CONFESSIONS HANDBOOK

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DISCLAIMER

All information in this handbook is subject to change and should only be used as a starting point for further investigation and study of current law and practice.

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CONFESSIONS HANDBOOK
TABLE OF CONTENTS

Preface

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The Sixth Amendment affords the right "to have the assistance of Counsel for his defense."

The law interpreting use of the statements of an accused, turns largely upon the conditions under which the words were uttered and the person who elicited them.

This handbook is meant to be a guide to help determine whether your client's statement is admissible in court or is subject to suppression. Basic state law examples are provided for assistance in beginning research.

Because statements by an accused can also implicate the Sixth Amendment and the Due Process clause of the 14th Amendment, those considerations are included in the handbook, along with a chart following the Table of Contents that demonstrates the application and overlap of the constitutional protections.

Be aware that the Indiana Constitutional protections against self-incrimination and the right to present a defense are not necessarily co-extensive with the federal constitution and may provide additional grounds for exclusion. Article 1, § 13 provides that the accused shall have the right "to be heard by himself and counsel"; and Article 1 § 14 provides (in part) that "no person, in any criminal prosecution, shall be compelled to testify against himself."

Most often when an individual confesses, there are Fifth and Fourteenth Amendment implications. If the individual makes a statement after she has been charged, there are also Sixth Amendment implications. Further, if the individual is a juvenile, there are statutory, as well as constitutional, issues that arise. So, while reading this manual, be aware that the different constitutional and statutory provisions overlap. Although it may seem redundant, always raise each possible constitutional and statutory issue to avoid waiver.

Differences Between the Fifth, Sixth and Fourteenth Amendments in Context of Confessions			
RIGHT	**5th AMENDMENT**	**6th AMENDMENT**	**14th AMENDMENT**
What relevant rights does an individual have under the amendment?	right to remain silent; right to counsel during custodial interrogations	right to counsel	right to due process (right not to be coerced into confessing by State)
Does the D have to affirmatively invoke right?	yes	yes	no
When can the right be invoked?	prior to or during custodial interrogation, either before or after charge has been filed	anytime and anywhere (initial hearing) after charges have been filed; does not require custodial interrogation	N/A
Can the police initiate further contact after the D invokes her rights?	*right to remain silent* - yes, after a reasonable amount of time passes *right to counsel* – yes, but only after 14-day "break in custody"	yes	N/A
Does the D's invocation of his right in one case apply to unrelated charges?	yes	no, unless offenses are same under Blockburger double jeopardy test	N/A

CONFESSIONS HANDBOOK

I. DID THE TAKING OF THE DEFENDANT'S STATEMENT VIOLATE THE FIFTH AMENDMENT?

A. DOES THE FIFTH AMENDMENT APPLY?

1. Was the interrogator a government agent?

The Fifth Amendment only applies to government officials acting in an official capacity or others acting as agents for the government. Roberts v. United States, 445 U.S. 552, 560 (1980). The Miranda warning requirement is not limited to custodial interrogations conducted by law enforcement officers but should be given before any official custodial interrogation is conducted. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981).

(1) Private Citizens

The Miranda warning requirement does not apply to interrogations by private citizens acting on their own and not under police control, even if the private citizens place the suspect in some form of restraint. Lucket v. State, 303 N.E.2d 670, 671 (Ind. Ct. App. 1973). A statement could be admissible even if a private citizen used physical persuasion to force the defendant to admit to his crimes. Trinkle v. State, 284 N.E.2d 816 (Ind. 1972).

(2) Agents of Police

The police cannot avoid their duty under Miranda or otherwise circumvent the protections offered under the Fifth Amendment by attempting to have someone act as their agent in order to bypass Miranda requirements, which apply to the functional equivalent of police interrogation. Robey v. State, 555 N.E.2d 145 (Ind. 1990); Smith v. State, 465 N.E.2d 1105 (Ind. 1984).

> Johnson v. State, 117 N.E.3d 581 (Ind. Ct. App. 2018) (juvenile probation officer who talked to D at detention center was not acting as an agent for the police, but instead was appointed by the court pursuant to I.C. 11-13-1-1 for non-law enforcement purposes).

(3) Fellow Prisoners

As long as a fellow prisoner independently collects information and is not an informant for or otherwise acting under the direction of police, the statements are admissible.

> Leaver v. State, 250 Ind. 523, 237 N.E.2d 368 (1968), *cert. den'd* (where D wrote note to another inmate containing statement "I am guilty," writing was admissible because police were merely passive receiver of information from independent informer).

> Yates v. State, 267 Ind. 604, 372 N.E.2d 461 (1978) (statements written out by 15-year-old D to fellow prisoners in exchange for cigarettes were result of private interaction and were admissible).

(4) Confidential Informants

Confidential informants are not generally subject to Miranda requirements but may be held to the rules governing the Sixth Amendment implications of confessions. Lehman v. State, 730 N.E.2d 701 (Ind. 2000). Even if the defendant is currently incarcerated at the time of the confession, a confidential informant does not have to comply with Miranda warnings or otherwise.

State v. Ashley, 661 N.E.2d 1208 (Ind. Ct. App. 1995) (no Fifth Amendment violation where D disclosed location of stolen property to police informant whom he solicited to help remove incriminating evidence from home).

Wells v. State, 30 N.E.3d 1256 (Ind. Ct. App. 2015) (fact that D was on home detention when he made incriminating statements to an informant who was recording conversation did not create a custodial interrogation requiring Miranda warnings).

(5) DCS Caseworkers

Social workers or other family services caseworkers are agents of the government and subject to Miranda requirements. Clephane v. State, 719 N.E.2d 840 (Ind. Ct. App. 1999).

(6) IRS Agents

IRS agents are subject to the requirements under Miranda when they are investigating a defendant for criminal tax violations. Beckwith v. United States, 425 U.S. 341 (1976).

(7) Mental Health Facility Employee

Mental health workers at a county mental hospital act in a capacity that contemplates prosecution as a fruit of their work and thus are subject to Miranda requirements. United States v. D.F., 63 F.3d 671 (7th Cir. 1995), *aff'd on remand*, 115 F.3d 413 (1997).

(8) Media

Media interviews, no matter how likely to produce an incriminating response that would be welcomed by law enforcement, do not come within the purview of Miranda, even where the police arrange for the interview. Richie v. State, 875 N.E.2d 706, 717 (Ind. 2007). However, the media must not be acting under any requests by the police to ask certain questions or through any other influence on the actual subject matter of the interviews.

Sears v. State, 668 N.E.2d 662 (Ind. 1996) (there was no evidence that news media was acting as agent for police where there was no official interrogation by any police officer and media was never acting on any requests by police to ask certain questions or in any way influence actual subject matter of interviews).

2. Did the police obtain evidence that is testimonial in nature?

The privilege against self-incrimination protects the accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, but not from being compelled by the State to produce real or physical evidence. To be testimonial, the communication must, explicitly or implicitly, relate a factual

assertion or disclose information. Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990).

a. Requests for real or physical evidence

The Fifth Amendment does not shield the defendant from compulsory submission to physical exams. Turner v. State, 508 N.E.2d 541 (Ind. 1987).

Huey v. State, 503 N.E.2d 623 (Ind. Ct. App. 1987) (field sobriety tests are not communicative in nature; therefore, Miranda warnings are not required prior to their administration).

Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990) (slurred nature of D's speech in connection with videotaped efforts to perform sobriety tests and regarding his refusal to take breathalyzer test were admissible; however, D's answer to question regarding date of his sixth birthday was testimonial and inadmissible).

Murray v. State, 182 N.E.3d 270 (Ind. Ct. App. 2022) (compelling D to show his uncovered face and teeth to jury did not violate Fifth Amendment).

b. Request for records and documents

Although the U.S. Supreme Court has held that the Fifth Amendment protects against compulsory surrender of certain personal business records because of the implicit testimonial act of producing documents, it has not eliminated the "required records doctrine," under which records which are required to be kept by law are not privileged. The government can also compel the production of non-required records when the author created them voluntarily and production is not "testimonial"; the government is not forcing the author to give utterance to the facts but is merely gaining access to them.

United States v. Lehman, 887 F.2d 1328, 1332 (7th Cir. 1989) (the purpose of any record-keeping requirement would be entirely frustrated if records required by law to be kept could not be inspected by the government).

Smith v. Richert, 35 F.3d 300 (7th Cir. 1994) ("required records" doctrine evolved to allow government regulation of industry and business; an individual's choice to enter a business or industry requires one to abide by regulatory regime and is a voluntary decision to submit oneself to it).

Doe v. United States, 487 U.S. 201, 108 S. Ct. 2341 (1988) (compelled act of signing form directing banks to disclose records of D's accounts was not "testimonial" because it did not acknowledge existence of accounts or documents).

California v. Byers, 402 U.S. 42, 91 S. Ct. 1535 (1971) (law requiring drivers involved in auto accidents to give their name and address to the owner of the other car involved in the accident did not violate Fifth Amendment).

United States v. Porter, 711 F.2d 1397, 1404-05 (7th Cir. 1983) (statute that merely requires a taxpayer to maintain records necessary to determine tax liability is not within scope of required records doctrine); see also Smith v. Richert, *supra* (tax records are not "required records").

c. Cell phones

The compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection—unless the State demonstrates the foregone conclusion exception applies. A suspect surrendering an unlocked smartphone implicitly communicates that the suspect knows the password, the files on the device exist, and the suspect possessed those files. And, unless the State can show it already knows this information, the communicative aspects of the production fall within the Fifth Amendment's protection.

Seo v. State, 148 N.E.3d 952 (Ind. 2020) (trial court's order compelling defendant to unlock her iPhone violated her Fifth Amendment right against self-incrimination; Court noted that extending the foregone conclusion exception to the compelled production of an unlocked smartphone is concerning because such an expansion fails to account for the unique ubiquity and capacity of smartphones, may prove unworkable, and runs counter to U.S. Supreme Court precedent).

Kerner v. State, 178 N.E.3d 1215 (Ind. Ct. App. 2021) (because D voluntarily gave his cell phone pass code to law enforcement instead of timely asserting his Fifth Amendment privilege, his disclosure was not a compelled incrimination).

Doe v. United States, 487 U.S. 201, 210 n. 9 (1988) (forcing a person to reveal the password to their locked cell phone is testimonial because it is "[t]he expression of the contents of an individual's mind" to obtain incriminating evidence).

d. Compulsory polygraph

Compulsory polygraph examinations are testimonial, rather than merely physical, and are therefore subject to protection against compulsory self-incrimination. McDonald v. State, 328 N.E.2d 436 (Ind. Ct. App. 1975).

e. Forfeiture proceedings

Although a forfeiture proceeding is a civil in rem proceeding, the privilege against self-incrimination applies because forfeiture proceedings are "quasi-criminal." United States v. United States Coin & Currency, 401 U.S. 715, 91 S.Ct. 1041 (1971).

3. Was the Defendant a juvenile?

The privilege against self-incrimination applies to juvenile court proceedings which may result in the Defendant's commitment to a state institution. Such proceedings are regarded as "criminal" for purposes of the privilege. In Re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967).

In Re Gault, *supra* (confession was inadmissible where neither D nor parents were informed that D was not required to make statement or testify or that incriminating statement might result in delinquency adjudication).

NOTE: See p. 82, *Did the taking of the statement violate Indiana statutory requirements concerning interrogations of juveniles?*

4. Did the Defendant invoke her right to remain silent?

The Fifth Amendment privilege against self-incrimination is not self-enforcing, and an individual seeking its protection must invoke it at the time he or she relies upon it. Salinas v. Texas, 133 S. Ct. 2174 (2013). This requirement puts the government on notice that a person intends to rely on the privilege, so that they can either argue that the testimony sought is not self-incriminating or may cure any potential self-incrimination through a grant of immunity. In Salinas, the Court noted there are only two exceptions to the requirement that an individual explicitly invoke his or her right to remain silent. The first is a recognition that a defendant need not take the stand to assert the privilege at his own trial, but rather has an absolute right not to testify. The second exception applies where government coercion renders forfeiture of the privilege involuntary.

B. WAS MIRANDA VIOLATED?

1. Were Miranda warnings required?

"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). These "procedural safeguards" include advisement of the right to remain silent, that any statement made may be used against the person, and of the right to the presence of an attorney. Id.

Miranda warnings are required any time law enforcement, or an agent of law enforcement, attempts to conduct an interrogation while a suspect is in custody. Moreover, the questions being asked of the custodial suspect must be of an interrogatory nature. The Miranda warnings must also be adequately given in order to be valid. If, after a suspect has been warned of his rights, he proceeds to give a statement or confession, this constitutes a waiver of his Fifth Amendment rights, but this waiver must be voluntarily and freely given. Finally, if a defendant invokes his rights under the Fifth Amendment, an interrogation cannot begin or continue against the suspect.

For a full discussion of the juvenile-specific rules in the Miranda context, see p. 82.

a. Miranda warnings are based on the constitution

Miranda warnings are constitutionally based and may not be overruled by legislation. Any legislative alternative to Miranda warnings must be at least as effective at appraising accused persons of their right to silence and in assuring continuous opportunity to exercise it. Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000).

b. Was the Defendant subjected to custodial interrogation?

Miranda only applies to custodial interrogations, which involve questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612 (1976). A person need not be placed under formal arrest to be considered in custody for purposes of Miranda. King v. State, 844 N.E.2d 92, 96 (Ind. Ct. App. 2005).

(1) Was the Defendant in custody?

(a) Totality of circumstances test

In determining whether an individual was in "custody" for Miranda purposes, courts must examine the totality of the circumstances surrounding the interrogation. The objective test asks whether a reasonable person under the same circumstances would believe that she was under arrest or not free to leave. Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991); Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465 (1995); and Torres v. State, 673 N.E.2d 472, 474 (Ind. 1996).

Loving v. State, 647 N.E.2d 1123, 1125 (Ind. 1995) ("[t]he test is how a reasonable person in the suspect's shoes would understand the situation").

Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526 (1994) (determination of whether person is in custody depends on objective circumstances of interrogation, not on subjective views of either officers or subject); see also Bishop v. State, 700 N.E.2d 473 (Ind. Ct. App. 1998).

Fowler v. State, 483 N.E.2d 739 (Ind. 1985) (to be custodial in non-arrest context, interrogation must commence after person's freedom of action has been deprived in any significant way).

Miranda custody issues fall into a few general categories, including the extent of the restriction on the defendant's freedom, the words or actions of the police officer or interrogator, and the location of the interrogation. However, the totality of the circumstances should be considered, and a single factor is rarely, if ever, dispositive of the issue.

(b) Considerations to determine "custody" generally

When determining whether someone is in custody for purposes of Miranda, courts should consider:

(1) whether and to what extent the suspect has been made aware that he is free to refrain from answering questions;

(2) whether there has been prolonged, coercive, and accusatory questioning, or whether police have employed subterfuge in order to induce self-incrimination;

(3) the degree of police control over the environment in which the interrogation takes place, and in particular whether the suspect's freedom of movement is physically restrained or otherwise significantly curtailed; and

(4) whether the suspect could reasonably believe that he has the right to interrupt prolonged questioning by leaving the scene.

Sprosty v. Buchler, 79 F.3d 635 (7th Cir. 1996).

(c) What was the extent of restriction on the Defendant's freedom?

Being handcuffed and/or placed in a police vehicle and questioned is a clear indication of being in custody for Miranda purposes.

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (despite officer's testimony that D was free to leave, D was in custody where officers refused to let her leave interrogation room and elicited information from her in an interview "managed with psychological skill").

Gibson v. State, 733 N.E.2d 945 (Ind. Ct. App. 2000) (where D was handcuffed in passenger's seat of police car when officer asked D whether he had any guns or contraband in car, D was in custody and should have been read his rights).

Crocker v. State, 989 N.E.2d 812 (Ind. Ct. App. 2013) (although a person is not automatically in custody whenever he is in a police vehicle, a reasonable person who is told to sit in vehicle and then immediately be subjected to HGN and field sobriety tests would not feel free to leave).

Theobald v. State, 190 N.E.3d 455 (Ind. Ct. App. 2022) (D was in custody when handcuffed on the side of the interstate for 45 minutes for a hit and run and told he was not free to leave).

State v. O'Neal, 921 A.2d 1079 (N.J. 2007) (question asked during pat- down constituted custodial interrogation because detention during a pat down, places suspect in custody).

Bishop v. State, 700 N.E.2d 473 (Ind. Ct. App. 1998) (D was not in custody when police told him to "hang tight" because he was left alone standing on public sidewalk out of officers' sight and appeared to occupy only role of injured victim and later was questioned without any restraints being placed on him).

(d) Did the police officer view the Defendant as a suspect at the time of questioning?

An officer's knowledge and beliefs are only relevant to the question of custody if conveyed through either words or actions to the individual being questioned, and an unarticulated plan of a police officer has no bearing on the question of custody. King v. State, 844 N.E.2d 92, 96 (Ind. Ct. App. 2005). Thus, any statements made by the police officer that would make a person feel as if they are not free to leave are relevant, unless withheld. Id.

Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526 (1994) (in determining if person is in custody for purposes of Miranda warnings, a police officer's subjective view regarding whether D is suspect is relevant only if D is told he is a suspect, and then only to extent the information would affect how a reasonable person in D's position would gauge breadth of his freedom to leave).

King v. State, 844 N.E.2d 92 (Ind. Ct. App. 2005) (fact that officer considered D merely a witness and not a suspect is irrelevant to court's

evaluation of whether he was in custody; rather, circumstances surrounding interview in this case may have conveyed the opposite message).

NOTE: The subjective intent of a police officer may be illustrated through his conduct and through questions he asks, which may implicate Miranda. See also p. 9, *Were the officers asking general investigatory questions without knowledge of criminal activity?*

(e) What did the officers say to the Defendant?

(i) Did the interrogator identify himself as a police officer or an agent of a police officer?

Owen v. State, 490 N.E.2d 1130 (Ind. Ct. App. 1986) (where D was suspected of shoplifting and questioned in store office by store manager and security guard who immediately identified himself as police officer, and D was not told he could leave or refuse to answer questions, D was in custody when interrogation occurred, and Miranda warnings were required).

Whitehead v. State, 511 N.E.2d 284 (Ind. 1987), *overruled on other grounds* (where D initiated conversation and no evidence was presented that youth care worker had any responsibility for investigating murder, statements D made to youth care worker at juvenile correctional institute were not product of coercive custodial interrogation).

Scott v. State, 510 N.E.2d 170 (Ind. 1987) (D confessed to private individual who arranged with police to discuss murder with D; because D was not in custody or deprived of freedom when he confessed, neither safeguards of Miranda warning nor procedural safeguard for waiver of juvenile's constitutional rights applied).

(ii) Did the officers tell the Defendant that he was free to leave?

A law enforcement officer cannot circumvent the Miranda rule simply by telling the Defendant during an interrogation that he is free to leave or will not be placed under arrest at that time. A Defendant does not necessarily have to be under arrest before the duty to give Miranda warnings will attach.

Aynes v. State, 715 N.E.2d 945 (Ind. Ct. App. 1999) (D was undergoing custodial interrogation when he came to sheriff's department at detective's request, even though he was told he would not be placed under arrest at that time; detective had focused his investigation exclusively on D, interview took place in small interrogation room located in secured area not open to public, and detective did not inform D that he was free to leave or that he did not have to answer questions); see also Johnson v. State, 484 N.E.2d 49 (Ind. Ct. App. 1985).

McIntosh v. State, 829 N.E.2d 521 (Ind. Ct. App. 2005) (fact that police say, "you are free to leave at any time" is not sole determinative factor of whether a person is in custody; here, officers' actions spoke louder than their words and D was in custody).

