrest. Evidence showed that undercover officers were driving when D & another man flagged them down & sold them cocaine. Prosecutor stated that he had originally filed possession charge rather than dealing, because of difficulty of overcoming entrapment defense. However, when he discovered that D had initially approached officers, he substituted dealing charge. It is violative of due process to add charges in retaliation for exercise of constitutional rights. [Citations omitted.] However, initial charging decision does not freeze future conduct, & prosecutor should remain free before trial to exercise broad charging discretion. US v. Goodwin, (1982), 457 U.S. 368, 102 S. Ct. 2485, 73 L.Ed. 2d 74. Presumption of prosecutorial good faith exists, & to overcome it, D must allege intentional purposeful discrimination & present facts sufficient to raise reasonable doubt about purpose. US v. Whaley, (1987), 830 F.2d 1469. Tr. Ct. found that D failed to establish any causal connection between motion to suppress & charging decision, concluding that prosecutor made legitimate though tardy decision that evidence supported dealing charge. D has not demonstrated on appeal that that conclusion was erroneous. Held, conviction affirmed.

RELATED CASES: Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011); (D's claim of prosecutorial vindictiveness rested only on circumstantial inferences, not direct evidence; thus, he failed to show State added class A felony neglect of dependent charge after Tr. Ct. rejected plea agreement for class B felony neglect of dependent to punish D for his successful motion to dismiss the first indictment); Hughes, App., 473 N.E.2d 630 (allowing state to dismiss charges and then refile them in different Ct. not subject to presumption of vindictiveness, although it followed on discovery sanctions against state; D failed to prove actual vindictiveness; see card at B.12.b.).

TITLE: Murphy v. State
INDEX NO.: B.10.l.
CITE: (9/16/83), Ind., 453 N.E.2d 219
SUBJECT: Vindictive prosecution - adding habitual count following mistrial
HOLDING: Tr. Ct. committed reversible error by denying D's motion to dismiss habitual count (added after D was granted a mistrial on burglary & theft counts); filing count subsequent to mistrial constitutes prosecutorial vindictiveness. US v. Jamison, (DC Cir. 1974) 505 F.2d 407 (indictment for first degree murder following grant of mistrial on second degree murder denied Ds due process); Blackledge v. Perry, (1974) 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 & NC v. Pearce, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 require restrictions on increased charges following mistrials. Here, D initially faced maximum of 12 years; addition of habitual meant D faced 40 years. See Cherry, 414 N.E.2d 301 (refiling of 2 additional charges following grant of D's MCE constituted prosecutorial vindictiveness; heavy burden on prosecution to prove increase in number/severity of charges filed following D's successful appeal is not motivated by vindictive purpose). Held, habitual reversed. DISSENT by Pivarnik joined by Givan, contends D was aware of habitual charge (filed 4 months before second trial) & had sufficient time to prepare his defense.

RELATED CASES: Sisson, 985 N.E.2d 1 (Ind. Ct. App. 2012) (no presumption of vindictiveness where prosecutor re-filed previously dismissed SVF and habitual charges after mistrial due to hung jury); Warner, 773 N.E.2d 239 (it is central to theory in Murphy that if new evidence is discovered, it contribute to State's case against D; here Tr. Ct. erred in permitting State to add felony murder & attempted robbery charges after mistrial); Harris, 481 N.E.2d 382 (prosecutor's amendment of information following hung jury, charging Class A rather than Class C robbery, was not vindictive where prosecutor learned 2 weeks prior to first trial that facts supported Class A charge but chose not to amend at that time).

TITLE: Reynolds v. State
INDEX NO.: B.10.l.
CITE: (3rd Dist., 12-22-93), Ind. App., 625 N.E.2d 1319
SUBJECT: No prosecutorial vindictiveness - filing of greater charges
HOLDING: It was not vindictive prosecution for State to dismiss 2 D felony theft charges & file charges of C felony forgery after D was acquitted of theft & received lenient sentence for cocaine possession. D was originally charged with 4 D felonies: cocaine possession, vehicle theft, & two thefts of checking account funds. Plea negotiations were unsuccessful & D went to trial where he was convicted of cocaine possession & acquitted of vehicle theft. State then dismissed remaining theft charges & refiled them as forgery charges. D argued this was vindictive prosecution. Where charges arising from same conduct are filed after appeal, prosecution must show increase in number or severity of charges isn't motivated by vindictiveness (because of chilling affect on rights). If charges are changed before trial, however, D is not entitled to vindictiveness presumption, & must show decision was motivated by desire to punish him for doing something he was allowed to do. State may file more charges where initial expectation D will plead guilty to lesser charges does not come to pass, U.S. v. Goodwin, (1982), 457 U.S. 368, & there's no element of retaliation in plea bargaining if D is free to accept or reject offer, Bordenkircher v. Hayes, (1978), 434 U.S. 357. State showed it had engaged in futile plea negotiations with D, & that when presented with alternative of pleading to D felony theft charges or facing trial on C felony forgery charges, he decided to go to trial. State also testified it first became aware victim had actual forged checks in his possession after negotiations. Ct. concluded filing of charges after breakdown in negotiations wasn't retaliation for exercising right to trial, & therefore D didn't show filing charges was product of prosecutorial vindictiveness. Held, convictions affirmed.

RELATED CASES: Schiro, App., 888 N.E.2d 828 (no prosecutorial vindictiveness where, after successful appeal of death sentence, newly filed charges stemmed from unrelated conduct).

TITLE: State v. Selva
INDEX NO.: B.10.l.
CITE: (3d Dist. 1/25/83), Ind. App., 444 N.E.2d 329
SUBJECT: Vindictive prosecution - additional charges filed pre-trial
HOLDING: When charges arising out of the same conduct are filed after appeal, "the prosecution bears a heavy burden of proving that any increase in the number or severity of the charges was not motivated by a vindictive purpose." Cherry, 414 N.E.2d 301. Actual vindictiveness is not required; "realistic apprehension of vindictiveness" controls. Cherry. Where additional charges are filed before trial, presumption of vindictiveness will not be applied, although D may prove actual vindictiveness if prosecutor's charging decision was motivated by desire to punish D for doing something plainly allowed by law. US v. Goodwin, (1982), 102 S. Ct. 2485. Here, state filed 4-count information against D. One day after state's motion to consolidate charges for trial & petition for bond revocation were denied, state moved to dismiss the 4 charges & filed 10-count information containing 4 previous charges & 6 additional ones. D moved to dismiss 10-count information, alleging prosecutorial vindictiveness. Following a hearing, Tr. Ct. dismissed 10-count information & reinstated original 4 charges. Ct. finds evidence supports Tr. Ct.'s determination of prosecutorial vindictiveness (10-count information filed one day after denial of state's motion/petition; prosecutor indicated displeasure with hearing on motion/petition; 6 new charges arose out of same conduct as 4 original ones; although prosecutor claimed newly discovered information formed basis of 6 new charges, information had been available in co-D's statement to police which prosecutor had when he filed original 4 charges). Held, dismissal of 6 new counts affirmed, dismissal of 4 original counts contained in 10-count indictment reversed.