Fowler v. State, 483 N.E.2d 739 (Ind. 1985) (where police told D he was not under arrest/was free to leave at any time and D was not detained after interviews, fact that police did not allow D meaningful consultation with father before interrogation did not invalidate confession).

(iii) Did the officers read the Defendant Miranda warnings?

Although the giving of Miranda warnings should not automatically render a suspect "in custody," they are a factor tending to provide support for a conclusion that the defendant was, in fact, in custody. Bean v. State, 973 N.E.2d 35 (Ind. Ct. App. 2012) (following Seventh, Tenth, and Eleventh Circuits).

(iv) Did the officers threaten the Defendant with arrest or knowledge of criminal activity?

Threatening a suspect with arrest on more serious, even unfounded, charges can transform a non-custodial interrogation into a custodial interrogation despite assurances that a suspect could leave. Commonwealth v. Coleman, 727 N.E.2d 103 (Mass. Ct. App. 2000). Further, threatening a suspect with greater charges upon arrest if he chooses to end the interrogation and leave can lend support for a custodial determination. Id.

State v. Linck, 708 N.E.2d 60, 63 (Ind. Ct. App. 1999), *trans. denied* (D was in custody after admitting he had smoked marijuana because reasonable person would not have felt free to leave following admission; police went to D's apartment, told D they had received complaint of illegal drug use, told D they smelled odor of burning marijuana and believed D had been engaging in illegal drug activity). See also Peel v. State, 868 N.E.2d 569 (Ind. Ct. App. 2007); but see Buchanan v. State, 913 N.E.2d 712 (Ind. Ct. App. 2009).

(v) Were the officers asking general investigatory questions without knowledge of criminal activity?

A police officer can engage in general investigatory questioning when the officer is investigating an incident without any knowledge that a criminal offense has in fact occurred. Lucas v. State, 413 N.E.2d 578 (Ind. 1980). However, when the officer realizes that there may be a potential crime, she must give Miranda warnings.

Lucas v. State, *supra* (officer investigating automobile accident in which D was apparently involved was not aware of fact that any offense had occurred and did not suspect foul play until discovering victim's body). **NOTE:** Lucas may be in conflict with Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526 (1994), which held that a police officer's subjective, undisclosed view regarding whether the person being interrogated is a suspect is irrelevant in determining whether that person is in custody.

J.D. v. State, 859 N.E.2d 341 (Ind. 2007) (deputy's informal discussion with juvenile regarding her recent confrontations with house parent was "far less intrusive" than general on-the-scene questioning left unaffected by Miranda holding).

Moore v. State, 723 N.E.2d 442 (Ind. Ct. App. 2000) (D was not "in custody" for Miranda purposes until officer knew or should have known that he was investigating potential crime scene; officer was simply gathering information for injury accident report, and upon arrival at scene, he believed it was accident scene and not crime scene).

Owens v. State, 266 N.E.2d 612 (Ind. 1971) (officer may engage in general investigative questioning even when investigating a particular offense and believes person being questioned may have committed offense; where officer observed suspect placing sweater under her dress in department store and followed her out of store and asked if she had anything she failed to pay for, officer was merely asking question that could have cleared up inadvertent mistake and was not required to give Miranda warnings; two concurring justices held Miranda was required). See also Stallings v. State, 264 N.E.2d 618 (Ind. 1970); and Lawson v. State, 803 N.E.2d 237 (Ind. Ct. App. 2004).

State v. Hicks, 882 N.E.2d 238 (Ind. Ct. App. 2008) (D was not in custody where officer, at scene of unoccupied truck stopped on railroad tracks, asked her five times in front of other individuals who was driving the truck).

Similar cases have been resolved by the court asking if the general investigatory questioning is interrogation, rather than if it put D in custody. See p. 18, *General investigatory questioning is not interrogation.*

(f) Where was the Defendant questioned?

While the location at which the interrogation occurs is highly relevant to the custody determination, it is not, in and of itself, dispositive of the issue.

(i) Scene of a Crime

Miranda requirements do not apply to on-the-scene investigations unless the police suspect the Defendant of criminal activity and the suspect is in custody. Dillon v. State, 275 N.E.2d 312 (Ind. 1971); Stallings v. State, 264 N.E.2d 618 (Ind. 1970).

However, after a suspect has admitted to a crime during an on-the-scene investigation, a reasonable person would not feel free to leave, thus police must give Miranda warnings before conducting any further questioning.

State v. Linck, 708 N.E.2d 60 (Ind. Ct. App. 1999), *trans. denied* (D was in custody after admitting he had smoked marijuana because reasonable person would not have felt free to leave following admission).

Merchant v. State, 926 N.E.2d 1058 (Ind. Ct. App. 2010) (D was under arrest when an officer observed an illegal police scanner in D's car, ordered D to get out of car and subjected him to pat-down search, even though D was not formally arrested or placed in handcuffs).

J.D. v. State, 859 N.E.2d 341 (Ind. 2007) (juvenile's statements made during meeting with deputy at scene of dispute with a guardian's home house parent were not used to prove her *prior* wrongful conduct, but rather to nature and manner of juvenile's behavior while she was making her statements).

Further, if a person is handcuffed at the crime scene, it is often an indication of a restraint on freedom of movement to the degree associated with a formal arrest, even if only detained as a possible witness.

Loving v. State, 647 N.E.2d 1123 (Ind. 1995) (D who was questioned at crime scene by various police officials, handcuffed, placed in back of marked police car, and taken to police station by uniformed officers to be questioned further was in custody); see also Theobald v. State, 190 N.E.3d 455 (Ind. Ct. App. 2022).

Wright v. State, 766 N.E.2d 1223 (Ind. Ct. App. 2002) (D was in custody when handcuffed for officer safety at time officer questioned him).

A defendant must submit to officer's authority before custody can exist. Thus, a defendant engaged in an armed standoff with police is not in custody until he submits to the show of authority of the officers, and Miranda warnings are not required until the suspect has submitted to the police officer's request.

Campbell v. State, 820 N.E.2d 711 (Ind. Ct. App. 2005) (D was not in custody at time he responded to police officer's inquiries at scene of crime, when officer arrived in midst of armed stand-off between D and other officers; Robb, J., concurring, notes that common definition of "custody" fails in this unique circumstance).

(ii) Traffic Stops

Although motorists detained during routine traffic stops are at least temporarily not free to leave, that does not necessarily mean that the traffic stop is custodial. Even in a situation where there is an usually high number of officers present for the traffic stop, if none of the officers touch the driver or otherwise retrain his freedom of movement and the driver is not asked incriminating questions, they are not in custody. Jones v. State, 655 N.E.2d 49 (Ind. 1995).

State v. Janes, 102 N.E.3d 314 (Ind. Ct. App. 2018) (considering totality of circumstances, D was in custody where three uniformed officers in separate police cars with flashing lights came to a traffic stop for a minor traffic violation on a rural highway in the middle of the night; when one of the officers returned D's license to him, he stood on the vehicle's driver's side while another officer stood on the passenger's side; after giving D a verbal warning for failure to dim his headlights, the officer asked D incriminating questions about alcohol consumption, illegal items, and weapons).

Brown v. Eaton, 164 N.E.3d 153 (Ind. Ct. App. 2021) (D was in custody and questioned without receiving Miranda warnings during traffic stop, thus his pre-Miranda statements should not have been admitted).

(iii) Scene of an Accident

A police officer can engage in general investigatory questioning when the officer is investigating an accident without any knowledge that a criminal offense has in fact occurred. Lucas v. State, 413 N.E.2d 578 (Ind. 1980). However, when the officer realizes that there may be a potential crime, she must give Miranda warnings.

Lucas v. State, *supra* (officer investigating automobile accident in which D was apparently involved was not aware of fact that any offense had occurred and did not suspect foul play until discovering victim's body).

Moore v. State, 723 N.E.2d 442 (Ind. Ct. App. 2000) (D was not "in custody" for Miranda purposes until officer knew or should have known that he was investigating potential crime scene; officer was simply gathering information for injury accident report, and upon arrival at scene, he believed it was an accident scene and not a crime scene).

State v. Hicks, 882 N.E.2d 238 (Ind. Ct. App. 2008) (officer did not restrain D or use coercive tactics at scene of unoccupied truck stopped on railroad tracks, but merely asked D five times in front of other individuals who was driving); see also Ramirez-Vera v. State, 144 N.E.3d 735 (Ind. Ct. App. 2020).

Hudson v. State, 129 N.E.3d 220 (Ind. Ct. App. 2020) (while D was in custody, the officer's initial question trying to determine location of gun amounted to an inquiry into the facts of the situation, not police interrogation, and did not require a Miranda advisement).

(iv) Suspect's Home

Depending on the circumstances, a suspect can be in custody even when the questioning occurs at the suspect's own home. Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095 (1969). But absent coercion, use of force or restraint on freedom, when police officers have consent to be inside a private residence, a reasonable person will generally feel free to leave or to ask the officers to leave, and thus will not be in custody for Miranda purposes. United States v. Mejia, 953 F.2d 461 (9th Cir. 1991); Reid v. State, 113 N.E.3d 290 (Ind. Ct. App. 2018).

Bond v. State, 788 A.2d 705 (Md. 2002) (D was in custody when officer confronted him in bedroom, it was late at night, D was only partially dressed, and questioning was of an accusatory nature).

Buchanan v. State, 913 N.E.2d 712 (Ind. Ct. App. 2009) (although D admitted to making false bomb threats during a first, 30-minute interrogation at his home, he was not in custody when the police returned the next day and interrogated him again; D acknowledged he was not

under arrest and his statement was voluntary). But see Peel v. State, 868 N.E.2d 569 (Ind. Ct. App. 2007).

J.D. v. State, 859 N.E.2d 341 (Ind. 2007) (juvenile was not in custody during encounter with deputy where deputy, who worked at house facility where juvenile resided, approached juvenile in dining room and asked juvenile to accompany deputy to deputy's office for informal discussion regarding juvenile's recent confrontations with house parent; juvenile's statements during meeting were not used to prove prior wrongful conduct and were voluntarily made).

Reid v. State, 113 N.E.3d 290, 300 (Ind. Ct. App. 2018) (questioning an individual the police suspect of a crime does not inherently render the questioning custodial interrogation; here, officer observed signs of intoxication and questioned D standing in her driveway about drinking, driving and damage to her vehicle, but did not order her to remain at the scene, thus she was not in custody).

Wells v. State, 30 N.E.3d 1256 (Ind. Ct. App. 2015) (fact that D was on home detention when he made incriminating statements to an informant who was recording conversation did not create a custodial interrogation requiring Miranda warnings).

United States v. Long Soldier, 562 F.2d 601 (8th Cir. 1977) (where agents entered house with consent and questioned D but did not restrain freedom or intend to place him under arrest, D was not in custody).

(v) Police Station

A person who goes voluntarily for a police interview, receives assurances that he is not under arrest, and leaves after the interview is complete, has not been taken into "custody" by virtue of an energetic interrogation so as to necessitate Miranda warnings. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711 (1977); Luna v. State, 788 N.E.2d 832 (Ind. 2003) (overruling Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972) to extent it conflicts with Mathiason). The fact that an interrogation takes place at a police station or other coercive environment does not necessarily mean the suspect is in custody. Luna v. State, 788 N.E.2d 832 (Ind. 2003).

a) In custody -- examples

State v. E.R., 123 N.E.3d 675 (Ind. 2019) (notwithstanding fact D provided his own transportation to police station and was told by first interrogation officer that he could "get up and walk…at any time," situation deemed custodial as (i) officer told D to "sit tight" multiple times, (ii) "the circuitous path by which [officer] took [D] into the interrogation room drew a labyrinthine exit route with many obstructions to egress, and (iii) the police "dramatically changed the interrogation atmosphere" when another, "more aggressive" interrogator took over).

Atkins v. State, 143 N.E.3d 1025 (Ind. Ct. App. 2020) (considering factors identified in E.R. (above), Court concluded that the interaction

between police and D went from a Terry stop to a custodial situation requiring a Miranda and Pirtle warnings).

McIntosh v. State, 829 N.E.2d 521 (Ind. Ct. App. 2005) (police denied D access to her purse, keys and car; took her to a secure area of police station and interrogation room where at least one officer was present at all times).

Bean v. State, 973 N.E.2d 35 (Ind. Ct. App. 2012) (despite fact that officers told D he could stop talking at any time and D agreed to go to police station, D was in custody where officers aggressively interrogated him for 2.5 hours, read D his right to remain silent and have an attorney, and after D invoked those rights, continued the interrogation).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (despite officer's testimony that D was free to leave, D was in custody where officers refused to let her leave interrogation room and elicited information from her in a seven-hour interview "managed with psychological skill").

Morris v. State, 871 N.E.2d 1011 (Ind. Ct. App. 2007) (distinguishing Luna (below), court found D was in custody where she was subjected to three police interviews and was at police station for several hours before she finally confessed; mere fact that a person is not placed in handcuffs or otherwise physically restrained by police does not necessarily mean a person is not in custody).

C.L.M. v. State, 874 N.E.2d 386 (Ind. Ct. App. 2007) (although 9-year-old was never told he was under arrest or in custody at child advocacy center where officer asked him questions re: allegations he molested his three-year-old half-sister, he was never told he was free to leave; thus, juvenile was in custody and should have been given a Miranda warning).

Aynes v. State, 715 N.E.2d 945 (Ind. Ct. App. 1999) (although D was told he would not be placed under arrest at that time, he was in custody when he came to sheriff's department at detective's request after detective had informed him that "allegation" had been made against him; interview took place in small interrogation room located in secured area not open to public, detective told D that he believed allegations of child molesting were true, and detective did not inform D that he was free to leave or that he did not have to answer questions); but see Luna v. State, *below*.

Morales v. State, 749 N.E.2d 1260 (Ind. Ct. App. 2001) (D was in custody when she voluntarily accompanied police officer to police station and was questioned after being told that she would be permitted to go to hospital to see her child after telling officer what happened to her child).

United States v. Turner, 761 A.2d 845 (D.C. 2000) (D who agreed to accompany officers to police station for questioning was "in custody" for purposes of Miranda when officers executed search warrant authorizing seizure of hair, blood, and saliva samples from him).

S.D. v. State, 937 N.E.2d 425 (Ind. Ct. App. 2010) (although D was told he was not under arrest and could leave at any time, D was interrogated for 1.5 hours in a twelve-by-twelve-foot room, accused of lying and molesting and read his Miranda rights; no reasonable person would have felt free to leave).

b) Not in custody – examples

California v. Beheler, 463 U.S. 1121, 103 S. Ct. 3517 (1983) (Miranda warnings not required for Ds who voluntarily consented to non-custodial interrogation in police station, even though questioning took place in coercive atmosphere); see also Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977).

State v. Diego, 169 N.E.3d 113 (Ind. 2021) (limited-English-speaking suspect was not in custody when he and his girlfriend voluntarily went to police station when asked to do so, where he was interviewed for 45 minutes in detective's personal office, and where he was free to leave after "exploratory and conversational rather than accusatory" interview).

Smith v. State, 983 N.E.2d 226 (Ind. Ct. App. 2013) (D was not in custody because he was not under arrest, went to the police station voluntarily, and was allowed to leave the interview room to get a drink).

Luna v. State, 788 N.E.2d 832 (Ind. 2003) (D was not in custody where he drove himself to police station after police asked to interview him, told him he was not under arrest, and interrogated him for about an hour before he confessed). See also Crabtree v. State, 152 N.E.3d 687 (Ind. Ct. App. 2020).

Dunaway v. State, 440 N.E.2d 682 (Ind. 1982) (D was not in custody where he voluntarily accompanied officers to police station, had previous experience with law, was friends with one of officers, and requested to see girlfriend before he was arrested).

Zook v. State, 513 N.E.2d 1217 (Ind. 1987) (D could not reasonably have believed that he was under arrest when he voluntarily agreed to go to police station where he was interviewed by two fire investigators; D asked twice if he was under arrest and was told no).

Davies v. State, 730 N.E.2d 726 (Ind. Ct. App. 2000) (where interview was conducted in room where entry was secure but D could exit at any time and went outside alone to smoke, and investigation was not focused on D at time of interrogation, trial court properly held that D was not in custody).

Laster v. State, 918 N.E.2d 428 (Ind. Ct. App. 2009) (where D rode with officer in front seat of car and was not handcuffed and was taken home after the interview, D was not in custody); see also Gauvin v. State, 878 N.E.2d 515 (Ind. Ct. App. 2007).

(vi) Prison or Jail

A person who is currently incarcerated for another offense and brought to an interrogation room in the jail is in custody for Miranda purposes unless they are first informed of their right to leave the interview room and go back to their cell. King v. State, 844 N.E.2d 92 (Ind. Ct. App. 2005). Courts have declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial, even when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison. The determination is fact sensitive. Howes v. Fields, 132 S. Ct. 1181, 1187 (2012).

Vanzyll v. State, 978 N.E.2d 511 (Ind. Ct. App. 2012) (D, who was incarcerated pending trial on drug dealing charges, was not "in custody" for purposes of Miranda when jail guard questioned him regarding a letter he sent to his girlfriend who was also incarcerated. An interrogation is not per se custodial when a prison inmate is questioned in private, even regarding events that occurred outside the prison.

(vii) Hospital

A Defendant who has been arrested and taken to a hospital for medical treatment may also be detained in the hospital in the custody of a law enforcement officer. The Defendant must be given Miranda warnings if he is in custody at the hospital and he is in fact subjected to custodial interrogation. Flowers v. State, 481 N.E.2d 100 (Ind. 1985), *appeal after remand* 518 N.E.2d 1096 (1988). A person may even be in custody while being transported to the hospital if being compelled to ride in a police car with an officer escort. State v. Veiman, 546 N.W.2d 785 (Neb. 1996).

Flowers v. State, *supra* (although D was confined to hospital room under armed guard and was therefore in custody, Miranda warnings were not required because D's confession was spontaneously volunteered).

Orr v. State, 472 N.E.2d 627 (Ind. Ct. App. 1984) (noting cases in other jurisdictions which have held that police questioning in hospital is "custodial interrogation" where police create or take advantage of coercive atmosphere (e.g., post guard outside room, place D under arrest, D sedated or in operating room awaiting surgery)).

Hurt v. State, 694 N.E.2d 1212 (Ind. Ct. App.1998) (where D was not physically restrained or detained and was free to terminate meeting with hospital security guard or leave room at any time, D was not in custody when he confessed in sunroom of psychiatric hospital).

(viii) School

Courts should consider a child's age when determining whether a child is in custody under Miranda. J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011). Questioning by police or a security officer at a school or in the presence of school officials usually requires Miranda warnings. But when police or school resource officers are not present at and involved in a suspect's interview, students are neither in custody nor under interrogation, unless

school officials are acting as agents of the police. D.Z. v. State, 100 N.E.3d 246 (Ind. 2018).

B.A. v. State, 100 N.E.3d 225 (Ind. 2018) (trial court abused its discretion by admitting 13-year-old's unmirandized confession to a room filled with multiple uniformed police and school administrators).

S.G. v. State, 956 N.E.2d 668 (Ind. Ct. App. 2011) (under certain circumstances, a police officer's presence in conjunction with a school official's questioning may be significant enough to constitute a custodial setting; here, however, there was no evidence that the principal was acting as officer's agent, officer did not ask any questions re: missing cell phone and did not conduct independent investigation).

State v. C.D., 947 N.E.2d 1018 (Ind. Ct. App. 2011) (although juvenile was detained by school security officer and administrator for educational purpose, i.e., to keep possibly intoxicated students out of the classroom, environment was not coercive, and juvenile was not undergoing custodial interrogation when he answered officer's questions and made incriminating admissions).