RELATED CASES: Johnson, 959 N.E.2d 334 (Ind. Ct. App. 2011); (D's claim of prosecutorial vindictiveness rested only on circumstantial inferences, not direct evidence; thus, he failed to show State added class A felony neglect of dependent charge after Tr. Ct. rejected plea agreement for class B felony neglect of dependent to punish D for his successful motion to dismiss the first indictment); Penley, 506 N.E.2d 806 (dismissal of rape charge in one Ct. & refiling of rape plus burglary charge was not vindictive despite fact D had won hung juries in 2 other rape cases in first Ct.); McCullough, 475 U.S. 134 at E.11.f (no basis for presumption of vindictiveness because sentencing Ct. itself granted D's motion for new trial, D was entitled by law to choose to be resentenced by either judge or jury and chose resentencing by judge, and different sentencers assessed varying sentences that D received).

TITLE: Snyder v. State
INDEX NO.: B.10.l
CITE: (4th Dist., 9-28-95), Ind. App., 655 N.E.2d 1238
SUBJECT: No prosecutorial vindictiveness - argument at sentencing
HOLDING: It was not vindictive prosecution for State to ask for felony treatment for D after previously offering plea allowing for misdemeanor treatment which was rejected by Tr. Ct. Relying on Cherry v. State, (1981), Ind., 414 N.E.2d 301, D argued that prosecutor acted vindictively by asking for more stringent sentence based on fact that he was forced to try case before jury. Ct. held that State's actions in requesting Class D felony sentence for Class D felony conviction did not point solely to vindictive motive. There is no requirement that, at sentencing hearing, prosecutor argue for same sentence which Tr. Ct. rejected in plea agreement. Held, conviction affirmed.

TITLE: Szymanski v. State
INDEX NO.: B.10.l.
CITE: (3rd Dist., 06-29-94), Ind. App., 636 N.E.2d 196
SUBJECT: Vindictive prosecution - additional charge after mistrial
HOLDING: It was error to allow State to file additional charge against D after statement about polygraph by State's witness caused mistrial. D was originally charged with criminal recklessness (crim reck), & after mistrial, State filed information alleging both crim reck & battery, based on same incident. Tr. Ct. dismissed added count State filed additional battery count, & Tr. Ct. also dismissed that count. State then moved to dismiss entire cause & refiled crim reck & battery charges in another Ct. D was eventually acquitted of crim reck but found guilty of battery.

Accused should not be faced with retaliation simply for exercising legal right to fair trial, Harris, 481 N.E.2d 382, & Murphy, 453 N.E.2d 219. Ct. noted D was originally brought to trial on single charge arising from conduct toward victim, & State's witness precipitated mistrial. Because he was then subjected to additional charge related to same conduct, after prosecutorial persistence if not vindictiveness, he was improperly penalized for exercise of right to fair trial. Held, reversed & remanded for vacation of conviction.

RELATED CASES: Owens, App., 822 N.E.2d 1075 (Tr. Ct. erred in allowing State to file an additional charge following D's first successful appeal; rationale for protecting a D's right to a fair trial, which justifies presumption of prosecutorial vindictiveness, is even more compelling in case of a successful appeal than in the case of a successful motion for mistrial); Warner, 773 N.E.2d 239 (in murder prosecution, Tr. Ct. erred in permitting State to add charges of felony murder & attempted robbery after defense successfully sought mistrial); U.S. v. Spears, 159 F.3d 1081 (7th Cir. 1998) (D failed to show that federal prosecution which occurred after acquittal in state court was fueled by vindictiveness; no evidence of actual animus on part of federal prosecutor & any animus of state prosecutor would not be imputed to federal prosecutor).

TITLE: U.S. v. Jenkins
INDEX NO.: B.10.l.
CITE: 494 F.3d 1135 (2007); amended by 504 F.3d 694
SUBJECT: Vindictive prosecution - new charges filed after D testifies
HOLDING: Ninth Circuit Court of Appeals held that government's decision to indict D for two prior acts of alien smuggling after she admitted to them during testimony in a case where she was charged for attempting to smuggle marijuana across the border created an appearance of prosecutorial vindictiveness. D's defense was that she was unaware that she was smuggling marijuana and that the two previous occurrences showed that in the past she was hired to drive vehicles with illegal immigrants hidden in them and that was what she thought she was doing and was told to do in case that resulted in the marijuana smuggling charge. After her testimony but prior to end of that trial, the government filed new charges against her for the previous smuggling of illegal immigrants. To establish a presumption of vindictiveness, D did not have to prove bad faith or maliciousness on part of prosecution, but rather a "reasonable likelihood" that the government would not have brought charges had she not elected to testify at her marijuana sumggling trial and present her theory of the case. Court rejected any inference that the prosecution needed D's trial testimony in order to make the charges or make them stronger. Court noted government already had D's admissions to guilt on the other charges but she was let go and never charged until she testified on her own behalf, calling the other cases essentially "open and shut". D told police when she was stopped for marijuana smuggling that she thought she was transporting aliens and noted her previous times being stopped for this to buttress her point. Consequently, government had no reason to think that D would not continue with this defense at trial. A dissenting opinion was entered.

TITLE: Worthington v. State
INDEX NO.: B.10.l.
CITE: (9/25/80), App., 409 N.E.2d 1261
SUBJECT: Motion to dismiss -- vindictiveness; delay in prosecution
HOLDING: If prosecution deliberately utilizes delay to strengthen its position by weakening that of defense or otherwise impairs D's right to fair trial, inordinate pre-indictment delay may be found to be prejudicial. Such delays causing prejudice may be shown by loss of material witness or other missing evidence or fading memory caused by lapse of time. Here, D was not charged until after he refused to testify at wife's trial, although he was granted immunity. Court found delay of almost four months after wife was charged was neither unreasonable nor deliberately caused to harass D. Thus, Tr. Ct. did not err in denying D's motion to dismiss for prosecutorial vindictiveness. Held, conviction affirmed.

RELATED CASES: Burress, App., 363 N.E.2d 1036 (D failed to show prejudice from two hundred thirty-day delay between drug sale and filing of information).

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.m. Destruction of/failure to preserve/failure to disclose evidence (see, also N.1.f, M.7.a)

TITLE: Boyd v. State
INDEX NO.: B.10.m.
CITE: (10/11/83), Ind., 454 N.E.2d 401
SUBJECT: Motion to dismiss - witness absence procured by state
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss premised upon grounds state procured absence of material witness (Johnson) where state provided D with witness' address in NY prison & where there was no evidence state procured Johnson's absence from IN by overt/covert act. Here, Johnson had acted as police informant in drug investigation of D & had accompanied undercover officer when she purchased drugs from D. D was originally charged with 10 counts of drug dealing/conspiracy to deal. State dismissed 7 charges based upon D's sales of narcotics to Johnson, leaving only charges based on sale to undercover officer. D contends Ortez, App., 333 N.E.2d 838 requires dismissal of all charges. Police in Ortez paid narcotics informant to go to CA & refused to cooperate with D's efforts to locate informant. D's conviction was reversed because bad faith by state denied D a fair trial. This Ct. distinguishes Ortez. Also, D had taken Johnson's deposition before he left IN, but did not move to publish it at trial. Held, no error.

B. PRETRIAL PROCEEDINGS

B.10. Motions to dismiss by D (grounds) (Ind. Code 35-34-1-4)

B.10.n. Other (Ind. Code 35-34-1-4(11))

TITLE: Brown v. State
INDEX NO.: B.10.n.
CITE: (2/10/84), Ind., 459 N.E.2d 376
SUBJECT: Motion to dismiss - multiple counts of same offense
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss 3 of 5 counts against him (3 counts of rape, 2 counts of criminal deviate conduct). Here, D contends evidence shows same 2 persons were involved in all complained of acts, which occurred as part of one transaction/course of events & number of offenses charged only inflamed jury & deprived him of a fair trial. Ct. notes each act of rape & each act of deviate sexual conduct requires proof of specific fact which others do not. When separate & distinct offenses occur, even when they are similar acts done many times to same victim, they are chargeable individually. Policy discourages compounding & viciousness of criminal acts. Wilson, 255 N.E.2d 817. Prosecutrix testified 3 separate acts of rape & at least 2 separate acts of deviate sexual conduct occurred at different times. Held, no error.

RELATED CASES: Harding, 457 N.E.2d 1098 (Indict 128; single offense may be charged in more than one count, provided only single judgment & sentence is imposed, *citing* Vaughn, 378 N.E.2d 859 & Holland, 352 N.E.2d 752; here, D was charged with 2 counts of attempted murder but found guilty of lesser included of battery & attempted murder; held, convictions affirmed).

TITLE: Carnes v. State
INDEX NO.: B.10.n
CITE: (2d Dist. 7/23/85), Ind. App., 480 N.E.2d 581
SUBJECT: Motion to dismiss - threats of additional charges/charges against spouse
HOLDING: Tr. Ct. did not err in denying D's motion to dismiss charges. Here, Ds (husband & wife) argue officer's threat to file charges against wife & additional charges against husband unless he consented to being an informant violated their due process rights. Police had probable cause to charge Ds originally; therefore, Ds were not harmed. Ct. finds situation similar to threats made to induce guilty plea, where D may face reindictment on more serious charge. See US v. Horton, (CA5 1981), 646 F.2d 181 (not unlawful coercion to threaten to indict members of D's family to induce D's guilty plea). "Although we do not condone [officer's] conduct, we will not decide what law enforcement tactics, aside from those which are constitutionally & statutorily prohibited, should or should not be employed." Held, no error.

TITLE: Richardson v. State
INDEX NO.: B.10.n
CITE: (12/13/83), Ind. App., 456 N.E.2d 1063
SUBJECT: Motion to dismiss by D -- agreement not to prosecute
HOLDING: When prosecutor secures guilty plea by agreeing not to prosecute one or more related offenses, guilty plea statute requires that Tr. Ct. dismiss any subsequent prosecution for such related offenses, regardless of county in which it is filed. Here, where uncontroverted evidence submitted by D who pled guilty to sale of controlled substance showed that subsequent conspiracy charge filed in another county was related offense that prosecutor agreed not to prosecute in exchange for D's guilty plea to sale charge, evidence entitled D to dismissal of subsequent prosecution for conspiracy, notwithstanding fact that it was filed in another county. Held, conviction reversed and remanded with instructions to enter dismissal.

TITLE: State v. Helton
INDEX NO.: B.10.n.
CITE: (3rd Dist., 11-30-05), Ind. App, 837 N.E.2d 1040
SUBJECT: Pretrial dismissal improper where complaining witness recants
HOLDING: In domestic battery prosecution, Tr. Ct. erred in dismissing case after complaining witness recanted her statements to police. A pretrial motion to dismiss directed to the insufficiency of the evidence is improper, & a Tr. Ct. errs when it grants such a motion. State v. Houser, 622 N.E.2d 987 (Ind. Ct. App.1993). D argued that no police officer could testify because "once a witness has admitted an inconsistent prior-statement she has impeached herself & further evidence is unnecessary for impeachment purposes." Pruitt v. State, 622 N.E.2d 469 (Ind. 1993). He also argued that other witnesses may not be placed on the stand for the sole purpose of introducing otherwise inadmissible evidence cloaked as impeachment. Appleton v. State, 740 N.E.2d 122 (Ind. 2001). Ct. declined the invitation to adopt reasoning that might allow the dismissal of most cases in which the victim recants his or her testimony. The police officers might not have been called to impeach the complaining witness; it is more likely they would have been called to report what they personally observed including complaining witness's crying & being fearful & afraid as noted in the probable cause affidavit. Their testimony would probably have been allowed under the excited utterance exception to the hearsay rule. A victim's decision to recant her prior statements or to not testify at all does not necessarily prevent a trial. See Fowler v. State, 829 N.E.2d 459 (Ind. 2005) (victim declined to testify after taking the stand). Held, judgment reversed & remanded for trial.

RELATED CASES: Gill, 949 N.E.2d 848 (Ind. Ct. App. 2011) (CW's decision to recant prior statements was insufficient grounds to dismiss information).

TITLE: State v. Houser
INDEX NO.: B.10.n.
CITE: (3rd Dist., 10-27-93), 622 N.E.2d 987
SUBJECT: Order dismissing information improper
HOLDING: Tr. Ct. erred in granting Ds' motions to dismiss theft & conspiracy to commit theft informations due to lack of evidence of "unauthorized control," material element of offense. When Tr. Ct. held evidentiary hearing on Ds' motions to dismiss, State failed to offer any evidence of unauthorized control, & Tr. Ct. granted motions. Tr. Ct. erred because motions to dismiss before trial, relating to sufficiency of evidence, are improper, State v. Nesius, App., 548 N.E.2d 1201. Whether Ds exerted unauthorized control was question of fact to be decided at trial.