S.A. v. State, 654 N.E.2d 791 (Ind. Ct. App. 1995), *disapproved on other grounds* (where atmosphere was not coercive and student was not in police custody or interrogated by police officers, juvenile D was not subject to custodial interrogation and his statements made to vice-principal were properly admitted). See also D.Z. v. State, 100 N.E.3d 246 (Ind. 2018).

For a detailed discussion of when a juvenile is in custody while inside their school, see p. 82.

(ix) Courtroom

A defendant who chooses to testify at trial is not being subjected to custodial interrogation and therefore does not have to be advised of Miranda rights before testifying. State v. Shepherd, 569 N.E.2d 683, 685 (Ind. Ct. App 1991).

(x) Probation/Parole Office

Even though meeting with a probation officer is often a prerequisite to a defendant's conditional liberty, a defendant is not generally in custody when attending these meetings, and thus Miranda warnings are not required.

Brabandt v. State, 797 N.E.2d 855 (Ind. Ct. App. 2003) (D was not in custody where he arrived at probation office on his own, was not restrained in any fashion during probation meeting, and left the office after the meeting; therefore, his affidavit signed during the meeting without Miranda warning was valid).

Scanland v. State, 139 N.E.3d 237 (Ind. Ct. App. 2020) (although D was in custody and not advised of his Miranda rights, he was not subjected to interrogation or the equivalent thereof when he made voluntary

statements to parole agent regarding drug pipes in his home; there was no indication that the parole agent spoke with D in any manner in an attempt to get incriminating statements).

(xi) Office of Division of Child Services

Southern v. State, 878 N.E.2d 315 (Ind. Ct. App. 2007) (D was not in custody when he voluntarily agreed to go to an office of the Division of Family and Children where he was questioned by a police officer and a caseworker; the interview did not occur in a police station or a police-dominated atmosphere).

(xii) Polygraph Examiner's Office

A person is not automatically in custody when at a polygraph examiner's office, even if arriving under court order as part of a presentence investigation.

Jones v. State, 866 N.E.2d 339 (Ind. Ct. App. 2007), *disapproved on other grounds* (D was not in custody when he went to a polygraph examiner's office even though he was ordered to do so by trial court as part of a presentence investigation).

McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007) (D was not in custody when he made incriminating statement during post-polygraph phase of examination; prior to examination, D consulted with attorney, signed a polygraph waiver and indicated he understood his rights; D was at liberty to stop questioning at any time or not to respond at all).

(2) Were the police interrogating the Defendant?

A person is subject to interrogation requiring Miranda warnings if a reasonable objective observer would have believed that the questions claimed to have been an unlawful interrogation were in fact "reasonably likely to elicit" an incriminating response. United States v. Westbrook, 125 F.3d 996 (7th Cir. 1997). Interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980).

Fellers v. United States, 540 U.S. 519, 124 S. Ct. 1019 (2004) (police "deliberately elicited" incriminating statements from D at his home after he was indicted for conspiracy to distribute methamphetamine; questioning was conducted in violation of Sixth Amendment, and Court of Appeals erred in concluding that D was not "interrogated" by police).

(a) General investigatory questioning is not interrogation

When a law enforcement officer engages in general investigatory questions, or for the purpose of obtaining basic identifying information, Miranda warnings are not required. Deckard v. State, 670 N.E.2d 1, 5 (Ind. 1996); Baker v. State, 562 N.E.2d 726 (Ind. 1990).

Lawson v. State, 803 N.E.2d 237 (Ind. Ct. App. 2004) (excise police officer did not have to give Miranda warnings in investigation of minor consumption of alcohol prior to asking D his age, even though D's age is material element of crime for which officer was specifically investigating).

Seeglitz v. State, 500 N.E.2d 144 (Ind. 1986) (D was not entitled to Miranda warnings where officer asked D's name after traffic accident).

Matheny v. State, 983 N.E.2d 672 (Ind. Ct. App. 2013) (fact that officer asked D twice for address and that address was used against him at trial did not make the questioning an interrogation).

General investigatory questioning is also sometimes addressed as a question of whether the Defendant is in custody, rather than if the questions constitute interrogation. See p. 9, *Were the officers asking general investigatory questions without knowledge of criminal activity?*

(b) "Conversation" is not interrogation

Engaging in a conversation with the Defendant without any serious interrogation does not rise to the level of custodial interrogation requiring Miranda warnings. Lee v. State, 531 N.E.2d 1165 (Ind. 1988). Miranda's safeguards come into play whenever a person is subjected either to express questioning or its functional equivalent. Thus, an officer's statements, if made in such a way as to elicit a response from the suspect, can be considered a deliberate elicitation of incriminating information.

Andrews v. State, 441 N.E.2d 194 (Ind. 1982) (officer's statement to juvenile D that he understood gun had been thrown out in vicinity of school and he "hoped no little kid found it and...hoped that nobody would get hurt" was interrogation and required Miranda warnings prior to making).

Bugg v. State, 372 N.E.2d 1156 (Ind. 1978) (where officer who knew D for over five years asked, in course of trying to calm her down, "if she had any problems," officer was not interrogating her and, thus, was not required to Mirandize her).

Johnson v. State, 380 N.E.2d 1236 (Ind. 1978) (where officer approached D sitting on his porch with blood on his face and asked D "what happened?", to which D claimed he shot a man and wanted to turn himself in, officer's question was not interrogation, but rather "was more in the nature of a greeting intended more for its calming effect than for obtaining an admission"; officer Mirandized D immediately after D stated he killed a man).

Hopkins v. State, 582 N.E.2d 345 (Ind. 1992) (officer's response of "what?" to D's statement "I think I did it" did not constitute interrogation, but rather was merely a reflex to D's first statement).

(c) Requesting consent to search is not interrogation

Because requesting consent to search is not likely to elicit an incriminating statement, such questioning is not interrogation and, therefore, Miranda warnings

are not required. LaGrone v. United States, 43 F.3d 332 (7th Cir. 1994). However, under the Indiana Constitution, a person in police custody must be informed of his or her right to consult with counsel about the possibility of consenting to a search before valid consent can be given. See Pirtle v. State, 323 N.E.2d 634 (Ind. 1975); and State v. Janes, 102 N.E.3d 314 (Ind. Ct. App. 2018).

(d) Field sobriety tests and blood draws are not interrogation

Miranda warnings are not required before administering field sobriety tests or seeking and obtaining consent to blood draws. State v. Necessary, 800 N.E.2d 667 (Ind. Ct. App. 2003); Cohee v. State, 945 N.E.2d 748 (Ind. Ct. App. 2011).

(e) Confronting Defendant with evidence of a crime is interrogation

Briefly questioning a suspect regarding evidence already gathered against him, prior to Miranda warnings, violates Miranda. Pope v. Zenon, 69 F.3d 1018 (9th Cir. 1995). A monologue in which an officer reviews all the evidence against a suspect is a form of interrogation because it can only have the purpose of attempting to induce an inculpatory statement. Alford v. State, 699 N.E.2d 247 (Ind. 1998). Even making observational comments during a custodial situation can rise to the level of interrogation.

Wright v. State, 766 N.E.2d 1223 (Ind. Ct. App. 2002) (before reaching inside D's pants pocket, officer stated to D "that's rock cocaine right there"; officer's remarks and actions were clearly designed to elicit incriminating responses).

Loving v. State, 647 N.E.2d 1123 (Ind. 1995) (officer's conversation with D at police station where officer commented on inconsistencies between D's account of events at crime scene and physical evidence was interrogation, thus D was entitled to Miranda warnings).

Furnish v. State, 779 N.E.2d 576 (Ind. Ct. App. 2002) (in context in which it was made, police officer's statement, "damn, Delbert, where'd you get all the money" constituted interrogation at time when D was handcuffed and searched incident to arrest; question was investigatory in nature, not a mere observation).

Baker v. State, 111 N.E.3d 1046 (Ind. Ct. App. 2018) (D was in custody and un-Mirandized at time he answered officer's question (that he ran because he was scared)).

Brown v. Eaton, 164 N.E.3d 153, 157 (Ind. Ct. App. 2021) (trial court improperly admitted D's pre-Miranda statements regarding the origin of large amount of cash he possessed because a reasonable person in D's circumstances would have believed he was in custody at the time the deputy asked about the money, and the questions were investigatory because they were likely to incriminate him).

Theobald v. State, 190 N.E.3d 455 (Ind. Ct. App. 2022) (custodial D was interrogated when the police gave him two options: admit to hitting car's side mirror or go to jail).

McClure v. State, 803 N.E.2d 210 (Ind. Ct. App. 2004) (fact that officer approached patrol car in which handcuffed D was sitting, rolled down D's window and displayed handgun found in D's car was not tantamount to interrogation).

(f) Routine identification or "booking" questions do not constitute interrogation

Police may ask routine identification information required for booking procedure without giving Miranda warnings. Boarman v. State, 509 N.E.2d 177 (Ind. 1987). Whether such administrative questions are considered within a "routine booking exception" or whether deemed "not testimonial," they are generally removed from the requirements of Miranda. Loving v. State, 647 N.E.2d 1123 (Ind. 1995). However, even routine booking questions can cross the line from general information to interrogation if police ask for more personal information that could be used for investigative purposes, thus triggering the requirements of Miranda.

Castillo-Aguilar v. State, 962 N.E.2d 667 (Ind. Ct. App. 2012) (where D was asked to fill out an "information sheet" at the police station, he was "interrogated" for purposes of Miranda and should have been given the required advisements prior to filling out the form; routine identification questions such as requests for D's name and age do not require Miranda warnings, but some of questions on the form, e.g., length of residence and name of car insurance company, indicated form was used for investigative purposes).

Franks v. State, 486 S.E.2d 594 (Ga. 1997) (officer engaged in interrogation by asking D how he received bandage on his arm; considered in context, question did not qualify as routine booking question to which strictures of Miranda do not apply).

Richardson v. State, 794 N.E.2d 506 (Ind. Ct. App. 2003) (although D was in custody, his statement to booking officer in response to question about what he was in jail for was not product of interrogation, thus Miranda rights were not required).

(g) Defendant must know questioner is law enforcement officer or government agent

When the Defendant does not believe that the person to whom he is speaking has authority over him or is a police officer, then there is no compulsion or coercive activity implicating the protections of Miranda.

Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990) (undercover officer posed as fellow inmate and initiated conversation with D about murder which D admitted; questioning can weaken suspect's will with pressures but where suspect does not know undercover agent is government agent, pressure to speak does not exist).

D.Z. v. State, 100 N.E.3d 246 (Ind. 2018) (even if vice principal was acting as agent of police when questioning a juvenile student, Miranda warnings would not be required because no evidence shows juvenile even knew that

the vice principal had talked to the police officer to create a coercive atmosphere).

P.M. v. State, 861 N.E.2d 710 (Ind. Ct. App. 2007) (although juvenile was in custody by police at time he made incriminating statements, he was not being subject to interrogation at time; it was employee of theft victim who asked juvenile a single question).

NOTE: In cases where an undercover officer or inmate is acting as an agent of the State, the Defendant's Sixth Amendment right to counsel is violated if the questioning occurs after the Defendant has been formally charged. See p. 73, *Did the taking of the statement violate the Defendant's Sixth Amendment right to counsel?*

(h) No interrogation where the Defendant makes a volunteered, unsolicited statement

Where a Defendant is in custody but makes a wholly volunteered and unsolicited statement, Miranda does not apply. Hicks v. State, 609 N.E.2d 1165 (Ind. Ct. App. 1993). Thus, any statement made voluntarily, freely, and without any compelling influence is admissible. In this situation, as the saying goes, the suspect "cook[s] his own goose." Ross v. State, 151 N.E.3d 1287, 1292 (Ind. Ct. App. 2020) (Mathias, J., concurring).

Hill v. State, 470 N.E.2d 1332 (Ind. 1984) (where D said he wished to talk with officer, asked about molestation charge and stated he had touched child but did not rape her, D was not interrogated, but rather voluntarily confessed).

State v. Bowen, 491 N.E.2d 1022 (Ind. Ct. App. 1986) (D's unsolicited, volunteered confession was product of remorse, not result of any compulsion by police).

Sater v. State, 441 N.E.2d 1364 (Ind. 1982) (where D requested that officer be summoned so that they might continue previous conversation and D told officer he did not want his family and girlfriend harassed because of crime he and his brother had committed, officer was not required to give D Miranda warning even though D was already represented).

Smith v. State, 419 N.E.2d 743 (Ind. 1981) (where during transportation of D from Chicago to Indianapolis D stated he had stabbed murder victim, Miranda warnings were not required because D volunteered statement without being subjected to any interrogation).

VanPelt v. State, 760 N.E.2d 218 (Ind. Ct. App. 2001) (when police officer asked D to submit to chemical test, D refused and volunteered that he had smoked marijuana earlier that evening; D's statement was voluntary and Miranda advisement was not required).

Borton v. State, 759 N.E.2d 641 (Ind. Ct. App. 2001) (there was no custodial interrogation because D volunteered information to police officers while pretending to be victim/eyewitness).

Lyons v. State, 506 N.E.2d 813 (Ind. 1987) (D's statement that "he was in trouble this time" made during custodial detention was admissible even though officers did not Mirandize him before statement was made; no questioning or conduct by officers designed to bring forth self-incriminating response by D).

Broome v. State, 687 N.E.2d 590 (Ind. Ct. App. 1997) (D was not interrogated for Miranda purposes where: (1) D relayed to officer facts of his case after D asked officer if he would be guilty under self-defense theory and officer responded that D needed to talk to lawyer, (2) in response to another officer's question asking D if he would like to talk to reporters, D stated he would like to go on television so he could explain why he "popped" victim, and (3) D was overheard telling another inmate that he killed homosexual man; in all three instances, officers never did anything to elicit incriminating response from D).

McClure v. State, 803 N.E.2d 210 (Ind. Ct. App. 2004) (Court rejected D's argument that he did not voluntarily blurt out confession and that it was made as immediate response to officer's action of displaying handgun while rolling down back window of squad car); see also Ross v. State, 151 N.E.3d 1287 (Ind. Ct. App. 2020).

Scanland v. State, 139 N.E.3d 237 (Ind. Ct. App. 2020) (D was not subjected to interrogation or the equivalent thereof when he made voluntary statements to parole agent regarding drug pipes in his home; there was no indication that the parole agent spoke with D in any manner in an attempt to get incriminating statements).

c. Did the custodial interrogation fall under an exception to Miranda?

(1) Was there an emergency that alleviated the need for Miranda? ("Public Safety" exception)

There is an emergency exception to Miranda where questioning is necessary to ensure the safety of the public, police officers, or the accused and time is a critical factor. New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984). However, any questions asked during such an emergency situation must be limited and related to the exigency at hand.

Cronk v. State, 443 N.E.2d 882 (Ind. Ct. App. 1983) (where D chained himself to cannon on courthouse lawn and D told officers bomb would explode if they stepped off plywood platform they were standing on at that time, officers did not have to Mirandize D before asking about bomb, its location and how it was detonated; however, failure to read D his rights before further questioning at police station was erroneous because emergency situation had dissipated).

Bailey v. State, 763 N.E.2d 998 (Ind. 2002) (Court followed other jurisdictions which have held that questioning for limited purposes of locating or aiding possible victim falls within public safety exception to Miranda; here, officer limited his initial questions to location of potential victim and immediately advised D of his rights once location was ascertained).

New York v. Quarles, *supra* (where D made statement indicating whereabouts of gun in supermarket in response to questioning by officer without being read Miranda, statements were admissible because officers were attempting to locate weapon for public safety).

Lucas v. State, 413 N.E.2d 578 (Ind. 1980) (where officer's concern was for injuries which victim may have received in accident and officer did not suspect foul play, lack of Miranda warnings did not require suppression).

Price v. State, 591 N.E.2d 1027 (Ind. 1992) (although D stated: "I ain't gonna lie; I shot her and I'll show you where the gun is" while he was forced to ground with guns pointed to his head, statement was admissible because statement was in response to officer's question of where gun was; officer's question was motivated by concern for public safety); see also Gavin v. State, 41 N.E.3d 1038 (Ind. Ct. App. 2015).

(2) Was there an equivalent to Miranda warnings?

Miranda warnings are required only "in the absence of a fully effective equivalent." Having an attorney present while a suspect is undergoing custodial interrogation is equivalent of having been advised of Miranda rights. Sweeney v. State, 704 N.E.2d 86 (Ind. 1998).

(3) Was D's statement itself evidence of a new crime? (New-crime exception)

A statement made by a person who is subject to custodial interrogation but not given Miranda warnings is still admissible if the statement itself can be considered evidence of a new crime (such as bribery or a threat).

Theobald v. State, 190 N.E.3d 455 (Ind. Ct. App. 2022) (although D might have a convincing argument that he was offering to pay for damage to car rather than attempting to bribe a police officer (especially depending on what he said during unintelligible part of body cam footage), the State can present evidence of the statement in a bribery prosecution and let the trier of fact decide guilt).

2. Did the police adequately administer the Miranda warnings?

Prior to any questioning, a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). This is not a precise formulation necessary to meet Miranda's requirements. Florida v. Powell, 130 S. Ct. 1195 (2010). As long as a common sense reading of the advisement given explains the Defendant's rights, the advisement sufficiently fulfills the Miranda requirement. Id.

A claim that Miranda advisements were inadequate requires only that the State prove that warnings were given and that they were sufficiently clear. Allen v. State, 686 N.E.2d 760 (Ind. 1997). To determine if the Miranda warnings given were adequate, the court should consider the words in the context used, considering the age, background, and intelligence of the individual interrogated, such that the individual had a clear, understandable warning of all his rights. Sotelo v. State, 342 N.E.2d 844 (Ind. 1976).

a. Were the advisements complete?

Merely informing a suspect that he not required to answer questions, without informing him of the consequences of forgoing his privilege against self-incrimination and right to counsel, is inadequate. Edwards v. State, 412 N.E.2d 223 (Ind. 1980). A person undergoing custodial interrogation does not have to be informed of the right to stop questioning at any time and to invoke right to remain silent. Smith v. State, 602 N.E.2d 1043 (Ind. Ct. App. 1992); See also Tiller v. State, 541 N.E.2d 885 (Ind. 1989); Miller v. State, 335 N.E.2d 206 (Ind. 1975). And earlier, proper warnings are not rendered inadequate by subsequent "deplorable" explanation of Miranda rights given at the time a defendant chooses to waive his rights. Allen v. State, 686 N.E.2d 760 (Ind. 1997).

(1) Right to counsel advisements

State v. Banks, 2 N.E.3d 71 (Ind. Ct. App. 2013) (detective's advisement did not inform D that he had the right to have counsel present during questioning and was thus inadequate).

Goodloe v. State, 252 N.E.2d 788 (Ind. 1969) (arresting officer's statement to D that State would "furnish her an attorney" if she could not afford one was patently inadequate, incomplete, and clearly did not inform D of right to attorney prior to questioning).

United States v. Wysinger, 683 F.3d 784 (7th Cir. 2012) (concluding that the "agent's divergence from the familiar script would put a suspect to a false choice between talking to a lawyer before questioning or having a lawyer present during questioning, when Miranda clearly requires that a suspect be advised that he has the right to an attorney both before and during questioning").

England v. State, 479 N.E.2d 1323 (Ind. 1985) (Miranda warnings were inadequate when officer failed to advise D that if he could not afford an attorney, one would be appointed for him prior to any questioning if he asked for one or that D had right to stop questioning at any time).

Franklin v. State, 314 N.E.2d 742 (Ind. 1974) (only advising D of his "right to have attorney present to consult with" is not clear enough expression of D's right to presence of counsel during interrogation because time of such entitlement is not specified; however, here, officer advised D of his immediate and continuous right to attorney).

Sauerheber v. State, 698 N.E.2d 796 (Ind. 1998) (warning that lawyer will be appointed for you "probably after you're arrested" is sufficient to satisfy Miranda requirement).

Florida v. Powell, 130 S. Ct. 1195 (2010) (where D was advised that "he had the right to talk to a lawyer before answering any of their questions" and that "he had "the right to use any of these rights at any time [he] want[ed] during this interview," D was sufficiently advised that he could have an attorney present, not only at the outset of interrogation, but at all times).

(2) Vienna Convention

Even assuming the Vienna Convention may create some judicially enforceable rights, the Convention does not require the suppression of statements made to police officers by a person in custody who is not advised of his rights under the convention. Sanchez-Llamas v. Oregon, 548 U.S. 331, 126 S. Ct. 2669 (2006).

(3) Pirtle advisements when seeking consent to search

Although not required by Miranda or the Fifth Amendment, under Article 11 of the Indiana Constitution, an officer must advise a person who is in custody of his right to an attorney prior to consenting to a search. Sims v. State, 413 N.E.2d 556 (Ind. 1980); Pirtle v. State, 323 N.E.2d 634 (Ind. 1975); and Sellmer v. State, 842 N.E.2d 358 (Ind. 2006).

Crocker v. State, 989 N.E.2d 812 (Ind. Ct. App. 2013) (while trial court erred in admitting statements made by D after he had been ordered into a police vehicle and questioned without having been read his Miranda rights, D's consent to search vehicle was valid because he had been read his Pirtle warnings prior to consenting to the search).

Clarke v. State, 868 N.E.2d 1114 (Ind. 2007) (a police officer who neither explicitly nor implicitly communicates that a person is not free to leave may ask questions of the person to investigate allegations of criminal activity without implicating the Fourth Amendment or requiring the advisement of rights under Indiana Constitution).

b. Was the Defendant advised of the nature and consequences of potential charges?

Miranda does not require the accused to be specifically informed of the precise nature of potential charges for which the accused is being questioned. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984); Armour v. State, 479 N.E.2d 1294 (1985). Further, failure to inform the defendant that he has been charged with the crime for which he is making a statement does not vitiate an otherwise valid Miranda warning given at the interview where the statement was made. Johnson v. State, 851 N.E.2d 372 (Ind. Ct. App. 2006).

Burgans v. State, 500 N.E.2d 183 (Ind. 1986) (failure of police to advise D that death penalty was possible sentence before commencing custodial interrogation did not render D's waiver and confession involuntary or unintelligent).

Moore v. State, 143 N.E.3d 334 (Ind. Ct. App. 2020) (there is no authority requiring investigating officers to advise D of the charges he faces before making incriminating statements; instead, Article 1, Section 13 of the Indiana Constitution requires an accused to be sufficiently informed of the crime of which he is charged in writing so that he can prepare a defense).

Pedraza v. State, 145 N.E.3d 152 (Ind. Ct. App. 2020) (in its original memorandum opinion, Court rejected D's argument that his Miranda waiver was not knowing or voluntary because detective did not recite the specific charges pending against him despite D's multiple requests during the custodial interrogation. On rehearing, Court clarified that the detective referred to the incident involving victim's death approximately twenty seconds after D signed the Miranda waiver).

c. Did the police use written advisements?

Merely handing the Defendant a warning and waiver form to sign is insufficient to establish that the Defendant understood his rights prior to signing the form, unless accompanied by a clear and adequate explanation. Hedgecough v. State, 328 N.E.2d 230 (Ind. Ct. App. 1975). Law enforcement officers must clearly explain a person's constitutional rights and determine the accused's understanding prior to commencing an interrogation. If a person does not read or otherwise understand English, the officers must provide a translator or alternative forms to ensure that the defendant understands his rights.

Dickerson v. State, 276 N.E.2d 845 (Ind. 1972), *overruled on other grounds*, 788 N.E.2d 832 (D presented with waiver form, but police did not read/explain it or make sure D could read it).

Morales v. State, 749 N.E.2d 1260 (Ind. Ct. App. 2001) (D, who spoke very little English, did not knowingly, voluntarily, and intelligently waive her Miranda rights when she signed waiver form before answering officer's questions at police station; translator did not ask D whether she understood her rights and did not advise D that she would be waiving her rights by signing waiver form).

State v. Keller, 845 N.E.2d 154 (Ind. Ct. App. 2006) (written advisement of rights was insufficient to ensure a knowledgeable and intelligent waiver of D's constitutional rights; despite fact that D briefly reviewed/signed form and affirmed that he had read it, there was no indication that D understood his right to have an attorney present or to stop answering questions at any time).

Eagan v. State, 480 N.E.2d 946 (Ind. 1985) (D's first statement was admissible where officers had read and explained first waiver form to D before D made his confession).

Hutts v. State, 298 N.E.2d 487 (Ind. Ct. App. 1973) (D, who declined to make written statement to officers after signing card stating he waived his rights to counsel and to remain silent but who soon thereafter voluntarily made an oral confession, had been adequately informed of his constitutional rights; testimony concerning D's oral confession was admissible).

(1) Written waiver need not be signed

There is no requirement that the suspect sign a written waiver in order to comply with the constitutional requirement of being advised of his or her rights prior to any custodial interrogation. Grimes v. State, 353 N.E.2d 500 (Ind. Ct. App. 1976).

(2) Oral advisement sufficient to satisfy Miranda

An oral advisement of rights, whether or not accompanied by the use of a form, is the preferred (but not required) method of ensuring an accused's constitutional rights. State v. Keller, 845 N.E.2d 154 (Ind. Ct. App. 2006). Further, if the oral advisement of rights read to the defendant is complete, any subsequent inadequacies in a written form ordinarily will not make it inadequate. Harkins v. State, 415 N.E.2d 139 (Ind. Ct. App. 1981).

NOTE: For discussion on the effect of a waiver form on the voluntariness of a confession, see p. 33, *Was the Defendant presented with a waiver form?*

d. Were the police required to repeat the Miranda advisements?

If at the beginning of a custodial interrogation the Defendant validly waived his rights after being read his Miranda warnings, the warnings need not be repeated as long as the circumstances surrounding any interruption of the process is such that the Defendant has not been deprived of the opportunity to make an informed and intelligent assessment of his interests involved in the interrogation. Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975); Ogle v. State, 698 N.E.2d 1146 (Ind. 1998).

Partlow v. State, 453 N.E.2d 259 (Ind. 1983) (where D showed that he had continuing understanding of his rights and was willingly and knowingly proceeding with interrogation by police, police were not required to repeat Miranda warnings).

(1) Effect of time passage

(a) Time between warning and interrogation

Edwards v. State, 412 N.E.2d 223 (Ind. 1980) (giving oral advisement of rights five hours prior to interrogation was inadequate; there is no way to infer the completeness and accuracy of oral advisement just before confession from complete advisement five hours earlier).

Allen v. State, 686 N.E.2d 760 (Ind. 1997) (fact that two hours had passed between proper advisement of Miranda and waiver where officer also defamed half of practicing attorneys at time of waiver did not invalidate D's waiver).

(b) Length of interrogation after advisement

Willey v. State, 712 N.E.2d 434 (Ind. 1999) (one Miranda advisement was sufficient despite interrogation by five officers over a seven-hour time period).

Grey v. State, 404 N.E.2d 1348 (Ind. 1980) (despite evidence concerning incomplete warnings given to D, evidence as to prior Miranda warnings, both oral and written, given five and two hours before inadequate advisement, was sufficient to support conclusion that D had been adequately advised of potential inculpatory use of his statements).

(2) Discussion of different and new charge or investigation

Once a Defendant has been Mirandized, warnings do not have to be reiterated every time the subject of the interrogation is changed, as long as the suspect is not deprived of an opportunity to make an informed and intelligent assessment of his interests.

Saintignon v. State, 616 N.E.2d 369 (Ind. 1993) (although at time of interrogation concerning death of child, D was in custody as result of unrelated charge and thought interrogation was about that charge, procedure used was not irregular and statements were admissible).

State v. Holt, 725 N.E.2d 1155 (Ohio Ct. App. 1997) (requiring Miranda warnings before questioning custodial D about unrelated offense, even if his status with respect to new offense is that of witness rather than suspect, protects constitutional interests Miranda is intended to serve and saves police and courts

trouble of determining exactly when person's status changes from witness to suspect).

(3) Interruption of interrogation

Re-advisement of Miranda warnings is only necessary when the interruption of the interrogation deprived the suspect of an opportunity to make an informed and intelligent assessment of his interests. Willey v. State, 712 N.E.2d 434 (Ind. 1999).

Shane v. State, 615 N.E.2d 425 (Ind. 1993) (where D voluntarily went to police station, was advised of rights and signed waiver, consented to collection of bodily samples, and upon return to police station from hospital was asked if he still understood his rights, it was not necessary that he be Mirandized again before making statement).

Bivins v. State, 642 N.E.2d 928 (Ind. 1994) (questions put to D after examination would not have caused him to forget rights of which he had been advised and understood moments before).

Ogle v. State, 698 N.E.2d 1146 (Ind. 1998) (when interrogation was interrupted and then resumed within hour, there was no need to give Miranda warnings a second time).

Edwards v. State, 412 N.E.2d 223 (Ind. 1980) (not giving full re-advisement of Miranda warnings before second questioning was inadequate when original oral advisement was five hours prior and in time between first and second questioning D left station and went to bowling alley).

Wilkes v. State, 917 N.E.2d 675 (Ind. 2009) (when D was properly advised of his Miranda rights at beginning of his interrogation, the warning of his rights did not have to be repeated when the interrogation was resumed after a four-hour interruption).

3. Did the Defendant voluntarily waive her Miranda rights?

The trial court is required to conduct a hearing on whether the Defendant voluntarily waived his right to remain silent and to consult with counsel. Craig v. State, 370 N.E.2d 880 (Ind. 1977). A waiver of one's Miranda rights occurs when a Defendant, after being advised of those rights and acknowledging that he understands them, proceeds to make a statement without taking advantage of those rights. Sneed v. State, 500 N.E.2d 186 (Ind. 1986). The waiver of one's Miranda rights must be "free and voluntary, and not induced by any threats, promises, or other improper influence." Nacoff v. State, 267 N.E.2d 165 (Ind. 1971).

Whether a waiver is knowing, voluntary and intelligent is considered under the totality of the circumstances. While any of the elements reviewed may be insufficient to find a waiver to be involuntary, a combination of effects may make the waiver invalid. United States v. Garibay, 143 F.3d 534 (9th Cir. 1998). Some factors include a defendant's difficulty with the English language, borderline retardation, low IQ, poor verbal comprehension skills, and lack of experience with the criminal process. United States v. Garibay, 143 F.3d 534 (9th Cir. 1998).

Waiver of Miranda rights may not be presumed from a Defendant's silence or a confession. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

Johnson v. State, 829 N.E.2d 44 (Ind. Ct. App. 2005) (record was devoid of any evidence, apart from D's silence and statement itself, showing that D acknowledged that he understood his rights).

The police have a duty to either clarify the warnings or cease questioning when a suspect claims that he does not understand the warnings. Malott v. State, 485 N.E.2d 879 (Ind. 1985).

a. De novo review on appeal

The issue of voluntariness of a Miranda waiver is reviewed de novo on appeal. United States v. Mills, 122 F.3d 346 (7th Cir. 1997). While the voluntariness of the confession itself must be proved beyond a reasonable doubt, the State need only prove a knowing and voluntary waiver of Miranda rights by a preponderance of evidence. Light v. State, 547 N.E.2d 1073 (Ind. 1989). On remand, the trial court must merely have an evidentiary hearing on the issue of voluntariness, rather than a new trial. Craig v. State, 370 N.E.2d 880 (Ind. 1977).

NOTE: In a substantial number of decisions, the Indiana appellate courts have adhered to the view that the State must prove the voluntariness of a waiver of rights by proof beyond a reasonable doubt. See, e.g., Johnson v. State, 584 N.E.2d 1092, 1098-99 (Ind. 1992); Little v. State, 694 N.E.2d 762 (Ind. Ct. App. 1998).

b. Was the Defendant competent to waive her rights?

(1) Did the Defendant suffer from a learning or mental disability?

To determine whether a Miranda waiver is valid, the degree of impairment of the Defendant's faculties at the time of the waiver and confession is of critical importance. The Defendant's mental condition may be significant in determining whether the confession was given voluntarily. Mental condition by itself and apart from its relation to official coercion never disposes of the inquiry into the constitutional voluntariness. Nichols v. State, 542 N.E.2d 572 (Ind. Ct. App. 1989) (*citing* Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986))).

(a) Waiver invalid

Blatz v. State, 369 N.E.2d 1086 (Ind. Ct. App. 1977) (State did not carry its burden of showing that eighteen-year-old D, who had eight years of special education as slow learner, made voluntary and knowing waiver of his rights to remain silent and to have attorney present during interrogation, even though D signed written waivers before giving statement).

(b) Waiver valid - examples

Harrison v. State, 382 N.E.2d 920 (Ind. 1978) (even though D had 90 I.Q. and fourth grade reading level, D's intelligence and reading ability were not such as would render D's waiver of rights involuntary; when D indicated he did not understand his rights, they were further explained to D by his friend).

Brewer v. State, 646 N.E.2d 1382 (Ind. 1995) (State satisfied its burden of showing voluntary waiver of Miranda rights prior to confessing to murder, despite D's claim that he was under influence of marijuana and suffered from

paranoid schizophrenia; at time of confession, D appeared cogent and lucid and had consumed neither drugs nor alcohol for at least eight hours and there was no proof of threats, violence, promises, or other improper influence).

Chamness v. State, 431 N.E.2d 474 (Ind. 1982) (where D was eighteen, had eighth-grade education, poor reading ability, and 75 I.Q., but I.Q. and reading level were not submitted to court at time it considered motion to suppress, trial court's determination of knowing and intelligent waiver was affirmed).

(c) Compulsion must be from police, not mental disability

The attempted waiver of Miranda rights is invalid only when compulsion to waive flows from government coercion, and waivers of Miranda rights prompted by mental or emotional condition which prevents the exercise of free will but not the result of official coercion are otherwise valid. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986).

(2) Did the Defendant state that he did not understand his rights?

The police have a duty to either clarify the warnings or cease questioning when a suspect claims that he does not understand the warnings. Police violate Miranda if they continue to interrogate a suspect after the suspect answers "no" when asked whether he understands his rights. Malott v. State, 485 N.E.2d 879 (Ind. 1985).

(3) Did the Defendant understand English?

When attempting to Mirandize a non-English speaking suspect, law enforcement officers are under a heightened duty to use special care in explaining the rights and the limited ability to understand English may render a waiver of rights defective. United States v. Short, 790 F.2d 464, 469 (6th Cir. 1986). Minor errors in written advisements or errors in translation will not render an otherwise voluntary waiver involuntary unless they alter the substance of the rights so drastically that it alters the ability of the individual to understand his or her rights. Santana v. State, 679 N.E.2d 1355 (Ind. Ct. App. 1997). However, utilizing unskilled translators and failing to read and translate the required components of the rights will render a waiver involuntary.

Morales v. State, 749 N.E.2d 1260 (Ind. Ct. App. 2001) (custodial D, who spoke very little English, did not knowingly, voluntarily, and intelligently waive her Miranda rights when she signed waiver form before answering officer's questions at police station; translator did not ask D whether she understood her rights and did not advise D that she would be waiving her rights by signing waiver form).

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (that D attended U.S. high school in English and told officer he could understand English was not sufficient to automatically find that D understood his constitutional rights and could intelligently waive them).

Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989) (Spanish-speaking D was able to waive Miranda rights where he said he understood rights read to him even though he spoke in broken English and lapsed into Spanish during interview).

Possible argument: The Indiana Court of Appeals has recommended that standardized forms containing Miranda warnings and waivers written in Spanish be created and distributed to all law enforcement agencies, and that similar forms be made available for other large non-English speaking populations. Morales v. State, 749 N.E.2d at 1267 (Ind. Ct. App. 2001). If a non-English speaking Defendant is not provided with proper translations of both warning and waiver, argue that the waiver could not be knowing, voluntary, or intelligent. Further, if the Defendant is not fully literate, argue that adequate oral interpretation and explanation is required.

(4) Was the Defendant a juvenile?

The State must prove beyond a reasonable doubt that a juvenile's purported waiver of rights was knowingly, voluntarily, and intelligently made before a juvenile's statement is admissible. Tingle v. State, 632 N.E.2d 345 (Ind. 1994); Hickman v. State, 654 N.E.2d 278 (Ind. Ct. App. 1995). For a more detailed analysis of the required warnings and voluntariness of juvenile waivers, see p. 82, *Did the taking of the statement violate Indiana statutory requirements concerning interrogations of juveniles?*

Cherrone v. State, 726 N.E.2d 251 (Ind. 2000) (sixteen-year-old juvenile who signed waiver while father was present voluntarily waived his rights).

Carter v. State, 686 N.E.2d 1254 (Ind. 1997) (fourteen-year-old D's waiver of Miranda rights at police station was voluntary, even if D's mother was unaware at time she signed waiver of rights form that D was suspect; both D and his mother acknowledged that they understood each right after each was read aloud by detective, both signed form indicating they had been informed of D's rights, they were given opportunity to consult privately with each other immediately after rights were read, and they both signed form again indicating they waived D's rights).

(5) Was the Defendant intoxicated?

A confession may be inadmissible if the defendant was so intoxicated or impaired as to be unconscious of what he was doing. Houchin v. State, 581 N.E.2d 1228, 1231 (Ind. 1991), *overruled on other grounds*; see also Ellis v. State, 707 N.E.2d 797, 802 (Ind. 1999). Intoxication is merely a factor that is included in the totality of the circumstances that at trial court considers in ruling on whether to admit a statement. Brewer v. State, 646 N.E.2d 1382 (Ind. 1995).

Brooks v. State, 683 N.E.2d 574 (Ind. 1997) (even where evidence is uncontradicted that D was under influence of some substance at time of police interrogation, other evidence may be sufficient to prove that resulting statement was made voluntarily); See also Watson v. DeTella, 122 F.3d 450 (7th Cir. 1997).

Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (D's pain medication and mental capacities did not undermine his ability to waive his rights and give police a voluntary statement).

Wilkes v. State, 917 N.E.2d 675, 680 (Ind. 2009) (statements are inadmissible due to intoxication only when an accused is intoxicated to the point that he or she is unaware of what is being said).

c. Was the Defendant presented with a waiver form?

A signed waiver form is one item of evidence showing the accused was aware of and understood his Miranda rights, but it is not dispositive of the issue. Allen v. State, 686 N.E.2d 760, 770 (Ind. 1997). Officers are not required to obtain an express waiver of Miranda rights before interrogating a person who is in custody. Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010). Further, officers are not required to provide a suspect's rights in writing, nor is a written, express waiver required. Hill v. State, 825 N.E.2d 432 (Ind. Ct. App. 2005).

Lee v. State, 531 N.E.2d 1165 (Ind. 1988) (where D was not presented with waiver form, but spoke freely about incident after receiving Miranda warnings, D voluntarily waived his rights).

Johnson v. State, 829 N.E.2d 44 (Ind. Ct. App. 2005) (D's literacy could not support an acknowledgment of his Miranda rights because he was not provided with a copy of waiver of rights form; thus, State did not establish that D knowingly and voluntarily waived his rights).

The State may be required to show further evidence tending to show that a defendant understood and voluntarily waived his rights when a form is involved. Clear communication of an individual's rights and understanding is central to the analysis.