RELATED CASES: Tanoos, 137 N.E.3d 1008 (Ind. Ct. App. 2019) (no error in denying motion to dismiss bribery charges, which alleged a school superintendent accepted meals, concert tickets and other items in exchange for recommending a specific vendor receive a contract; motion to dismiss did not allege deficiencies in the charging information, but rather alleged questions of facts which are more proper as a defense at trial); Bilbrey, App.,743 N.E.2d 796 (fact that D denied allegation that he was operating motor vehicle does not demonstrate, as matter of law, that he was not operating motor vehicle. Held, judgment reversed.).

TITLE: State v. Larkin
INDEX NO.: B.10.n
CITE: (6/27/2018), 100 N.E.3d 700 (Ind. 2018)
SUBJECT: Outright dismissal is not appropriate remedy for State's misconduct
HOLDING: Trial court abused its discretion by granting D's Motion to Dismiss for a pattern of pretrial government misconduct. After being charged with voluntary manslaughter, D submitted to questioning by police regarding his wife's death. During a break in questioning, police recorded privileged communications between D and his attorney. The recording was transcribed and distributed to the prosecutor and others. There was also evidence in the record reflecting potential evidence tampering. Although the State committed misconduct, the remedy is not outright dismissal, but suppression of tainted evidence for which the State cannot rebut the presumption of prejudice pursuant to State v. Taylor, 49 N.E.3d 1019 (Ind. 2016). Under Taylor, the State is entitled to a hearing to look at each piece of evidence and determine what, if any, evidence was tainted by the State's misconduct, and if so, whether the State can rebut prejudice beyond a reasonable doubt. Dismissal is an extreme remedy. As the U.S. Supreme Court has held, for constitutional violations committed by the government, "the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence' gained from the violation." U.S. v. Morrison, 449 U.S. 361, 365 (1981). Held, transfer granted, Court of Appeals' opinion at 77 N.E.3d 237 vacated, judgment reversed and remanded to hold a hearing or proceed to trial pursuant to Taylor.

B. PRETRIAL PROCEEDINGS

B.11. Motion to dismiss (procedure)

TITLE: Foster v. State
INDEX NO.: B.11.
CITE: (8/3/88), Ind., 526 N.E.2d 696
SUBJECT: Motion to dismiss by D -- time for filing
HOLDING: Sufficiency of information must be challenged by motion to dismiss no later than twenty days prior to omnibus date. Ind. Code 35-34-1-4(b)(1). If this requirement is not followed, any error regarding information is waived. Carter, 467 N.E.2d 694. Here, D claimed that habitual offender allegation was defective, but he did not challenge it at time it was filed. Held, no fundamental error; conviction affirmed.

RELATED CASES: Brown, 442 N.E.2d 1109 (challenge to sufficiency of indictment or information is governed by statute and must be made by motion to dismiss prior to arraignment and plea or any error is waived; see card at A.4.); King, 560 N.E.2d 491 (contents of D's motion to dismiss information placed motion within purview of statute pertaining to failure to state offense with sufficient certainty; thus, where D's motion to dismiss came well after omnibus date, motion was untimely); Brittain, 565 N.E.2d 757 (no error in denying D's untimely motion to dismiss misdemeanor disorderly conduct charge on ground that D's name was omitted from charging portion of information, since motion was not made until after jury was sworn); Stwalley, 534 N.E.2d 229 (any challenge to sufficiency of information must be made by motion to dismiss prior to arraignment, which is equivalent to D's initial hearing under Ind. Code 35-33-7-et seq.).

B. PRETRIAL PROCEEDINGS

B.11. Motion to dismiss (procedure)

B.11.a. Motion (CR 3; Ind. Code 35-34-1-8(a))

TITLE: Hitch v. State
INDEX NO.: B.11.a
CITE: (7/7/72), Ind., 284 N.E.2d 783
SUBJECT: Motion to dismiss -- pleading requirements
HOLDING: Memorandum which merely repeats conclusions of motion to quash does not meet requirements of rule relating to supplying memorandum in support of motion to quash. CR3(A). Instead, it must enlighten Tr. Ct. with counsel's reasoning and authorities. Here, Court held that denial of motion to quash was not erroneous because motion was based on allegations that affidavit did not state facts sufficient to constitute public offense or to charge offense with sufficient certainty, and memorandum in support of motion merely stated that no cause of action was shown in affidavit. Held, conviction affirmed.

TITLE: Johnson v. State
INDEX NO.: B.11.a.
CITE: (11/17/83), Ind., 455 N.E.2d 932
SUBJECT: Motion to dismiss - untimely filed
HOLDING: Tr. Ct. did not err in denying D's motion to quash information ("unlawfully" rather than "intentionally" used) where motion was filed after D appeared in Ct., waived arraignment, filed written jury waiver & pled not guilty. Ind. Code 35-3.1-1-4(b), now Ind. Code 35-34-1-4(b), provides motion to dismiss for failure to state offense or lack of specificity may be summarily dismissed if filed after arraignment & plea. Held, motion properly *denied*.

RELATED CASES: Wright, 474 N.E.2d 89 (Crim L 1032(1); D failed to preserve any error re propriety of charging information by not filing motion to dismiss prior to trial; here, D raised issue in motion to correct error; held, no error); Averhart, 470 N.E.2d 666 (allegation of defective grand jury proceedings untimely filed); Sappenfield, App., 462 N.E.2d 241 (Crim L 627.9 (5); in interlocutory appeal Ct. rejects D's contention that Tr. Ct. abused discretion by denying his motion to produce transcript of entire grand jury proceedings (requested to support second motion to dismiss), here motion was filed 171 days after time required by statute; once omnibus date is set it cannot be altered, even though continuances move actual date of omnibus hearing, *citing* Ind. Code 35-36-8-1).

TITLE: State v. Fields
INDEX NO.: B.11.a.
CITE: (8/24/88), App., 527 N.E.2d 218
SUBJECT: Motion to dismiss -- supporting material
HOLDING: Motion to dismiss may be supported by material outside pleadings. Ind. Code 35-34-1-8 provides that motion to dismiss may be supported by affidavits or documentary evidence and Tr. Ct. may even conduct hearing, but D has burden of proving every fact essential to support motion by preponderance of evidence. Materiality requirement is not limited to trials and has been considered applicable to grand jury proceedings. Richardson, 266 N.E.2d 51. Here, D's allegedly false statement regarding use of marijuana in fire house was not material to investigation of alleged receipt of stolen property by firemen. Held, order granting motion to dismiss information affirmed.