State v. Keller, 845 N.E.2d 154 (Ind. Ct. App. 2006) (written advisement of rights was insufficient to ensure a knowledgeable and intelligent waiver of D's constitutional rights; despite fact that D briefly reviewed/signed form and affirmed that he had read it, there was no indication that D understood his right to have an attorney present or to stop answering questions at any time).

Even though not required, an oral recital and explanation provided by officers of a written waiver form will help ensure that a defendant understands his rights. Eagan v. State, 480 N.E.2d 946 (Ind. 1985).

(1) Did the Defendant sign the form?

The signing of a waiver of rights form does not conclusively show a valid waiver of rights to remain silent and to consult with counsel. McFarland v. State, 519 N.E.2d 528 (Ind. 1988). When challenged, the State may need to show additional evidence tending to prove that the Defendant's waiver and decision to speak were voluntary. Allen v. State, 686 N.E.2d 760 (Ind. 1997).

Once a written waiver is signed and valid, a suspect is not entitled to another set of warnings about his rights when the police re-enter and attempt to continue an interrogation after a break.

Oldham v. State, 467 N.E.2d 419 (Ind. Ct. App. 1984) (although D asked to consult with lawyer before taking polygraph, but attorney was unavailable, original signed waiver prior to polygraph covered polygraph and subsequent questioning).

McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007) (D's post-polygraph statements were admissible where D had consulted with attorney, signed a polygraph waiver, and indicated he understood his rights).

Brock v. State, 540 N.E.2d 1236 (Ind. 1989) (signed rights waiver form is not dispositive of issue, and express written or oral waiver of rights is not required to establish a valid waiver).

(2) Did the Defendant refuse to sign the waiver form?

Mere refusal to sign a waiver form does not in and of itself constitute the exercise of Miranda rights. Auten v. State, 542 N.E.2d 215 (Ind. Ct. App. 1989); see also Berghuis v. Thompkins, 130 S. Ct. 2250 (2010). A suspect's reasoning for refusing to sign the form is irrelevant if he or she voluntarily speaks to the officers.

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (a suspect who has received and understood the Miranda warnings and does not invoke the Miranda rights waives the right to remain silent by making an un-coerced statement to police; here, D was warned of his rights and refused to sign a waiver form; he thereafter remained silent during two hours and forty-five minutes of questioning but then made an incriminating statement that was found to be un-coerced).

Norris v. State, 498 N.E.2d 1203 (Ind. 1986) (where D refused to sign form because attorney had advised him never to sign anything in his absence, but D indicated that he would be happy to cooperate, D voluntarily waived rights).

Bevill v. State, 472 N.E.2d 1247 (Ind. 1985), *abrogated on other grounds* (D's refusal to sign written statement of his confession was based on D's concern with accuracy of contents of D's story as retold by officers; statements to police were freely and voluntarily given).

However, a refusal to sign a waiver form is an explicit, voluntary, and knowing refusal to waive rights, and officers then have a duty to refrain from interrogating a suspect. Benton v. State, 401 N.E.2d 697 (Ind. 1980).

Auten v. State, 542 N.E.2d 215 (Ind. Ct. App. 1989) (where D twice refused to sign waiver form, several hours apart and without explanation, D invoked her right to remain silent by refusing to sign the waiver; State failed to meet burden of proving voluntary waiver after D gave statement after second refusal; without evidence of what transpired between second refusal to sign waiver and giving of statement, there is no proof that police scrupulously honored D's refusal to talk).

d. Did the police use coercion or other tactics to procure a waiver from Defendant?

"The relinquishment of the right [to remain silent] must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception . . ." Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986).

(1) Attempting to prevent the Defendant from exercising his rights

Allen v. State, 686 N.E.2d 760 (Ind. 1997) (where polygraph examiner reviewed Miranda warnings with D but defamed half of practicing lawyers and suggested remaining silent might hurt D, examiner's remarks may have affected D's subsequent decision to waive his rights, but did not nullify prior, proper written and oral warnings D received).

(2) Minimizing the importance of Defendant's rights

Ramirez v. State, 739 So.2d 568 (Fla. 1999) (where officer stated to other officer during interrogation after D confessed to burglary, "Why don't you let [D] know about his rights. I mean, he's already told us about going into the house and whatever. I don't think that's going to change [his] desire to cooperate with us," D's subsequent confession to murder was invalid; officers' efforts to minimize importance of 17-year-old suspect's mid-interview waiver of Miranda rights rendered waiver involuntary).

(3) Use of deception to obtain the Defendant's waiver

Edwards v. State, 412 N.E.2d 223 (Ind. 1980) (where D confessed to murder shortly after interrogators had policewoman walk by door of room in which D was being interrogated and say "yes, that's the man," and such trick and falsehood came very shortly after D had arrived at interrogation room and prior to waiver of his Miranda rights, such deception required conclusion that waiver of rights was involuntary, especially where interrogators knew D was mental patient on furlough from state hospital at time of alleged crime).

Roehling v. State, 776 N.E.2d 961 (Ind. Ct. App. 2002) (police officers incorrectly represented that they already had search warrant and suggested that presence of any contraband should be disclosed before search began; D's post-Miranda admission that he had unlicensed handgun in his vehicle was involuntary, improperly obtained under circumstances and could not be used to establish probable cause to search his vehicle).

(4) Lengthy detention of the Defendant

Nacoff v. State, 267 N.E.2d 165 (Ind. 1971) (although D was properly advised of his rights, his waiver was invalid because D was held incommunicado for over four days in six foot by three foot cell without warm water or shower facilities, leaving cell only to be interrogated, and was not taken promptly before magistrate for initial hearing).

(5) Failing to tell the Defendant that his lawyer was present

The federal constitution does not require police to inform a suspect who has not requested an attorney that one is present. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986).

Under Article 1, § 13 of the Indiana Constitution, law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the police station seeking access to him. However, an attorney's unsolicited and unknown efforts to contact a suspect prior to pre-charge interrogation does not impose a duty on police to inform the suspect of such efforts before starting the interrogation. Ajabu v. State, 693 N.E.2d 921 (Ind. 1998).

Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (courts have specifically distinguished between attempts to contact client in person, as in this case, and attempts over the phone, as in Ajabu; despite withholding of information in this

case, D knowingly, voluntarily, and intelligently waived his right against self-incrimination and right to counsel during questioning at police station).

When deciding on the validity of a waiver, courts tend to look at the totality of the circumstances to evaluate it, considering factors such as the extent to which the police had reasonable notice of the counsel's request, conduct of the suspect, nature of the counsel's request, and relationship of the suspect to the attorney. Id.

Little v. State, 694 N.E.2d 762 (Ind. Ct. App. 1998) (D's confession to murder was voluntary, despite fact that Illinois contingent did not notify D's Indiana attorney before interviewing D about Illinois murder).

(6) Failing to tell the Defendant the nature of the offense being investigated and potential penalties

The suspect should be informed of the reason for the investigation or incident which gives rise to the interrogation so he or she can make a knowing and intelligent decision whether to forgo the privilege against self-incrimination. However, the police do not have to inform the suspect of the nature of all potential charges and penalties before obtaining a valid waiver. Armour v. State, 479 N.E.2d 1294 (Ind. 1985); Washington v. State, 808 N.E.2d 617 (Ind. 2004); and Burgans v. State, 500 N.E.2d 183 (Ind. 1986).

Mere silence by law enforcement officials as to the subject matter of an interrogation is not "trickery" sufficient to invalidate a suspect's waiver. A valid waiver does not require that the suspect be informed of all information that might affect his decision to confess. Colorado v. Spring, 479 U.S. 564, 107 S. Ct. 851 (1987).

Colorado v. Spring, *supra* (fact that D thought he was being interrogated about arms violation but was really being interrogated about unrelated homicide did not invalidate waiver).

Armour v. State, *supra* (although D was actually convicted of neglect charges of which he was unaware at time of interrogation and rather believed he was being questioned concerning battery of three-month old son, court found no police deception and voluntary waiver).

Shifting the topic of interrogation does not create a situation in which an officer must stop and re-advise a defendant of their rights and obtain another waiver. Further, hiding the real intentions of an interrogation is not, in and of itself, sufficient to invalidate an otherwise valid waiver.

Dickson v. State, 520 N.E.2d 101 (Ind. 1988) (even if FBI agent did not re-advise D of his rights when D shifted topic of conversation and made inculpatory statements about murder, substantial evidence supported trial court's determination that D voluntarily waived his rights; therefore, waiver form, confession and search waiver form were admissible).

Atteberry v. State, 911 N.E.2d 601 (Ind. Ct. App. 2009) (D's waiver and statement were voluntary despite fact that police officer did not tell him that he was from Indianapolis and planned to question D regarding an incident that occurred decades earlier in Indianapolis).

e. Did the Defendant initiate the dialogue with the police?

Initiation of conversation or discussion by the accused, by itself, is not sufficient to establish waiver of a previously asserted right to counsel. Grimm v. State, 556 N.E.2d 1327 (Ind. 1990). A question or statement that does not invite further interrogation before an attorney is present cannot qualify as a voluntary initiation. Certain questions can breach that line by asking questions that express a willingness and a desire for a generalized discussion about the investigation. But there are some inquiries that are so routine (e.g., requesting a telephone call or a drink) that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.

Oregon v. Bradshaw, 462 U.S. 1039, 1045-46, 103 S.Ct. 2830 (1983) (even the broaching of a subject relating indirectly to the case against D is sufficient to establish voluntary initiation).

Perkins v. State, 158 N.E.3d 1274 (Ind. Ct. App. 2020) (following D's request for an attorney during his interview in a felony murder and attempted murder case, he initiated further discussions with law enforcement officers and knowingly, voluntarily and intelligently waived the right previously invoked; no evidence that D lacked the capacity to understand his rights, and at no point did police threaten, intimidate, deceive, or make promises in order to induce him to continue the second interview).

f. Did the Defendant make an earlier confession without being advised of Miranda?

Questioning a suspect regarding evidence already gathered against him, prior to Miranda warnings, violates Miranda. In Missouri v. Seibert, 124 S. Ct. 2601 (2004), the U.S. Supreme Court disapproved of an interrogation technique in which police officers purposefully withhold Miranda warnings until a confession is obtained, and thereafter, give Miranda warnings and obtain a waiver before obtaining a second similar confession. When such a technique is utilized, any subsequent confession must be suppressed because "the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." Id. at 2610. Seibert is limited to situations which involve questioning a Defendant over time which is briefly interrupted. If there is enough time between questioning, then the significant break in time and an accompanying dramatic change in circumstances will create a "new and distinct experience," and a second Miranda warning will offset the failure to give warnings during the first interrogation. Bobby v. Dixon, 132 S. Ct. 26, 32 (2011).

Bobby v. Dixon, *supra* (D was not subjected to the "question first-warn later" interrogation technique prohibited in Seibert because D denied guilt during the first step, so nothing was out-of-the-bag by the time the rights warning was given in step two; moreover, D's first and second statements were separated by four hours and did not form one continuous whole).

Drummond v. State, 831 N.E.2d 781 (Ind. Ct. App. 2005) (officer's two-part interrogation was not subject to independent evaluation simply because Miranda warnings formally punctuated it in the middle; the two-part, "question-first, Mirandize later" interrogation technique used in this case appears to be exactly of the character that Seibert sought to avoid); See also King v. State, 844 N.E.2d 92 (Ind. Ct. App. 2006).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (in triple murder prosecution, trial court abused its discretion by admitting into evidence D's full statement to police where majority of statement was obtained prior to Miranda advisement and remaining portion of statement was obtained without a voluntary waiver of her Miranda rights).

Because the primary evil to be avoided by this rule is the "ask first, Mirandize later" technique, a good-faith Miranda mistake open to correction by careful warnings with a subsequent waiver and confession does not render the subsequent confession inadmissible. Johnson v. State, 829 N.E.2d 44 (Ind. Ct. App. 2005). See also Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985); and State v. Keller, 845 N.E.2d 154 (Ind. Ct. App. 2006).

Further, Seibert should not be extended to cover situations where police have any conversation with a suspect without giving Miranda warnings, but instead only those that contain a pre-Miranda confession and interrogation with a subsequent waiver and second confession. Maxwell v. State, 839 N.E.2d 1285 (Ind. Ct. App. 2005); see also Hicks v. State, 5 N.E.3d 424 (Ind. Ct. App. 2014).

While police officers may reference initial statements obtained in violation of Miranda, they may not use earlier statements to threaten or coerce the suspect into giving a subsequent statement. Meadows v. State, 785 N.E.2d 1112, 1119 (Ind. Ct. App. 2003).

Kelly v. State, 997 N.E.2d 1045 (Ind. 2013) (inculpatory statements D made to police were obtained through "question first, warn later" tactic disapproved in Seibert and were thus inadmissible. Court differentiates this case from Oregon v. Elstad, noting the two statements were made mere minutes apart at the same location in response to questioning by the same officer, and most importantly, the officer referred to D's pre-warning admission three times during the post-warning interrogation).

Possible argument: The rule that a subsequent warned statement is not the fruit of a prior illegal unwarned statement is based on the assumption that Miranda warnings are not constitutionally required. See Butler v. State, 478 N.E.2d 126 (Ind. Ct. App. 1985) (signed Miranda waiver prior to second confession removed taint of prior unwarned confession). However, Missouri v. Seibert, *supra*, and Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000), which held that Miranda warnings are constitutionally based, arguably overruled Butler.

4. Did the Defendant attempt to invoke her Miranda rights at any time during the interrogation?

The opportunity to exercise the Defendant's rights "must be afforded to him throughout the interrogation." Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966). An interrogation of a suspect cannot begin or cannot continue if the suspect asserts his or her rights under the Fifth Amendment. The Fifth Amendment privilege against self-incrimination is not self-enforcing, and an individual seeking its protection must invoke it at the time he or she relies upon it. Salinas v. Texas, 133 S. Ct. 2174 (2013).

Mira v. State, 3 N.E.3d 985 (Ind. Ct. App. 2013) (testimony about D's pre-arrest, pre-Miranda silence did not violate his Fifth Amendment right against self-incrimination; such testimony only violates this right only if D unambiguously invoked his right to remain silent).

Even if the Miranda rights are waived, the suspect may thereafter assert the rights at any time during the interrogation and the interrogation must then be terminated. Kerr, 16 Indiana Practice § 7.2(h), 571 (1991).

a. Rights cannot be invoked anticipatorily

In order for a suspect to invoke his or her Miranda rights, the authorities must be conducting interrogation, or interrogation must be imminent. United States v. LaGrone, 43 F.3d 332, 339 (7th Cir. 1994).

Sauerheber v. State, 698 N.E.2d 796 (Ind. 1998) (although D made several requests for attorney at time State collected hair, saliva, and blood samples pursuant to search warrant, police-initiated interrogation of D four days later was proper; D's invocation of his Fifth and Sixth Amendment rights had no effect at time of body sample collection; moreover, court does not permit anticipatory invocation of Sixth Amendment right).

United States v. Muick, 167 F.3d 1162, 1166 (7th Cir. 1999) (where D's attorney made request to be present at interviews when D was not under arrest, and it would be another thirteen months before agents arrested him, D's prospective invocation of Miranda rights was invalid).

McNeil v. Wisconsin, 501 U.S. 171, 181 n.3, 111 S.Ct. 2204 (1991) ("if the Miranda right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect . . .The fact that we have allowed the Miranda right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect."); see also Bobby v. Dixon, 132 S. Ct. 26 (2011).

b. Clear and unequivocal invocation of rights is required

A police officer is required to stop an interrogation only if the accused person makes an unambiguous request for the assistance of counsel. In order to invoke the right to counsel and end questioning, a statement must be sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350 (1994); See also p. 47, *Do the police have a duty to clarify an ambiguous invocation?*

NOTE: The police officer's response, including briefly stopping the interrogation, to a suspect's statement about counsel can be considered in determining whether the statement was an unequivocal request for counsel or an assertion of the right to remain silent. See State v. Bohn, 950 S.W.2d 277 (Mo. Ct. App. 1997); State v. Murphy, 467 S.E.2d 428 (N.C. 1996).

Practice NOTE: Counsel can request an *in camera* inspection of the interrogator's notes to determine how the suspect's requests for counsel or assertions of his right to remain silent were viewed by police. State v. Jackson, 497 S.E.2d 409 (N.C. 1998) (officer's notes included statement that D asked for counsel).

(1) Was the Defendant trying to invoke the right to counsel?

If the suspect states at any time prior to or during questioning that he wants an attorney, the interrogation must cease until an attorney is present, unless the suspect initiates further communication with the police and voluntarily waives the right to counsel. Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981). For cases discussing resumption of questioning after the suspect's assertion of his Fifth Amendment right to counsel, see p. 44, and p. 79, *How did the police respond?*

Hicks v. State, 5 N.E.3d 424 (Ind. Ct. App. 2014) (trial court was not required to credit D's self-serving testimony at suppression hearing that he told investigating officers, "I think I should talk to an attorney" even though this alleged request for counsel was uncontroverted).

(a) Examples of unequivocal requests for counsel

- "I think it would be in my best interest to talk to an attorney." Alford v. State, 699 N.E.2d 247 (Ind. 1998).
- "I do want an attorney before it goes very much further." Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983).
- "I'm in a situation where I feel like … I really need an attorney to … talk with, and for me." Carr v. State, 934 N.E.2d 1096 (Ind. 2010).
- "Well, I feel (sic) like I ought to have an attorney around…" Sleek v. State, 499 N.E.2d 751 (Ind. 1986).
- "I really would like to talk to an attorney or something because I don't know where this is going. I don't want y'all to feel like I'm lying to you in any kind of way. I'm confused and there's a lot of stuff going on." Anderson v. State, 961 N.E.2d 19 (Ind. Ct. App. 2012).
- "Can I get a lawyer?" Lewis v. State, 966 N.E.2d 1283 (Ind. Ct. App. 2012).
- Telling a police officer you would "feel more comfortable with a lawyer," even though D subsequently changed his mind and did not want an attorney. Morgan v. State, 759 N.E.2d 257 (Ind. Ct. App. 2001).
- Asking an officer if you can "do this with an attorney" in response to being provided Miranda rights. Hendricks v. State, 897 N.E.2d 1208 (Ind. Ct. App. 2008).
- Stating that the suspect felt "like [she] ought to have a good counselor." State v. Bohn, 950 S.W.2d 277 (Mo. Ct. App. 1997).
- "I think we really should have an attorney." State v. Hannon, 636 N.W.2d 796 (Minn. 2001).
- "I suppose I need an attorney." United States v. McGee, 2000 U.S. Dist. LEXIS 15059 (W.D.N.Y. 2000).
- "I should talk to a lawyer." People v. Romero, 953 P.2d 550 (Col. 1998).

(b) Examples of ambiguous or equivocal requests for counsel

- "Maybe I should talk to a lawyer." Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994).
- "I don't know what to say; I guess I really need a lawyer, but I mean, I've never done this before, so I don't know." Taylor v. State, 689 N.E.2d 699 (Ind. 1997); Goodner v. State, 714 N.E.2d 638 (Ind. 1999).