B. PRETRIAL PROCEEDINGS

B.11. Motion to dismiss (procedure)

B.11.b. Burden of proof

TITLE: State v. King
INDEX NO.: B.11.b.
CITE: (2d Dist. 1/29/87), Ind. App., 502 N.E.2d 1366
SUBJECT: Motion to dismiss - burden of proof
HOLDING: Tr. Ct. erred in granting D's motion to dismiss, where D argued that probable cause affidavit established defense to crime. Ind. Code 35-34-1-8 establishes facts that determine whether, as matter of law, offense has been charged properly against D. Facts permitted to be raised under Ind. Code 35-34-1-8 typically concern only pretrial matters, such as lack of jurisdiction, adequacy of form of information, agreement in plea agreement not to prosecute related offense, double jeopardy, collateral estoppel, double jeopardy & agreement for immunity for plea agreement. (Citations omitted.) Questions of fact to be decided at trial or facts constituting a defense are not properly raised by motion to dismiss. State v. Gillespie, App., 428 N.E.2d 1338. Ct. finds information adequately charges crime of unlawfully selling fireworks. State was not required to charge in information that Ds did not fall within statutory exception to Ind. Code 22-11-14-8. Held, dismissal of information set aside; case remanded.

RELATED CASES: Helton, App., 837 N.E.2d 1040 (a victim's decision to recant her prior statements or to not testify at all does not necessarily prevent a trial); Isaacs, App., 794 N.E.2d 1120 (Tr. Ct. erred in granting D's motion to dismiss two counts of operating vehicle while intoxicated (OWI), but properly granted motion to dismiss one count of operating with schedule I or II controlled substance in his body; see full review at K.9.a); Fields, App., 527 N.E.2d 218 (no error in granting dismissal of information charging perjury; see card at K.5.g.).

B. PRETRIAL PROCEEDINGS

B.11. Motion to dismiss (procedure)

B.11.e. Other

TITLE: State v. D.M.Z.
INDEX NO.: B.11.e.
CITE: (1st Dist., 12-16-96), Ind. App., 674 N.E.2d 585
SUBJECT: Motion to dismiss - Tr. Ct. need not accept allegation as fact
HOLDING: Tr. Ct. considering motion to dismiss in criminal case need not rely entirely on text of charging information but can hear & consider evidence in determining whether D can be charged with crime alleged. Ind. Code 35-34-1-8. Here, in child seduction prosecution, State argued that because charging information alleged that D was victim's custodian, Tr. Ct. was required to treat that allegation as fact in ruling on D's motion to dismiss. In rejecting this argument, Ct. noted that interpretation of statute is not question of fact but one of law reserved for Tr. Ct. Robinson v. Zeedyk, 625 N.E.2d 1249 (Ind. Ct. App. 1993), *trans. denied*. Here, Tr. Ct. accepted all material facts in charging information as true but properly concluded that they did not establish, as matter of law, that D was "custodian" within meaning of Indiana's child seduction statute. Thus, Tr. Ct. did not err in declining to accept at face-value State's allegation that D was victim's custodian. Held, judgment affirmed.

RELATED CASES: Fettig, App., 884 N.E.2d 341 (Tr. Ct. did not abuse its discretion in dismissing battery charge against D, whom Tr. Ct. found acted within bounds of her authority to physically discipline her student).

TITLE: State v. McCarty
INDEX NO.: B.11.e.
CITE: (10/25/62), Ind., 185 N.E.2d 732
SUBJECT: Motion to dismiss -- dismissal as "final judgment"
HOLDING: Mere sustaining of motion to quash is not final judgment. It is only where state has, by its appeal, elected to stand on charges filed that Ct. has treated sustaining of motion to quash as final judgment. Silver, 182 N.E.2d 587. For purpose of appeal, order sustaining motion to quash has all characteristics of final judgment and will be treated as such on appeal. In this case, there was neither judgment entered upon sustaining of motion to quash nor appeal from sustaining of motion to quash. Held, motion to discharge D affirmed.

TITLE: Stwalley v. State
INDEX NO.: B.11.e.
CITE: (2/20/89), Ind., 534 N.E.2d 229
SUBJECT: Motion to dismiss by D -- time for filing
HOLDING: Any challenge to sufficiency of information must be made by motion to dismiss prior to arraignment; otherwise, any error in that regard is waived. Here, D failed to object before appeal and therefore waived that error. Held, conviction affirmed.

B. PRETRIAL PROCEEDINGS

B.12. Motion to dismiss by prosecutor (Ind. Code 35-34-1-13)

TITLE: Davenport v. State
INDEX NO.: B.12.
CITE: (12-23-97), Ind., 689 N.E.2d 1226
SUBJECT: Dismissal & refiling of additional charges prejudiced substantial rights of D
HOLDING: After charging information has been dismissed on State's motion pursuant to Ind. Code 35-34-1-13(a), State may not refile charges if doing so will prejudice substantial rights of D. Here, State received adverse ruling in original Tr. Ct. on its motion to amend information. As result, D had to defend against one count of murder. In response, State dismissed case & filed second information which contained three additional counts. Then, for no apparent reason other than because State knew that Tr. Ct. had already prohibited inclusion of those three additional counts in information, State moved for & was granted transfer to different Ct. By doing so, State not only crossed over boundary of fair play but also prejudiced substantial rights of D. Because of sleight of hand, State was able to escape ruling of original Ct. & pursue case on charges State had sought to add belatedly. Therefore, Tr. Ct. erred in denying D's motion to dismiss three additional charges. Held, convictions for felony murder, attempted robbery, & auto theft reversed; murder conviction affirmed.

RELATED CASES: Casady, 934 N.E.2d 1181 (Ind. Ct. App. 2010) (State was not attempting to avoid the adverse ruling when it dismissed original two charges and chose to pursue only 16 additional charges against D); Wingate, App., 900 N.E.2d 468 (where nothing in the record suggested that State's actions were purposefully taken in order to deprive D of his substantial rights or to evade an adverse ruling the by Tr. Ct., State's dismissal of charges & addition of new, factually distinct charges on the 69th day after D's speedy trial request was proper); Fultz, App., 849 N.E.2d 616 (State's dismissal of arson charge and re-filing along with murder was not in bad faith to avoid CR 4(B) motion, but rather was motivated due to newly-discovered evidence); Hollowell, App., 773 N.E.2d 326 (when State dismissed charges against D, it was not trying to circumvent adverse ruling from Tr. Ct.; nor was State trying to punish D by piling on additional charges; Honest mistake or oversight in original decision to prosecute will excuse refiling different counts); Davenport, 696 N.E.2d 870 (on rehearing; while Ct. offered no opinion had State attempted this maneuver at earlier stage when D had not yet finished significant preparation for trial, Ct. held it cannot be allowed to happen on very eve of trial); Jones, App., 701 N.E.2d 863 (D's substantial rights were not prejudiced by State's refiling of neglect charge & its addition of murder charge 3 weeks before trial); Klein, App., 702 N.E.2d 771 (prosecutor's dismissal of original charges followed by refiling to add attempted murder charge 3 weeks prior to trial was improper & prejudiced D's right to prepare defense); Malone, App., 702 N.E.2d 1102 (D's rights were not prejudiced when State dismissed criminal recklessness charge after omnibus date & refiled charge as attempted murder).