- "I don't know anything about lawyers. I've never had on[e] in my life. So, I don't know about [what] I should do to be safe for myself." Williams v. State, 997 N.E.2d 1154 (Ind. Ct. App. 2013).
- "Am I going to need an attorney?" King v. State, 991 N.E.2d 612 (Ind. Ct. App. 2013).
- "I mean, what happens if I say I want a lawyer? Do I get one in here now and then we talk about it?" and "If I ask for a lawyer and what's it going to be, what's it going to be?" Smith v. State, 983 N.E.2d 226 (Ind. Ct. App. 2013).
- "Is it best advised to speak with a lawyer?" Followed by a statement that he tried to get a lawyer earlier but couldn't. Malloch v. State, 980 N.E.2d 887 (Ind. Ct. App. 2012).
- "Do I need an attorney," "I probably need an attorney," and "how long would it take to obtain an attorney?" Collins v. State, 873 N.E.2d 149 (Ind. Ct. App. 2007).
- Advising police that you already have an attorney and that you were advised not to speak with anyone, but immediately saying thereafter that you would talk, claiming innocence. Cox v. State, 854 N.E.2d 1187 (Ind. Ct. App. 2006).
- "How long would it be before I got a lawyer appointed?" Stroup v. State, 810 N.E.2d 355 (Ind. Ct. App. 2004).
- Making cryptic reference to "an attorney" after being advised of rights, and then declining invitation to use telephone. United States v. Muhammad, 120 F.3d 688 (7th Cir. 1997).
- "I would like to have an attorney eventually, but in the meantime, I will talk with you." Bane v. State, 587 N.E.2d 97 (Ind. 1992).
- "I want my attorney, but I'll answer, you can ask me questions however." Schuler v. State, 112 N.E.3d 180 (Ind. 2018).
- Refusing to sign a waiver form without the presence of counsel, but still continuing to speak with the police. Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828 (1987).
- "I can't afford a lawyer, but is there any way I can get one?" Lord v. Duckworth, 29 F.3d 1216 (7th Cir. 1994).
- "I may need [lawyer]." Bailey v. State, 763 N.E.2d 998 (Ind. 2002).
- Mother's statement "we need an attorney" which was made in the presence of her adult son is not sufficient to serve as her son's request for counsel. Rider v. State, 570 N.E.2d 1286 (Ind. Ct. App. 1991).
- Police are permitted to ask clarifying questions following an ambiguous request for counsel regarding the request without violating the rule against continuing the interrogation. Edmonds v. State, 840 N.E.2d 456 (Ind. Ct. App. 2006).
- Agreeing with conclusion that asking whether a person could obtain counsel was a procedural question/comment, not requests for counsel. Clemons v. State, 967 N.E.2d 514 (Ind. Ct. App. 2012).

(2) Was the Defendant trying to invoke the right to remain silent?

In Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627-28 (1966), the Court held that once warnings have been given, if the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. However, in Berghuis v. Thompkins, 130 S. Ct. 2250 (2010), the Court significantly pulled back from this position and held that just as an invocation of the right to counsel must be unequivocal, so must the assertion of the

right to silence. But the law does not require a formal declaration such as "I'm invoking my right to remain silent." Risinger v. State, 137 N.E.3d 292 (Ind. Ct. App. 2019).

Simply refusing to cooperate or sign a waiver of rights form and sitting silently does not invoke the right to remain silent and answering a single question can serve as an implied waiver.

The suspect's assertion of the right to remain silent does not preclude further interrogation as long as the suspect's right to cut off questioning at any time is "scrupulously honored" by the interrogating officers. Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975); Moore v. State, 498 N.E.2d 1 (Ind. 1986). For cases discussing resumption of questioning after the suspect's assertion of his right to remain silent, see p. 44, *How did the police respond?*

(a) Examples of comments sufficient to invoke silence

- "I'm done talking." Risinger v. State, 137 N.E.3d 292 (Ind. Ct. App. 2019).
- "I just want to get this over with . . . I want to go back home," and "They won't take me home." State v. Glaze, 146 N.E.3d 1086 (Ind. Ct. App. 2020).
- During lengthy interview about allegations D molested his stepsister, D told police he was "pissed off" and was "done with answering questions right now." State v. Battering, 85 N.E.3d 605 (Ind. Ct. App. 2017).
- When requested to discuss charges, suspect replied, "At this point, I don't think so. At this point, I don't think I can talk," and "I don't want to discuss it right now." People v. Peracchi, 102 Cal.Rptr.2d 921 (Cal. 2001).
- "No comment." State v. Hukowicz, 2000 Tenn. Crim. App. LEXIS 646 (Tenn. Crim. App. 2000).
- "I got nothing to say, man." State v. Murphy, 467 S.E.2d 428 (N.C. 1996).

(b) Examples of comments insufficient to invoke silence

- "I don't got nothing to say," when being presented with a Miranda rights waiver form. United States v. Banks, 78 F.3d 1990 (7th Cir. 1996).
- "I'm about to end this." Broome v. State, 687 N.E.2d 590 (Ind. Ct. App. 1997), *sum. aff'd.,* 694 N.E.2d 280 (Ind. 1998).
- Expressing indecisiveness followed by continued dialogue with officers. Goodner v. State, 714 N.E.2d 638 (Ind. 1999).
- "I'm through with this." Haviland v. State, 677 N.E.2d 509 (Ind. 1997).
- "I might as well not say anything more." Griffith v. State, 788 N.E.2d 835 (Ind. 2003).
- "Could I see about getting a lawyer or something man?" and "yeah, I'm ready to cut this off cause, I mean I feel like y'all getting ready to start asking me some crazy questions, you know what I'm saying," and "man I'm done, man." Powell v. State, 898 N.E.2d 328 (Ind. Ct. App. 2008).
- Mentioning D's attorney in child custody matter and fact she had been advised not to speak with anyone, but immediately stating thereafter that she would talk, claiming innocence. Cox v. State, 854 N.E.2d 1187 (Ind. Ct. App. 2006).

c. Invoking Sixth Amendment right to counsel in a different case

(1) Under the Sixth Amendment

Claiming the right to counsel under Miranda is not offense specific and prevents questioning as to other crimes in a police-initiated conversation. However, the assertion of the right to counsel under Miranda cannot be inferred from the invocation of a suspect's Sixth Amendment right to counsel on different or future charges.

McNeil v. Wisconsin, 501 U.S. 171, 111 S.Ct. 2204 (1991) (request for assistance of attorney at bail hearing on separate offense does not establish invocation of Fifth Amendment right to counsel).

Leonard v. State, 73 N.E.3d 155 (Ind. 2017) (right to counsel for charged case does not apply to future cases, so trial court did not abuse its discretion in admitting statements D made, while awaiting his double murder trial, to an officer posing as a hit man, where D asked the officer to kill a person who was going to testify for the State).

Because the Sixth Amendment is "offense specific," it does not extend to offenses that are "factually related" to those that have been charged.

Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335 (2001) (even though D has been indicted for burglary, interrogation regarding murders that occurred during course of burglary was permissible).

Sweeney v. State, 704 N.E.2d 86 (Ind. 1998) (even though federal charges had been filed against D for placing a pipe bomb, State had not yet charged D with indirectly related murder and his Sixth Amendment right to counsel did not attach).

J.D.P. v. State, 857 N.E.2d 1000 (Ind. Ct. App. 2006) (although juvenile D had asserted his Sixth Amendment right to counsel on charged false informing offense, this assertion did not invoke the right for his future prosecution on arson offense).

State v. Ashley, 661 N.E.2d 1208 (Ind. Ct. App. 1995) (although D had previously invoked his Sixth Amendment right to counsel on unrelated charges, Fifth Amendment right to counsel was not violated by undercover police officer acting as cell mate).

(2) Under the Indiana Constitution

Article 1, Section 13 of the Indiana Constitution provides more protection than Texas v. Cobb (above). Under the Indiana Constitution, the right to counsel also attaches to police questioning regarding offenses which are inextricably intertwined with the charge on which counsel is also representing the Defendant. Jewell v. State, 957 N.E.2d 625 (Ind. 2011).

Leonard v. State, 86 N.E.3d 406 (Ind. Ct. App. 2017) (pending murder charges were not inextricably intertwined with D's plan to murder a witness against him in the pending prosecution, thus admission of recordings of D's jail phone calls

with undercover officer posing as a hitman did not violate right to counsel under Indiana Constitution).

5. How did the police respond following Defendant's invocation of rights?

a. When the suspect states that he or she does not understand warnings

The police have a duty to either clarify the warnings or cease questioning when a suspect claims that he does not understand the warnings.

Malott v. State, 485 N.E.2d 879 (Ind. 1985), *abrogated on other grounds* (police erred by continuing to interrogate D after he answered "no" to whether he understood his rights).

b. Once the suspect invokes Fifth Amendment right to counsel

Police must terminate interrogation of the accused in custody if he or she requests counsel. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966); Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981). Unless counsel is provided, re-interrogation may occur only if "the accused himself initiates further communication, exchanges, or conversations with the police." Id. at 485. If the suspect believes he or she is not capable of undergoing questioning without counsel, it is presumed that any subsequent waiver has come at the authorities' behest and is the product of inherently compelling pressures, not purely the voluntary choice of the suspect.

Unlike invoking the right to counsel under the Sixth Amendment, the Fifth Amendment is not offense specific; thus, once a suspect has clearly invoked his rights during an interrogation, the police may not initiate interrogation about a different offense within a short amount of time. Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093 (1988) (three days).

Hartman v. State, 988 N.E.2d 785 (Ind. 2013) (D's confession suppressed after detective, in violation of the Fifth Amendment, reinitiated interrogation of D within 48 hours after D had invoked his right to counsel. Detective's statements to D that "by law" they had to read him search warrants and then asking D if he had any questions constituted impermissible questioning, or its functional equivalent).

Minnick v. Mississippi, 498 U.S.146, 111 S. Ct. 486 (1990) (D who had invoked his Fifth Amendment right to counsel under Miranda may not waive his right in police-initiated conversation in absence of counsel even though he had consulted with counsel in meantime; counsel must be present at any further interrogations).

Carr v. State, 934 N.E.2d 1096 (Ind. 2010) (although D made statements suggesting he voluntarily waived his right to counsel and would speak with officers, such statements occurred after D had unambiguously requested counsel and officers continued questioning; D's waiver or equivocation would not have occurred had the detective scrupulously honored D's requests for counsel by immediately ceasing further communication with him until an attorney was present; confession should have been suppressed); see also Bean v. State, 973 N.E.2d 35 (Ind. Ct. App. 2012).

(1) *Maryland v. Shatzer* – 14-day rule

However, if the accused who has invoked his right to counsel during custodial interrogation is released from custody and returned to his normal life for some time before a later attempted interrogation, there is little reason to think that any change of heart would have been coerced. Maryland v. Shatzer, 130 S. Ct. 1213 (2010). Thus, the police can re-initiate the interrogation after a fourteen-day break in custody. Id. Fourteen days provides plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody. Id.

(2) *Per se* rule in Indiana

In Indiana, the courts have adopted a *per se* rule prohibiting police from initiating discussion or further questioning after a suspect invokes their Fifth Amendment right to counsel. Moore v. State, 498 N.E.2d 1 (Ind. 1986). Thus, after the Fifth Amendment right to counsel is invoked, a waiver in response to police-initiated interrogation is not sufficiently voluntary to meet that amendment's mandate. Hendricks v. State, 897 N.E.2d 1208 (Ind. Ct. App. 2008).

(3) Rule not applicable to different charges

If a defendant is arrested, questioned, invokes their right to counsel, and then is released and re-arrested on a different charge, Edwards is not controlling and questioning on the second charge is permissible. Lindsey v. State, 485 N.E.2d 102 (Ind. 1985).

(4) Rule applies to functional equivalent of interrogation

The rule that police must cease questioning when Defendant asserts her right to counsel applies not only to express questioning, but also to its "functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980). Any words or actions on the part of police (other than those attendants to arrest/custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect constitute the "functional equivalent" of interrogation. Id.

Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931 (1987) (when wife asked to talk to her husband who had killed their son, was in custody and had invoked his right to counsel, action of police in allowing talk but requiring presence of officer and tape recording of talk, did not constitute functional equivalent of questioning in violation of Miranda; no showing that officers sent wife in to see D for purpose of eliciting incriminating statements).

Storey v. State, 830 N.E.2d 1011 (Ind. Ct. App. 2005) (officer's monologue about his discovery of potentially incriminating evidence and likelihood D's wife would be arrested had no apparent purpose other than to induce D to say something inculpatory, and thus constituted interrogation even though no questions were asked).

Porter v. State, 743 N.E.2d 1260 (Ind. Ct. App. 2001) (police officer's request for D's consent to search apartment violated D's Fifth Amendment right to have attorney present during questioning where D had unequivocally invoked his right to counsel and D's later comments about how people were trying to run D out of

town and how D would take care of his apartment and cat were not a knowing, intelligent, and voluntary waiver of D's right to have attorney present).

See also p. 5, *Was the Defendant subjected to custodial interrogation?*

(5) Suspect must be in custody

If a person is not in custody, interrogation does not have to be terminated when a person asks to speak with counsel. Joyner v. State, 736 N.E.2d 232, 241-42 (Ind. 2000). Police are not precluded from questioning a person during noncustodial interrogation, regardless of any requests for counsel. Harrison v. State, 644 N.E.2d 1243 (Ind. 1995), *superseded by statute on other grounds.*

c. Once the suspect invokes Fifth Amendment right to remain silent

Complete and indefinite cessation of police questioning is required only when the accused invokes his right to counsel, not when he invokes his right to silence. Once the accused invokes his right to silence, police must cease questioning immediately. However, the police may resume questioning after passage of a significant amount of time and after giving a fresh set of Miranda warnings. Borkholder v. State, 544 N.E.2d 571 (Ind. Ct. App. 1989) (*citing* Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321 (1975)). The admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right to cut off questioning was scrupulously honored. Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

However, where a defendant has invoked the right to remain silent but then independently initiates further discussions, there may not be a violation, particularly if officers remind the defendant of his rights and the defendant proceeds to waive them anyway. Jenkins v. State, 627 N.E.2d 789 (Ind. 1993).

There are several non-exclusive factors used to determine whether interrogation was properly resumed including: (1) the amount of time that lapsed between interrogations; (2) the scope of the second interrogation; (3) whether new Miranda warnings were given; and (4) the degree to which police officers pursued further interrogation once the suspect has invoked his right to silence. United States v. Gilliaum, 372 F.3d 848, 856 (7th Cir. 2004).

(1) Examples of police properly honoring invocation of right to remain silent

- Police immediately ceased interrogation after a D's refusal to answer and commenced questioning on a different offense after more than two hours and after a fresh set of warnings had been given. Michigan v. Mosley, 423 U.S. 96 (1975).
- Police waited ninety minutes before reinitiating questioning. Pilarski v. State, 635 N.E.2d 166 (Ind. 1994).
- D invoked right to remain silent, later consented to a search of his home, was then re-advised of his Miranda rights by police from another town, and then confessed. Moore v. State, 498 N.E.2d 1 (Ind. 1986).

(2) Examples of police failing to honor an invocation of right to remain silent

- Police continued to talk to D after he unequivocally invoked his right to remain silent; D eventually re-engaged in the interview at officer's urging and only after

officer continued to talk to him in a way that was unquestionably designed to pull D back into the conversation. State v. Battering, 85 N.E.3d 605 (Ind. Ct. App. 2017).

- Detectives' questions relating to a possible false alibi and ostensibly unrelated, increasingly contentious questioning concerning children in D's care at time of her arrest amounted to interrogation, which was pursued despite D's clear invocation of her right to remain silent. State failed to show that police's community-caretaking function justified continued questioning. State v. Moore, 23 N.E.3d 840 (Ind. Ct. App. 2014).
- Police did not wait a substantial amount of time before re-initiating questioning and instead immediately began to question D right after he invoked his right to remain silent; nor did they re-advise him of his Miranda rights before re-initiating questioning. Mendoza-Vargas v. State, 974 N.E.2d 590 (Ind. Ct. App. 2012).
- D continuously and clearly invoked her right to remain silent, but officers continued interrogating for hours, without even stopping during the numerous invocations of the defendant's rights. Robinette v. State, 741 N.E.2d 1162 (Ind. 2001).
- Although officers waited 15 hours before attempting to renew interrogation of D who had claimed his right to silence, when officers renewed questioning, D again asserted his right to silence and refused to talk; D's statement was obtained improperly because officers asked D two times within five-minute period whether he wished to make statement. Craft v. State, 372 N.E.2d 472 (Ind. Ct. App. 1978).
- D invoked his right to remain silent, but officer once again questioned him later that evening, stating he wanted to offer "encouragement" as a fellow member of D's church, without providing fresh warnings. Stewart v. United States, 668 A.2d 857 (D.C. Ct. App. 1995).
- D asserted right to remain silent, and questioning stopped, but he was then transferred to a different location and left in room for several hours with crime scene pictures of victim on wall and officers making small talk with him. Subsequent statements were inadmissible despite D's waiver of rights because officers did not scrupulously honor assertion of Miranda rights. United States v. Taylor, 164 F.3d 150 (3rd Cir. 1998).

Note: The totality of circumstances still governs, and there may be other facts and circumstances present that provide greater weight in determining whether the police scrupulously honored a defendant's invocation of rights.

d. Do the police have a duty to clarify an ambiguous invocation?

Although an officer "should" stop and clarify an ambiguous invocation of the Defendant's rights, a police officer is not required to stop questioning or limit the questioning to clarify whether the Defendant wants to invoke his right to counsel or right to remain silent. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994); Goodner v. State, 714 N.E.2d 638 (Ind. 1999).

Article 1, Section 13 of the Indiana Constitution likewise does not require police to attempt to clarify an ambiguous statement. Taylor v. State, 689 N.E.2d 699 (Ind. 1997).

Edmonds v. State, 840 N.E.2d 456 (Ind. Ct. App. 2006) (because D's prior actions and statements cast doubt on legitimacy of her request for attorney, detectives were not required to stop questioning D and make a good faith, non-coercive inquiry into

whether she really intended to request attorney on waiver form before she spoke to police).

(1) Is Davis still good law?

Davis was decided partly on the basis that Miranda is not a constitutional requirement. Since Davis, the U.S. Supreme Court has held that Miranda is a constitutional requirement. Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000). Therefore, the Davis holding may be subject to reconsideration. Moreover, four of the nine justices concurred on the basis that they would impose a "stop and clarify" rule.

Moreover, other states have developed different approaches to the "stop and clarify" issue. For instance, in Utah, a police officer must stop and clarify the suspect's ambiguous invocation of his right to counsel after the suspect is informed of his rights. However, a police officer is not required to stop and clarify an ambiguous request after the suspect has waived his Miranda rights. State v. Leyva, 951 P.2d 738 (Utah 1997).

(2) Pre-Davis law

If a suspect's request for counsel is perceived to be inherently ambiguous or equivocal in light of preceding events, any further questioning should be narrowly limited to clarifying whether the suspect actually wished to have counsel present. Jackson v. State, 597 N.E.2d 950 (Ind. 1992); Sleek v. State, 499 N.E.2d 751 (Ind. 1986).

Clark v. State, 465 N.E.2d 1090 (Ind. 1984) (when D asserts right to counsel during questioning, subsequent confession is per se inadmissible absent proof that D initiated resumption of questioning and made voluntary/ knowing/ intelligent waiver of counsel).

Pilarski v. State, 635 N.E.2d 166 (Ind. 1994) (D's mumbling after initial advisement raised question as to assertion of right to counsel, and so advising him again was proper procedure to clarify situation; also no problem with questioning after D invoked right to remain silent because police needed to clarify counsel situation).

Cox v. State, 493 N.E.2d 151 (Ind. 1986) (invocation was ambiguous; D then continued to ask questions of officer, which constituted knowing waiver of right to counsel).

C. WAS THE DEFENDANT'S STATEMENT COMPELLED?

When a court orders an individual to participate in therapy, be evaluated for competency to stand trial, or provide a statement that can later be used against the individual, or if failure to cooperate would result in punishment of some type, the Fifth Amendment privilege against compelled self-incrimination is implicated. Thus, the State can use the individual's statement against him only if: 1) the individual was advised of his right to remain silent and that any statement he made could be used against him, and 2) the individual knowingly decided to waive those rights. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981).