TITLE: Gregor v. State
INDEX NO.: B.12.
CITE: (5th Dist., 12-28-94), Ind. App., 646 N.E.2d 52
SUBJECT: Dismissal without prejudice - State's lack of preparation
HOLDING: Despite having dismissed D's case with prejudice because of State's lack of preparation & unavailability of witnesses, Tr. Ct. did not abuse discretion in granting State's motion to correct error & ordering case dismissed without prejudice. D appeared with counsel on original date of trial & was prepared for trial. Over objection, Tr. Ct. granted State's request for continuance, based on lack of preparation & unavailability of victim. On rescheduled trial date, deputy prosecutor decided that he needed additional witnesses & was not prepared to try case. Victim was sent home, deputy prosecutor requested continuance, & after D objected, Tr. Ct. dismissed case with prejudice. State's motion to correct error alleged that dismissal should have been without prejudice. Ct. found that this particular case could not have been dismissed with prejudice. D failed to prove that her substantial rights were prejudiced & did not contend that jeopardy had attached or that her right to speedy trial was violated. Because prosecutor did not move for dismissal of D's case, Ct. noted that State did not attempt to usurp Ct.'s administrative power by trying to dismiss case rather than complying with statutory requirements for continuance, distinguishing State v. Lynn, Ind. App., 625 N.E.2d 499. Held, judgment affirmed.

RELATED CASES: Joyner, 678 N.E.2d 386 (because initial sustaining of D's motion to suppress was not final & jeopardy had not yet attached, D's substantial rights were not prejudiced by dismissal & refiling case in another county).

TITLE: Johnson v. State
INDEX NO.: B.12.
CITE: (1-3-01), Ind., 740 N.E.2d 118
SUBJECT: Dismissing & refiling prejudiced the substantial rights of D
HOLDING: Tr. Ct. abused its discretion by allowing prosecutor to dismiss & refile as tactic to circumvent proper evidentiary ruling, & to punish D for exercising his procedural rights by piling on additional charges. While Cts. have allowed State significant latitude in filing second information, State cannot go so far as to abuse its power & prejudice D's substantial rights. Davenport v. State, 689 N.E.2d 1226 (Ind. 1997), modified on *reh'g*, 696 N.E.2d 870 (Ind. 1998). Here, after Tr. Ct. granted D's motion in limine excluding State's Ind. R. Evid. 404(b) evidence due to State's lack of notice, State moved to dismiss case without prejudice over D's objection. State then refiled case & added ten more counts. If State may circumvent adverse evidentiary ruling by simply dismissing & refiling original charge, & also "punish" D for successful procedural challenge by piling on additional charges, Ds will, as practical matter, be unable to avail themselves of legitimate procedural rights. In order to restore D to something like status quo ante, Ct. remanded case with instructions on how State could proceed. State could either proceed on original count with motion in limine granted, or file comparable Class D felony to original count & have opportunity to give proper 404(b) notice. Held, denial of motion to dismiss reversed & remanded.

RELATED CASES: Hollowell, App., 773 N.E.2d 326 (when State dismissed charges against D, it was not trying to circumvent adverse ruling from Tr. Ct.; nor was State trying to punish D by piling on additional charges; Honest mistake or oversight in original decision to prosecute will excuse refiling different counts).

TITLE: State v. Lynn
INDEX NO.: B.12.
CITE: (2nd Dist., 12-14-93), Ind. App., 625 N.E.2d 499
SUBJECT: Dismissal with prejudice
HOLDING: Where prosecutor's original motion to dismiss charges was entered by Tr. Ct. as dismissal with prejudice, subsequent refiling of same charges was barred. On day of D's trial, State filed to dismiss due to lack of witness. D objected to dismissal on grounds his substantial rights would be prejudiced, & Tr. Ct. found necessary showing & entered dismissal with prejudice. State did not appeal dismissal, & later filed identical charge. D objected to new filing because of dismissal with prejudice, & Tr. Ct. granted D's motion to dismiss, leading to State's appeal of that dismissal. Ct. rejected State's argument that Tr. Ct. erred in dismissing charge because original Tr. Ct. had erred in dismissing with prejudice, & State had absolute right to dismiss preceding charge & refile it. Initial dismissal with prejudice was final judgment, & because of State's failure to appeal that judgment, present appeal was merely impermissible collateral attack on prior judgment. Situation was like that in State v. Moore, App., 553 N.E.2d 199, where dismissal with prejudice was considered adjudication on merits & therefore final appealable order. Held, dismissal of charge affirmed.

B. PRETRIAL PROCEEDINGS

B.12. Motion to dismiss by prosecutor (Ind. Code 35-34-1-13)

B.12.a. In general

TITLE: Cherry v. State
INDEX NO.: B.12.a.
CITE: (1/7/81), Ind., 414 N.E.2d 301
SUBJECT: Motion to dismiss by prosecutor -- vindictiveness
HOLDING: It was prosecutorial vindictiveness when prosecutor refiled two previously dismissed charges in order to punish D for pursuing appeal of conviction. Two antithetical interests are brought into conflict by prosecutorial vindictiveness: due process right of D to be free of apprehension that he will be subjected to increased punishment if he exercises his right to attack his conviction, and substantial discretion traditionally accorded prosecutor in controlling decision to prosecute. Blackledge, 417 U.S. 21, and its progeny show that there must be a balancing of D's interest against that of State in order to protect both these interests. When prosecution has occasion to file more numerous or more severe charges for same basic criminal conduct against accused after accused has successfully exercised his statutory or constitutional rights to appeal, prosecutor bears heavy burden of proving that any increase in number or severity of charges was not motivated by vindictive purpose. Here, State refiled charges it previously dismissed against D after D was granted new trial. Because State could not offer any legitimate reason for refiling, State failed to meet its burden of proving that timing of refiling two charges after third charge was overturned was not motivated by vindictiveness. Held, reversed in part, affirmed in part.