Seo v. State, 148 N.E.3d 952 (Ind. 2020) (trial court's order compelling D to reveal the password to her locked iPhone and thereby decrypting it was testimonial and violated Fifth Amendment right against self-incrimination).

The privilege against self-incrimination exists until possibility of further incrimination ceases, i.e., when sentence has been fixed and judgment of conviction has become final.

Highbaugh v. State, 773 N.E.2d 247 (Ind. 2002) (affirming trial court's finding of contempt, Court held that because D expressed his intent to appeal his life sentence, he may have retained his Fifth Amendment privilege with regard to statutory aggravator, but privilege only extended to questions that could incriminate him on that matter).

1. Production of documents

A person may be required to product specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not "compelled." United States v. Hubbell, 530 U.S. 27, 35 (2000). Thus, a party cannot avoid a subpoena merely because the documents demanded contain incriminating evidence, whether written by others or voluntarily prepared by the defendant. Id. at 36. Moreover, the act itself of producing documents in response to a subpoena may have a compelled testimonial aspect by implicitly communicating statements of fact by admitting that the papers existed, was in the defendant's possession or control, and were authentic, particularly where the government was unable to describe the documents with reasonable particularity. Id.

2. Sex offender treatment

Where sex offender treatment is ordered as a condition of probation, any information given to the counselor is privileged and cannot be used against defendant at trial. Sims v. State, 601 N.E.2d 344 (Ind. 1992). Further, even if the treatment is a condition of probation, it is error to revoke a defendant's probation for failing to refuse to admit a "problem," and cannot count as failure to successfully complete counseling. Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991).

A defendant's Fifth Amendment rights do not cease simply because he or she is sentenced and incarcerated. McKune, Warden et al. v. Lile, 536 U.S. 24 (2002). However, they may be limited unless the conditions constitute "atypical and significant hardships on inmates in relation to the ordinary incidents of prison life." Id. Thus, a treatment program's requirement that a defendant admit all prior, uncharged criminal acts as part of treatment is not compulsion where the only punishment for failing to do so is losing certain rights and privileges during the incarceration (such as losing a television in the cell or visitation rights). Id.

Lacy v. Butts, 2015 WL 5775497 (S.D. Ind. 2015) (contra Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014) (certifying class for claim that deprivation of credit time based on refusal to participate in sex offender monitoring and treatment program is a serious hardship and program violates 5th Amendment privilege against self-incrimination).

3. Court-ordered mental health evaluations

Admission of testimony made by a defendant's counselor during a court-ordered evaluation or treatment violates a defendant's Fifth Amendment right against compelled self-incrimination in prosecution for the underlying offense. Sims v. State, 601 N.E.2d 344, 346 (Ind. 1992). Indiana has a physician-patient privilege by statute, which renders physician's incompetent to testify regarding matters communicated to them by patients in the course of

diagnosis or treatment. Watson v. State, 784 N.E.2d 515 (Ind. Ct. App. 2003). However, a defendant can waive this privilege by asserting his mental or physical condition at issue in a case, and thus waives this privilege to that extent, and only that extent. Id. Meaning that if the defendant's mental health is at issue in a case, a mental health counselor (or similar) may testify as to evaluation and defendant's mental health, but Fifth Amendment prohibits admission of any testimonial statements made by the defendant, unless directly related to the evaluation. Id.

> Kansas v. Cheever, 134 S. Ct. 596 (2013) (where a defense mental health expert who has examined D testifies that D lacked the requisite mental state, the prosecution may offer evidence from a court-ordered mental health exam for the limited purpose of rebutting D's evidence).

Although a mental health professional is statutorily required to report child abuse when suspected or admitted, the patient-physician privilege is not further abrogated with regard to confidential communications disclosed by a defendant while participating in counseling sessions ordered by a trial court pursuant to a previous report of child abuse or molestation. Daymude v. State, 540 N.E.2d 1263 (Ind. Ct. App. 1989).

4. "Clean-up statements" or other probationary confessions

A non-immunized clean-up statement as a condition of probation exceeds the trial court's statutory authority absent a reasonable relationship to the treatment of the accused and the protection of the public. Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000). The key ingredient is a grant of immunity included with the clean-up statement condition, which would ordinarily make such a statement lawful. Id. However, even if such a condition is imposed upon a defendant, he retains the right to remain silent at all times and may assert that right without violating that condition of probation. Id.

5. Statements obtained from public employees under threat of job loss

A suspect faced with a choice between self-incrimination or loss of his job is the antithesis of free choice to speak out or to remain silent and is thus coercive in an interrogation context. This can also be argued under the Fourteenth Amendment, as outlined below. See Criswell v. State, 45 N.E.3d 46 (Ind. Ct. App. 2015).

> Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616 (1967) (police officers questioned during an internal investigation did not give their statements voluntarily because they were expressly told that they would be terminated if they refused to answer any questions; incriminating statements made during inquiry were inadmissible in criminal case against the officers because they had an objectively reasonable belief that they would be terminated if the statements were not given).

6. Juvenile's statements to mental health evaluator

The 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.

> State v. I.T., 4 N.E.3d 1139 (Ind. 2014) (evidence derived from I.T.'s statements made during course of treatment as probation condition was protected by use immunity and derivative use immunity to encourage the child to participate "openly in treatment to reduce their likelihood of reoffending").

The compelled nature of a statement resulting from court-ordered therapy, treatment, or probation is a primary consideration in determining its voluntariness under the Fourteenth Amendment. For cases discussing this issue, see p. 48, *Was the Defendant's statement compelled?*

II. WAS THE DEFENDANT'S STATEMENT VOLUNTARY (DUE PROCESS VIOLATION)?

"A confession must be voluntary in order to be admissible under the Fourteenth Amendment due process provision. This requirement of voluntariness is distinct and separate from the requirement of voluntariness under the Fifth Amendment privilege against self-incrimination, but the two requirements are otherwise essentially the same." Kerr, 16 Indiana Practice § 7.4(b), 586 (1991).

A. RAISING THE VOLUNTARINESS ISSUE

1. Burden of proof

a. Indiana Constitutional requirements

Under the Indiana Constitution, the voluntariness of a confession must be proved beyond a reasonable doubt, and in reviewing voluntariness, the courts look at the totality of circumstances, reviewing all the evidence in the record rather than focusing only on the evidence supporting the finding of voluntariness. Magley v. State, 335 N.E.2d 811, 817 (Ind. 1975), *overruled on other grounds*, 689 N.E.2d 1238 (Ind. 1997) (reasonable doubt standard was approved by majority of Indiana Supreme Court); see also Scalissi v. State, 759 N.E.2d 618, 621 (Ind. 2001); Henry v. State, 738 N.E.2d 663, 664 (Ind. 2000); and Pruitt v. State, 834 N.E.2d 90, 114-15 (Ind. 2005).

b. Federal Constitutional requirements

Under the Federal Constitution, the prosecution only has to prove by a preponderance of the evidence that the confession was voluntary. Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 626-27 (1972); Smith v. State, 689 N.E.2d 1238 (Ind. 1997).

PRACTICE POINTER: To avoid the lower preponderance of evidence standard under the Federal Constitution, always challenge the admissibility of confessions under the Indiana Constitution. See, e.g., White v. State, 699 N.E.2d 630, 633, n.2 (Ind. 1998).

2. Role of court

The admissibility of a confession is to be determined by the trial court, not the jury. Coates v. State, 534 N.E.2d 1087 (Ind. 1989). The trial court should make a factual determination and weigh evidence regarding the voluntariness of a confession. Luckhart v. State, 736 N.E.2d 227 (Ind. 2000). Prohibiting the Defendant from introducing evidence disputing the voluntariness of a confession is a violation of the Defendant's right to present a defense. Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142 (1986).

Miller v. State, 770 N.E.2d 763 (Ind. 2002) (trial court erroneously excluded testimony of psychologist called by defense as expert in field of police interrogation and false confessions; given prominence of D's statement in State's case and unique circumstances present, exclusion of this evidence affected D's substantial rights); See also Carew v. State, 817 N.E.2d 281 (Ind. Ct. App. 2004).

PRACTICE POINTER: Be sure to have an expert on false confessions interview Defendant or review the police interrogation before proffering his opinion. Otherwise, his testimony is speculative and subject to exclusion. Ruiz v. State, 926 N.E.2d 532 (Ind. Ct. App. 2010).

3. Role of jury

The credibility of a confession is to be determined by the jury, not the trial court. Stanger v. State, 545 N.E.2d 1105 (Ind. Ct. App. 1989), *overruled on other grounds*, 689 N.E.2d 1238 (Ind. 1997). Even if the trial court finds that the statement is voluntary, the Defendant may still dispute its voluntariness at trial. The State must be permitted to present evidence on the issue of the Defendant's mental capacity to assist the jury in determining the statement's weight and credibility. Miller v. State, 825 N.E.2d 884 (Ind. Ct. App. 2005). If the jury finds the statement involuntary from a credibility standpoint, the statement should be given no weight in deciding the Defendant's guilt or innocence. Morgan v. State, 648 N.E.2d 1164 (Ind. Ct. App. 1995).

Morgan v. State, *supra* (trial court erred in not determining voluntariness issue as to admissibility of statement before allowing jury to hear voluntariness issue). See also Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).

Stanger v. State, *supra* at 1111 ("Stanger's premise is that the jury must determine for itself whether a confession has been knowingly and voluntarily given...Art. I, § 19 of Indiana Constitution has not been interpreted to require trial by jury of evidentiary rulings. Assuming...that this provision permits the jury to consider the competency of a confession anew before reaching its credibility, Stanger did not urge the jury to undertake that task here or seek an instruction authorizing the jury to disregard his statements if it found them to be involuntary.").

Miller v. State, 770 N.E.2d 763 (Ind. 2002) (erroneously excluded expert testimony would have assisted jury regarding psychology of relevant aspects of police interrogation and interrogation of mentally retarded persons, topics outside common knowledge and experience).

Carew v. State, 817 N.E.2d 281 (Ind. Ct. App. 2004) (appellate counsel was ineffective for failing to challenge on direct appeal trial court's exclusion of expert testimony regarding deceptive police techniques used in interrogation of mentally retarded individuals).

Shelby v. State, 986 N.E.2d 345 (Ind. Ct. App. 2013) (D's expert in murder trial sought to give testimony specific to challenged interrogation; expert not allowed to testify that techniques used increased risk of false confessions; no abuse of discretion in trial court's application of Miller and Rule 704(b)); see also Jimerson v. State, 56 N.E.3d 117 (Ind. Ct. App. 2016).

NOTE: The Defendant may be able to obtain an expert to explain coerced confessions and have the jury instructed as to the issue of voluntariness. See Morgan, *supra*, for language to construct an instruction. However, the Defendant cannot present evidence of an involuntary confession in the State's case-in-chief; rather, the Defendant must present the evidence in his case. Richeson v. State, 648 N.E.2d 384 (Ind. Ct. App. 1995).

B. DID STATE COERCION OVERBEAR THE DEFENDANT'S WILL?

A confession is involuntary if it is obtained by overbearing a person's will; the voluntariness of a confession is to be determined without any consideration of the reliability or probable truth or falsity of the confession. Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735 (1961). Voluntariness is determined by considering the manner in which the confession was obtained, considering the totality of the circumstances that surround the obtaining of the confession. Heald v. State, 492 N.E.2d 671, 677 (Ind. 1986).

Coercive police activity is a necessary predicate to a finding that the confession is involuntary within the meaning of the Due Process Clause. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986). However, coercive police activity is not a prerequisite to establish a violation of Article 1, Section 14 of the Indiana Constitution, as there may be other elements that would tend to support a finding of involuntariness. State v. Banks, 2 N.E.3d 71 (Ind. Ct. App. 2013). Thus, courts look to the totality of the circumstances to determine if the confession was voluntary, taking into account many factors, all discussed below, including: (1) whether the statement was made under a court order; (2) use of police trickery; (3) threats or promises by police; (4) defendant's race, age, or disability; (5) length of detention; (6) physical coercion; or (7) illegal police practices.

A confession is voluntary, if considering the totality of the circumstances, the confession is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will. Dillon v. United States, 150 F.3d 754 (7th Cir. 1998). The critical inquiry is whether the defendant's statements were induced by violence, threats, promises, or other improper influence. Page v. State, 689 N.E.2d 707, 710 (Ind. 1997). If the claim being made involves a non-custodial situation in which officers overbear a defendant's will to resist and bring about the confessions not freely self-determined, the appellate courts will examine the entire record and make an independent determination of the ultimate issue of voluntariness. Beckwith v. United States, 425 U.S. 341, 347-58 (1975).

Generally, the person subjecting the defendant to coercion must be a police officer, or an agent, in order for the coercion to be in violation of due process, and a defendant who is unaware of police presence cannot make a claim of police coercion.

> Patterson v. State, 563 N.E.2d 653 (Ind. Ct. App. 1990) (where child molest victim called D with police secretly listening in and convinced D into confessing to molestation, confession was voluntary because there was no police coercion).

Although the cases discuss "police coercion," coerced confessions may be inadmissible regardless of whether the police or a private citizen was the source of the coercion. Trinkle v. State, 284 N.E.2d 816, 820 (Ind. 1972) (DeBruler and Prentice, JJ., concurring).

1. Was the statement made under court order (mandatory)?

Where a court orders an individual to participate in therapy or provide a statement and failure to cooperate would result in punishment of some type, the compelled nature of the statement is a primary consideration in determining voluntariness.

> Hastings v. State, 560 N.E.2d 664 (Ind. Ct. App. 1990) (statement made to caseworker during court-ordered therapy in CHINS case could not be used against D in criminal case where statute required D to cooperate, and D was advised that full cooperation was required to avoid termination of parental rights).

However, the general obligation to appear and answer questions truthfully does not convert otherwise voluntary statements into compelled statements. A defendant may, even under compelled situations, still invoke his right to remain silent when he chooses.

Brabandt v. State, 797 N.E.2d 855 (Ind. Ct. App. 2003) (D's statement admitting drug and alcohol use to probation officer was not involuntary under 14th and 5th Amendments, despite fact that meeting was a prerequisite to D's conditional liberty; court rejected D's argument that confession was not voluntary due to probation officer's deceit in implying that if D signed affidavit he could get treatment rather than jail; D's testimony on this point was equivocal).

Jones v. State, 866 N.E.2d 339 (Ind. Ct. App. 2007), *disapproved on other grounds* (fact that D submitted to polygraph examination as part of court-ordered psychosexual exam does not mean that his confession was obtained by violence, threats, promises, or other improper influences so as to render it involuntarily made).

Clephane v. State, 719 N.E.2d 840 (Ind. Ct. App. 1999) (under totality of circumstances, D's statement was voluntary; D's cooperation in therapy was not mandated by statute or court; D voluntarily agreed to interview and testified that he knew he was free to leave when he arrived for interview).

Thomas v. State, 612 N.E.2d 604 (Ind. Ct. App. 1993) (confession made via Agreed Entry in CHINS case was voluntarily given and admissible against D because D had advice of counsel before giving statement).

In re A.H., 992 N.E.2d 960 (Ind. Ct. App. 2013) (D's due process rights did not prevent an interview of her children without her consent pursuant to I.C. 31-33-8-7).

NOTE: Although the above cases addressed court-ordered coercion as a Fifth Amendment violation, they all use a Fourteenth Amendment voluntariness approach. Thus, a Defendant faced with this problem should always object on the basis of both the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process clause. For cases dealing with the Fifth Amendment implications, see p. 48, *Was the Defendant's statement compelled?* For cases dealing with the Sixth Amendment implications, see p. 75, *Was the Confession given during a "critical stage" of the proceedings?*

2. Did the police use trickery to obtain the confession?

Police deception does not automatically render a confession inadmissible, but it is a factor to consider in the totality of the circumstances. Kahlenbeck v. State, 719 N.E.2d 1213 (Ind. 1999). A statement made by a juvenile during custodial interrogation in response to a materially false statement from a law enforcement officer regarding evidence or penalties/leniency is inadmissible against the juvenile unless certain exceptions apply. Ind. Code § 31-30.5-1-6 (effective July 1, 2023).

a. Lies

Police deceit during interrogation is not condoned and is not conclusive on the issue of voluntariness, but it does weigh heavily against a determination of voluntariness. Henry v. State, 738 N.E.2d 663, 664-65 (Ind. 2000). See also Heavrin v. State, 675 N.E.2d 1075 (Ind. 1996) and Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 14204 (1969) (lying alone does not compel a finding of involuntariness).

Not all police interrogation statements of conjecture, presented as fact, constitute police deception. If the police have a good faith basis for their technical falsehood, then their action will not be deemed deceptive. The Supreme Court has not explained whether cases involving legal misrepresentations rather than factual ones deserve a different analysis. Jackson v. Frank, 348 F.3d 658, 664, n.6 (7th Cir. 2003).

(1) Examples of confessions deemed involuntary due to police deception

- A police clerk at the police station pretended to be an eyewitness by appearing at the door of the interrogation room and saying, "yes, that's the man." Edwards v. State, 412 N.E.2d 223 (Ind. 1980).
- Where police falsely claimed they had a warrant to search all the vehicles on the premises and suggested that the suspects disclose any and all contraband before the search began, D's admission of the presence of an unlicensed handgun was involuntary and could not be used to establish probable cause to search the vehicle. Roehling v. State, 776 N.E.2d 961 (Ind. Ct. App. 2002).
- While an undercover officer, posing as a fellow prison inmate, does not commit unconstitutional deception by eliciting a confession from a D in this manner, it can, at times, rise to a level as to be a "gross deception" that violates due process, such as when the police go out of their way to deceive a D without any concern for the D's constitutional rights. Voltaire v. State, 697 So.2d 1002 (Fla. Ct. App. 1997).
- Lying to a D by telling him that he had talked to a murder victim, and he is "going to be okay." State v. Ritter, 485 S.E.2d 492 (Ga. 1997).
- Police falsely claimed they could get a court order compelling D to submit to a polygraph, claimed that police had bugged the defendant's home and tape-recorded a molestation with which D was charged, used a polygraph role-playing technique in interrogation, and repeatedly asserted that they only wanted to help D and his family and could only do so if he provided specific details of the offense. Cole v. State, 923 P.2d 820 (Ala. Ct. App. 1996).

Note: The totality of the circumstances still governs, and there may be other facts and circumstances present that provide a greater weight against a finding of voluntariness than the deception itself.

(2) Confessions held voluntary despite police deception

- Threatening to arrest a suspect's siblings if the suspect did not cooperate while the siblings were already actually in custody and telling a suspect that police had evidence of shoe prints that would be similar to his even though they had no actual evidence. Ellis v. State, 707 N.E.2d 797 (Ind. 1999).
- Falsely informing D of a problem with polygraph results. Harrington v. State, 755 N.E.2d 1176 (Ind. Ct. App. 2001).
- Urging a suspect to "cut a deal" before another suspect does. Bobby v. Dixon, 132 S. Ct. 26 (2011) (use of "prison dilemma" interrogation technique).
- Telling a suspect that an accomplice has been arrested and confessed. Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420 (1969).
- Fabricated evidence. Miller v. State, 770 N.E.2d 763 (Ind. 2002). See also Pierce v. State, 761 N.E.2d 821 (Ind. 2002) (false claim of DNA matches), and Giles v. State, 760 N.E.2d 248 (Ind. Ct. App. 2002) (not actually in possession of physical evidence claimed).