TITLE: Dennis v. State
INDEX NO.: B.12.a.
CITE: (11/18/80), Ind. App. 412 N.E.2d 303
SUBJECT: Motion to dismiss by prosecutor -- dismissal without prejudice
HOLDING: Dismissal of criminal charge will not bar renewal of proceedings unless substantial rights of accused have been prejudiced, as where speedy trial is found to have been denied or jeopardy has attached in first prosecution. Thus, Ind. Code 35-3.1-1-13 provides that prosecutor may secure dismissal at any time before sentencing and dismissal will not bar reprosecution unless D objects when motion is made. Maxey, 353 N.E.2d 457. Here, charge of child molesting was dismissed after prosecuting witness did not appear on basis of prosecutor's advice and after prosecutor's motion for continuance was denied on ground that it did not comply with statutory requirements. It was not dismissed with prejudice and therefore prosecution could be recommenced. Ind. Code 35-3.1-1-4; 35-3.1-1-13. Held, denial of motion to dismiss affirmed.

TITLE: Epperson v. State
INDEX NO.: B.12.a
CITE: (1st Dist. 11/21/88), Ind. App., 530 N.E.2d 743
SUBJECT: Motion to dismiss by prosecutor - reinstatement improper without filing of new
HOLDING: Absent filing of new information, Tr. Ct. erred in reinstating charge which prosecutor had moved to dismiss. Unless D objects to dismissal, granting of prosecutor's motion to dismiss does not bar subsequent trial on same charge. Ind. Code 35-34-1-13. Where dismissal occurs prior to attachment of jeopardy, state can refile information charging same offense. Burdine, 515 N.E.2d 1085. All prosecutions shall be instituted by filing of information or indictment by prosecutor, in Ct. with jurisdiction over crime charged. Ind. Code 35-34-1-1(b); Niece, App., 456 N.E.2d 1081. Here, state filed motion to reinstate, but filed no new information. Held, reversed.

TITLE: Holifield v. State
INDEX NO.: B.12.a.
CITE: (6/3/91), Ind., 572 N.E.2d 490
SUBJECT: Motion to dismiss by prosecutor -- court shall order dismissal
HOLDING: Tr. Ct. has no discretion under statute but to grant prosecuting attorney's motion to dismiss charge. Burdine, 515 N.E.2d 1085. Here, Tr. Ct. allowed prosecutor to dismiss conspiracy count which had originally been charged in addition to attempted murder charge. Court was at loss to see how dismissal could have harmed D. Held, no error and conviction affirmed.

RELATED CASES: Isaac, 605 N.E.2d 144 (statute mandating dismissal of indictment or information upon prosecutor's motion does not extend to probation revocation proceedings).

TITLE: Rhoton v. State
INDEX NO.: B.12.a.
CITE: (2d Dist. 4/22/86), Ind. App., 491 N.E.2d 577
SUBJECT: Motion to dismiss by prosecutor
HOLDING: Tr. Ct. is required to order dismissal upon motion of prosecuting attorney. Ind. Code 35-34-1-13. Swinehart, 376 N.E.2d 486; Hughes, App., 473 N.E.2d 630. Here, D contends he was prejudiced by state's dismissal of charges, which state did not later refile, because he was unable to confront accusers on those charges. D contends had he been able to do so, it would have reflected upon their credibility & affected outcome of other cases in which same people testified against him & in which he was convicted. Statutory requirement that prosecutor state reason for dismissal does not invite review by Tr. Ct. Purpose of requirement is to insure public accountability in instance of blatant prosecutorial malfeasance. Held, dismissals affirmed.

B. PRETRIAL PROCEEDINGS

B.12. Motion to dismiss by prosecutor (Ind. Code 35-34-1-13)

B.12.b. Forum/judge shopping (see, also T.7)

TITLE: Harris v. State
INDEX NO: B.12.b.
CITE: (03-16-12), 963 N.E.2d 505 (Ind. 2012)
SUBJECT: D need not show prejudice from violation of forum shopping rule
HOLDING: A D claiming a violation of a local felony case assignment rule need not establish prejudice to prevail on appeal. A criminal D has a right to a fair trial before an impartial judge. Everling v. State, 929 N.E.2d 1281 (Ind. 2010). In the eyes of the public, and certainly of the D, a judge's impartiality seems less convincing if the prosecution can select the judge before whom it will be heard. Ind. Crim. Rule 2.2 requires Tr. Ct.'s of each county to formulate a local rule for the nondiscretionary assigning of all felony and misdemeanor cases. Purpose of Rule 2.2 is to prevent State from gaining, at the moment of filing, an advantage that might not rise to the level of bias or prejudice that would entitle a D to a change of judge under Criminal Rule 12(B).

Here, in murder prosecution, D argued that the only reason his trial occurred in Howard Superior 1 was because prosecutors engaged in forum shopping. The Howard County courts adopted a rule requiring prosecutors to file felony charges in the court designated by a weekly rotation based on when the offense occurred. An exception says that when a D already faces an earlier criminal charge in a court not on rotation, the prosecutor must file the felony charge in that court. In this case, D already had a pending criminal charge in Howard Superior 1 on date he committed his second offense, but the pending charge had been resolved by the time the second charge was filed.

Although D need not show prejudice to win a reversal on this issue, in this case D did not show a violation. Tr. Ct.'s interpretation of its own rule was plausible and entitled to "some deference" on appeal, but Court asked that Howard County judges draft amendments to the rule sufficient to prevent reoccurrence of the situation in this case. Held, transfer granted, Court of Appeals' memorandum opinion affirmed as to remaining issues, judgment affirmed.

RELATED CASES: Gracia, 976 N.E.2d 85 (Ind. Ct. App. 2012) (D failed to show fundamental error from State's forum shopping in violation of Howard County local rule).

TITLE: Hughes v. State
INDEX NO.: B.12.b.
CITE: (1st Dist. 1/24/85), Ind. App., 473 N.E.2d 630
SUBJECT: Dismissal/refiling/judge shopping
HOLDING: Superior Ct. did not err in granting state's motion to dismiss. Here, some of state's evidence was ordered excluded for failure to comply with discovery. State moved to dismiss charges because it had filed same charges in circuit Ct. Ds objected & filed motion for sanctions alleging prosecutorial misconduct. Ind. Code 35-34-1-13 provides for mandatory dismissal upon prosecutor's motion. Swinehart, 376 N.E.2d 486; Maxey, 353 N.E.2d 457. Where dismissal occurs prior to jeopardy attaching, there is no bar to refiling information charging same offense in identical terms. Johnson, 246 N.E.2d 181; Winters, (1928), 200 Ind. 48. Ct. finds Ds may seek sanctions from circuit Ct. for state's non-compliance with prior discovery orders. Ct. distinguishes prosecutorial vindictiveness cases - here charges were not refiled after trial/successful MCE, thus no presumption of vindictiveness applies. Ds may attempt to prove actual vindictiveness to circuit Ct. Held, no error.

RELATED CASES: State v. Joyner, App., 482 N.E.2d 1377 (Tr. Ct. erred in dismissing information with prejudice; here, Tr. Ct. sustained D's objection to amendment of information on day of trial & state moved for dismissal; Tr. Ct. found D's due process/fair trial rights were prejudiced; Ct. finds D was inconvenienced but not prejudiced & reverses relief granted D).

B. PRETRIAL PROCEEDINGS

B.13. D's presence at pretrial proceedings

B.13.b. Other

TITLE: Abner v. State
INDEX NO.: B.13.b
CITE: (6/25/85), Ind., 479 N.E.2d 1254
SUBJECT: D's presence at deposition
HOLDING: When defense counsel takes deposition on behalf of D, any objection based on confrontation is waived if state subsequently seeks to admit deposition at trial. Roberts, 375 N.E.2d 215; Gallagher, App., 466 N.E.2d 1382. Here, D argued that admission of deposition of co-conspirator violated her right of confrontation because she was not present at taking of deposition. Deposition was requested by a third co-conspirator, but D's attorney was present & actively participated. When person deposed was called at trial, he refused to answer questions re his direct involvement in the murder. State then moved to have him declared a hostile witness & to admit deposition into evidence. Held, no error.

TITLE: Jones v. State
INDEX NO.: B.13.b.
CITE: (2/23/83), Ind., 445 N.E.2d 98
SUBJECT: D's presence at deposition
HOLDING: Where witness later testifies against D at trial, Ct.-ordered absence of D attacking of deposition does not violate D's right to confront witnesses. Bowen, 334 N.E.2d 691. Here, D was charged with child molesting. Victim was 11-year-old daughter. Other witnesses were 13-year-old daughter & D's son. D petitioned Ct. to allow him to be present when depositions of these 3 witnesses were taken. Hearing held; request denied. D acknowledges Bowen but asks Ct. to change rule, as it is possible deposition may be read into evidence at trial, in lieu of a face-to-face confrontation. F.R. Crim.P. 15(b) requires presence of D at taking of depositions. In US v. Benfield, (CA8 1979) 593 F.2d 815, D was barred from deposition of prosecuting witness, but watched on video monitor. Witness did not testify at trial; deposition was offered into evidence against D. Witness' doctors had testified that face-to-face confrontation with D would risk witness' health. CA8 reversed conviction finding D's confrontation rights had been too severely abridged under circumstances. IN Ct. finds fact situation distinguishable from Benfield, refuses to alter rule enunciated in Bowen & affirms D's conviction. Held, no error.

RELATED CASES: McKinney, 82 N.E. 3d 290 (Ind. Ct. App. 2017) (D had no constitutional right to attend deposition of alleged CM victim, and Tr. Ct. abused discretion in denying State's request to bar D from attending deposition where uncontroverted testimony established that alleged victim would be traumatized by D's presence at deposition).

TITLE: Ridley v. State
INDEX NO.: B.13.b.
CITE: (12-11-97), Ind., 690 N.E.2d 177
SUBJECT: D's presence at pretrial proceedings - discussions between counsel & court not critical stage
HOLDING: As matter of due process, D is guaranteed right to be present at any stage of criminal proceeding that is critical to its outcome if D's presence would contribute to fairness of procedure. Here, D's absence from discussions between counsel for both sides & Ct. did not violate D's right to be present at all critical stages of proceedings. Proceedings dealing with settling instructions, pretrial motions, discovery issues, & whether to redact juror identification information from juror questionnaires did not require presence of jury, & thus, they did not implicate D's state constitutional right to be present. Held, judgment affirmed in part, reversed in part on other grounds, & remanded for sentencing.

TITLE: Stevenson v. State
INDEX NO.: B.13.b.
CITE: (10-11-95), Ind., 656 N.E.2d 476
SUBJECT: D's presence at pre-trial conference - no ineffective assistance of counsel (IAC)
HOLDING: There was no IAC for allowing D to be absent from pre-trial conference where special judge was selected. After presiding judge agreed to recuse himself for possible prejudice, defense counsel, prosecutor, & judge agreed to appoint master commissioner employed in judge's Ct. to preside over trial. D argued that his right to be present at every critical stage of proceedings under Sixth & Fourteenth Amendments & his right to due process under Fourteenth Amendment to U.S. Constitution were violated by his absence. Sixth Amendment right to be present at all critical stages of proceedings requires only that D be present during his trial. Gallegher v. State, (1984), App., 466 N.E.2d 1382. Ct. noted that due process right to be present exists even in non-confrontational situations, whenever D's presence has "reasonably substantial" relation to fullness of his opportunity to defend against charge. Kentucky v. Stincer, (1987), 482 U.S. 730. However, many pre-trial motions are heard in D's absence, & Fourteenth Amendment has not been held to assure presence when"...the presence would be useless, or the benefit but a shadow," Snyder v. Massachusetts, (1934), 291 U.S. 97. Here, nothing in record indicated that special judge was prejudiced against D. Because D failed to show that he would have had fairer trial had he been present at pre-trial conference & successfully precluded master commissioner's appointment, absence from pre-trial conference did not impede fullness of D's opportunity to defend against charge. Although counsel's failure to inform D of connection between master commissioner & presiding judge may have been professionally unreasonable, D likewise failed to make sufficient showing that counsel's omission prejudiced his case. Held, denial of PCR affirmed.

B. PRETRIAL PROCEEDINGS

B.14. Misdemeanor Procedures

TITLE: Poore v. State
INDEX NO.: B.14.
CITE: (6-13-97), Ind., 681 N.E.2d 204
SUBJECT: Misdemeanor proceedings - waiver of jury trial
HOLDING: Absent some question by D or some evidence of lack of understanding or inability to read, Tr. Ct. is warranted in finding that D who receives misdemeanor jury advisement & proceeds to file general waiver of jury trial adequately understands that bench trial will thus lie ahead. D's understanding of his right to jury trial may be inferred when D & his attorney both sign a written waiver of right & file it in open Ct. Held, judgment of Tr. Ct. affirmed.

RELATED CASES: Liquori, 544 N.E.2d 199 (misdemeanor D was required to request trial by jury prior to first scheduled trial date, rather than prior to ultimate trial date).