- Suggestion that D did not intend to kill a victim was merely a suggestion, not a hope of benefit and not misleading. Pittman v. State, 592 S.E.2d 72 (Ga. 2004).
- Misleading a D as to the seriousness of possible charges. Garmon v. State, 775 N.E.2d 1217 (Ind. Ct. App. 2002).
- Falsely claiming that a murder victim is still alive. Carter v. State, 490 N.E.2d 288 (Ind. 1986).
- Secretly recording and listening to conversations between D and child molest victim. Patterson v. State, 563 N.E.2d 653 (Ind. Ct. App. 1990).
- Assuring D that his girlfriend would be released from custody if he confessed, when in fact police knew D's girlfriend had already been released. Villa v. State, 721 N.E.2d 1272 (Ind. Ct. App. 1999).
- In obstruction of justice case, telling D days before his confession that a jury would understand that he was helping his father. Moore v. State, 143 N.E.3d 334 (Ind. Ct. App. 2020).
- Falsely informing D about recording the interview. Schneider v. State, 155 N.E.3d 1268 (Ind. Ct. App. 2020).
- Doroszko v. State, 185 N.E.3d 879 (Ind. Ct. App. 2022), *aff'd* 201 N.E.3d 1151 (Ind. 2023) (police telling D they believed he was a victim in the shooting incident did not render confession at the metro homicide unit several hours later involuntary).

b. Omission of the precise nature of potential charges

Miranda does not require the accused to be specifically informed of the precise nature of the potential charges for which the accused is being questioned. Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984); Armour v. State, 479 N.E.2d 1294 (Ind. 1985). However, it can be considered as part of the totality of circumstances surrounding the voluntariness of a confession. Even failing to advise a suspect of the possibility of the death penalty does not render a subsequent confession involuntary. Burgans v. State, 500 N.E.2d 183 (Ind. 1986). Nor does a failure to inform a suspect of victim's death that would cause potential elevated charges. Eliacin v. State, 380 N.E.2d 548 (1978).

Moore v. State, 143 N.E.3d 334 (Ind. Ct. App. 2020) (rejecting argument that D's confession was involuntary because detective violated Article 1, Section 13 of the Indiana Constitution when he refused to advise D of the charges he faced until after he made incriminating statements; this constitutional provision requires an accused to be sufficiently informed of the crime of which he is charged in writing so that he can prepare a defense).

3. Did the police use threats or promises to obtain the confession?

There are many different forms of threats and promises courts have considered, including but not limited to: (a) using defendant's personal relationships with others; (b) promises of immunity or leniency; (c) promises of confidentiality; (d) promising medical or psychological treatment; (e) threatening harsher treatment; (f) using improper *quid pro quo*; or (g) using the Reid technique.

a. Use of Defendant's personal relationships with others to gain the confession

Promising help or threatening harm to the suspect's family or friends may improperly overcome the suspect's will.

(1) Threats

The voluntariness of a defendant's confession may be challenged when the State makes threats against the family of the accused, even when the threats may not be carried out. Hall v. State, 266 N.E.2d 16 (Ind. 1971). "In order to prevail on such a challenge, however, the defendant must present evidence of direct threats made by the police." Storey v. State, 830 N.E.2d 1001 (Ind. Ct. App. 2005) (discussing Brown v. State, 587 N.E.2d 111, 113-14 (Ind. 1992).

Threats that merely suggest that the lack of a defendant's cooperation might magnify family members' roles as suspects is not enough to render a defendant's statement involuntary, because the possibility of their arrest would not have had an unduly coercive effect on the defendant. Ellis v. State, 707 N.E.2d 797 (Ind. 1999).

Storey v. State, 830 N.E.2d 1011 (Ind. Ct. App. 2005) (D's confession was rendered involuntary when officer reviewed potentially incriminating evidence against D and discussed likelihood that D's wife would be arrested; statement constituted a threat to arrest the wife when it was made as an apparent attempt to induce D to make a confession).

A.A. v. State, 706 N.E.2d 259 (Ind. Ct. App. 1999) (juvenile's confession was involuntary because officer insisted juvenile confess to incident of child molesting or State would not prosecute his uncle who had allegedly abused juvenile).

Hall v. State, 266 N.E.2d 16 (Ind. 1971) (where officers obtained confession by implying D's wife would be arrested and his children would be placed in someone else's custody if he did not confess to burglary, confession was inadmissible because it was produced by threat).

Hastings v. State, 560 N.E.2d 664 (Ind. Ct. App. 1990) (D's statement was involuntary because it was made to caseworker for DCS who was investigating an allegation that D's child was a child in need of services and D was required to cooperate in investigation under threat that failure to do so could result in terminating her parent-child relationship); see also Samuel v. Frank, 525 F.3d 566 (7th Cir. 2008) (equating threat to remove a suspect's children from home if he does not confess as torture).

Courts distinguish between a threat and a simple factual statement concerning the current situation at hand. Informing a suspect of the possible consequences of his crime, absent a subsequent promise or threat that unduly influences a defendant's decision to confess, is permissible.

Neal v. State, 522 N.E.2d 912 (Ind. 1988) (D's confession was voluntary despite officer's statement that girlfriend would have to go to jail and her four children would be turned over to Department of Public Welfare Court if he did not confess). See also Ellis v. State, 707 N.E.2d 797 (Ind. 1999).

(2) Promises

Vague statements that the defendant will benefit by cooperating and telling the truth do not constitute promises sufficient to render a statement involuntary. Giles v. State, 760 N.E.2d 248, 250 (Ind. Ct. App. 2002) (*citing* Fields v. State,

679 N.E.2d 1315, 1320 (Ind. 1997). Further, a vague promise that a defendant can help himself by cooperating with police is not sufficient. Williams v. State, 997 N.E.2d 1154 (Ind. Ct. App. 2013). Neither are police statements such as "help in every way he could," "could probably talk to the prosecutor and make a deal." See Ortiz v. State, 356 N.E.2d 1188 (Ind. 1976) and Ward v. State, 408 N.E.2d 140 (Ind. Ct. App. 1980).

Bailey v. State, 473 N.E.2d 609 (Ind. 1985) (D was not tricked into making confession by detective's "promise" to release D's friend if D told truth).

Johnson v. State, 513 N.E.2d 650 (Ind. 1987) (D's confession was voluntary, despite detective's offer to see what he could do about release of D's mother who was held on unrelated charge).

State v. Phillips, 30 S.W.3d 372 (Tenn. 2000) (where "Child Protective Team" investigator repeatedly asked D to confess in order to avoid intervention of law enforcement and insisted that a full confession was necessary in order to secure treatment for him and his stepdaughter, repeated comments were coercive and rendered statements involuntary).

Where a credible threat of physical violence against the defendant is found, and the police offer protection from that threat in exchange for a confession, that confession is not voluntary, and is a true coerced confession in every sense of the word.

Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991) (where paid FBI informant promised protection to mentally slow and physically small D who was receiving rough treatment in jail in exchange for confession, confession was involuntary).

b. Using Defendant's race, religion or legal situation to gain the confession

Police may employ a number of interrogation techniques, including lying, to secure a confession, but may not "imply that a suspect's race precluded him from receiving a fair trial and an impartial jury." Bond v. State, 9 N.E.3d 134, 136 (Ind. 2014).

Bond v. State, 9 N.E.3d 134 (Ind. 2014) (finding D's confession involuntary based on officer's intentional misrepresentation of rights to a fair trial and impartial jury, and right not to be judged by or for the color of your skin carried out as leverage to convince D that his only recourse was to forego his claim of innocence and confess).

c. Promising immunity or leniency

A confession obtained by promises of immunity or leniency is inadmissible. Ashby v. State, 354 N.E.2d 192 (Ind. 1976); A.A. v. State, 706 N.E.2d 259, 263 (Ind. Ct. App. 1999). Statements by police during arrests or interviews that explain possible crimes and penalties that might result are not specific enough to constitute either promises or threats. Kahlenbeck v. State, 719 N.E.2d 1213 (Ind. 1999). Merely suggesting possibility of minimal punishment such as treatment and house arrest in exchange for confession is not the same as promising immunity or mitigation. A.A. v. State, 706 N.E.2d 259 (Ind. Ct. App. 1999).

Walker v. State, 233 N.E.2d 483 (Ind. 1968) (D's statements were inadmissible where officers promised D he would not be prosecuted for buying suits from robbers of clothing store if he would help officer arrest robbers).

Ashby v. State, 354 N.E.2d 192 (Ind. 1976) (officer induced Ds to confess by direct representation to them that by confessing, they would be able to serve ten-year sentence rather than life term; statements were inadmissible).

McGhee v. State, 899 N.E.2d 35 (Ind. Ct. App. 2008) (at very least, detective's comments constituted an implied promise that D would not be prosecuted if he admitted having sex with his niece and it turned out that the sex was consensual; fact detective did not know that incest between consenting adults is a crime is irrelevant in determining voluntariness of confession).

(1) Proving that police made a promise/threat

When faced with conflicting versions of events, the trial court is entitled to make a ruling based on the credibility of witnesses and proof available, and appellate courts will not ordinarily disturb the ruling if it is supported by substantial evidence of probative value. Pardue v. State, 403 N.E.2d 1072 (Ind. 1980).

Brabandt v. State, 797 N.E.2d 855 (Ind. Ct. App. 2003) (D's equivocal testimony stating both that probation officer threatened him with jail if he did not sign affidavit admitting drug and alcohol use and at another point saying otherwise did not lead to a conclusion of coercion).

Hampton v. State, 468 N.E.2d 1077 (Ind. Ct. App. 1984) (although D contended that officers threatened to file charges which could result in 20-year sentence if he did not confess and promised D misdemeanor conviction/sentence if he cooperated, confession was voluntary because detective testified he told D to tell truth and that, although detective could make no promises, he could inform court if D were truthful/cooperative).

Bailey v. State, 473 N.E.2d 609 (Ind. 1985) (D's expectation that confession would gain release of friend was insufficient to render confession involuntary).

Possible argument: If able to prove the police made a promise upon which the Defendant relied, instead of suppressing the confession, the Defendant may insist on the enforcement of the bargain, regardless of whether the prosecutor knew of the arrangement. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971); Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988); United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983).

(2) Promise must be direct or implied

Vague or indefinite statements by police are not sufficient inducements to render a subsequent confession inadmissible. Hampton v. State, 468 N.E.2d 1077 (Ind. Ct. App. 1984). Rather, the statements must rise to the level that a reasonable person could have construed to mean that the officer was offering leniency in exchange for his confession. Fleener v. State, 412 N.E.2d 778 (Ind. 1981). Suggesting the possibility of minimal punishment and/or likelihood of prosecutorial leniency, without a direct or implied promise of immunity in exchange for a confession, is not sufficient.

Giles v. State, 760 N.E.2d 248 (Ind. Ct. App. 2002) (officer also told D that he didn't guarantee anything and that he should hear it from prosecutor).

Lord v. State, 531 N.E.2d 207 (Ind. 1988) (officer's statements that "If I could get [the prosecutor] down here right now and tell him the truth, if I could get him down here and you were willing to tell him the truth, and I could cut him a deal, would you ... would you talk to him? If I could promise you ... he'd cut a deal with you, would you then talk and tell the truth? ... [I]f I can get him down here, would you tell the truth, if he cut you a deal?" did not constitute unconstitutional promise).

Palmer v. State, 426 N.E.2d 1369 (Ind. Ct. App. 1981) (statements by police such as "seeing what they could do for him," "his cooperation might help in assisting him," or it would "be in his best interest to tell the real story" are not sufficient inducements to preclude submission of subsequent confession as evidence). See also Turpin v. State, 400 N.E.2d 1119 (1980).

Booker v. State, 386 N.E.2d 1198 (Ind. 1979) (D was not induced to confess to purse snatching, which resulted in D's conviction for felony murder, where he was told that it was possible that he would not be charged with any other first degree burglary because he was already charged with one first degree burglary).

Love v. State, 400 N.E.2d 1371, 1373 (Ind. 1980) (when an officer told a juvenile D that if he did not confess he might go to adult prison and that cooperation might help, the juvenile's confession was not rendered involuntary).

Garmon v. State, 775 N.E.2d 1217 (Ind. Ct. App. 2002) (Court rejected D's argument that he was improperly induced to make incriminating statements by erroneous assurances that he faced only misdemeanor charge of possession of child pornography in connection with images found on his computer). See also Massey v. State, 473 N.E.2d 146 (Ind. 1985).

Ford v. State, 504 N.E.2d 1012 (Ind. 1987) (fact that law enforcement officers told D that other people were making statements implicating him in murder and told him it would be in his best interest to make statement himself did not render D's subsequent confession involuntary).

(3) Plea bargains

If the Defendant seeks out the police for an agreement and later fails to live up to his end of the bargain, the confession is voluntary and admissible despite the promise of leniency.

Drew v. State, 503 N.E.2d 613 (Ind.1987) (where suspect asked to speak with prosecutor and indicated to prosecutor he was involved in alleged offense and would make statement in return for leniency and D pled guilty to lesser offense in exchange for full confession and testimony against other involved persons, D's confession was later admissible in trial when D refused to testify pursuant to agreement).

Bell v. State, 622 N.E.2d 450 (Ind.1993) (confession obtained as part of plea agreement is inadmissible against D if D thereafter refuses to plead guilty).

NOTE: If the State fails to live up to its end of the bargain, the statements is inadmissible. See State v. McDermott, 554 A.2d 1302 (N.H. 1989) (where D was paid CI for police and was told his statement would be confidential, his statement was inadmissible against him).

d. Promising that Defendant's statement would be kept confidential

The police telling a Defendant that his statement will be kept confidential will most likely invalidate the confession. People v. Tanser, 394 N.E.2d 616 (Ill.Ct.App. 1979). A confession made in reliance on a promise of confidentiality is involuntary and coerced. State v. McDermott, 554 A.2d 1302 (N.H. 1989).

e. Promising medical or psychiatric treatment

An officer's statement to the accused during interrogation that he will get mental health assistance for the accused does not constitute a promise of immunity or mitigation of punishment, absent a further promise that the treatment would be in lieu of prosecution. Smith v. State, 500 N.E.2d 190 (Ind. 1986); Fennell v. State, 492 N.E.2d 297 (Ind. 1986); and Phillips v. State, 428 N.E.2d 20 (Ind. 1981). Merely stating that it would be to the defendant's benefit to seek counseling is also not a promise of leniency. Johnson v. State, 484 N.E.2d 49 (Ind. Ct. App. 1985).

f. Threatening harsher treatment

When a confession is induced by a threat of harsher treatment rather than by a promise of more lenient treatment, the court will presume the confession was involuntary. Such threats convey to the suspects that they will be punished for their silence, including a refusal to give further answers. Threatening to tell the prosecutor about a failure of cooperation on the part of the accused may be excused in some circumstances, but "there are no circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor." United States v. Harrison, 34 F.3d 886, 891-92 (9th Cir. 1994).

Beavers v. State, 998 P.2d 1040 (Alaska 2000) (confession made after sixteen-year-old suspect was told by police that he would be "hammered" if he didn't talk was presumptively involuntary in absence of evidence affirmatively indicating that suspect's will was not overcome by this threat).

Kelley v. State, 825 N.E.2d 420 (Ind. Ct. App. 2005) (detective's statement to D that he could be charged with perjury for false informing was not a threat which rendered D's confession involuntary; detective was doing no more than explaining consequences of D's actions should he give false information).

Love v. State, 400 N.E.2d 1371 (Ind. 1980) (interrogating officer's statement D might be sent to adult prison instead of boys' school if he did not confess and that "his cooperation might help in assisting him" did not constitute prohibited threats).

Further, mere advisements of the possible punishments, such as the possibility of the death penalty, are not threats. Turner v. State, 682 N.E.2d 491 (Ind. 1997). See also Coppock v. State, 480 N.E.2d 941 (Ind. 1985). A confession induced by the threat of the death penalty maybe involuntary, but it can be voluntary if it is made by a suspect who initiates bargaining by which the confession is made in exchange for the prosecutor's

promise not to seek the death penalty. Morgan v. State, 587 N.E.2d 680 (Ind. 1992) (concluding that this agreement does not constitute a plea agreement and therefore defendant can challenge the voluntariness of the statement).

g. Use of confrontational style in Reid technique

A confession is voluntary if it is the product of rational intellect and not the result of psychological intimidation or deceptive interrogation tactics that have overcome the Defendant's free will.

Malloch v. State, 980 N.E.2d 887 (Ind. Ct. App. 2015) (although detective's interrogation which employed Reid technique was confrontational and intense in light of serious offenses being investigated, there is substantial evidence to support conclusion that D's statements were voluntary).

4. Did the police take advantage of the Defendant's race, disability, or age?

Upon an allegation that the Defendant's waiver was not knowing or voluntary because of a mental condition or impairment, the State has the burden of proving beyond a reasonable doubt that the waiver was in fact knowing, voluntary, and intelligent. Thomas v. State, 443 N.E.2d 1197, 1199 (Ind. 1983). The degree of impairment of the suspect's mental faculties at the time of waiver and the statement is of critical importance in determining whether the statement was given voluntarily. Turner v. State, 407 N.E.2d 235 (Ind. 1980). However, because coercive police activity is a necessary predicate to finding that a statement was involuntary under the due process clause, a suspect's mental condition alone will not ordinarily render a confession involuntary. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986).

State v. Banks, 2 N.E.3d 71 (Ind. Ct. App. 2013) (substantial evidence supported trial court's determination that D's confession that he murdered two women was involuntary and should be suppressed, where D was a seriously mentally ill inmate diagnosed with schizo affective disorder and housed apart from the general prison population; detective interviewed D at a time when he was involuntarily medicated, "out of it" (per psychologist's testimony) and in restraints during interrogation).

Brown v. State, 485 N.E.2d 108 (Ind. 1985) (although D's waiver and statement occurred 1.5 hours after officer observed D in emotionally upset state, D was competent to confess).

Possible argument: Although it is clear that under the due process clause of the U.S. Constitution a person's mental or physical condition, alone, will not render a person's confession involuntary, argue that the Indiana Constitution does not require police coercion in order to show involuntariness. State v. Banks, 2 N.E.3d 71 (Ind. Ct. App. 2013); Hurt v. State, 694 N.E.2d 1212 (Ind. Ct. App. 1998) (discussing DeBruler's concurrence in Linthicum arguing that Indiana constitutional definition of involuntary confession does not require police coercion and that physical or mental conditions can render a person's confession "involuntary"; see Linthicum v. State, 511 N.E.2d 1026, 1031 (Ind. 1987)).

Possible argument: Argue that even if the confession was not unconstitutionally obtained, the Defendant's mental condition renders the confession unreliable and inadmissible under Indiana Rule of Evidence 403. See Connelly, 107 S.Ct. at 521-22.

a. Juvenile suspects

In all cases involving juvenile confessions, it must be determined whether there were neutralizing pressures which rendered the confessions involuntary and whether those pressures resulted from police presence. Bluitt v. State, 381 N.E.2d 458 (Ind. 1978). Juveniles are treated differently than adults because: (1) a child is not equal to police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interest or how to get the benefits of his constitutional rights; (2) a child cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions; (3) a child has no way of knowing what the consequences of a confession are without the advice as to the child's rights -- from someone concerned with securing him those rights-- and without aid of a more mature judgment as to the steps he should take in the predicament in which the child finds himself; (4) a lawyer or an adult relative or friend can give the protection which the child's own immaturity does not. Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1209 (1960).

Gallegos v. Colorado, *supra* (confession of fourteen-year-old boy violated due process where boy was advised of his right to counsel without presence of lawyer or his parents).

Hall v. State, 346 N.E.2d 584 (Ind. 1976) (where record does not show that juvenile D was allowed to consult with guardian sister prior to execution of waiver of rights and solicitation of confession, it is insufficient to demonstrate that the juvenile and guardian were afforded a meaningful opportunity to counsel).

Bluitt v. State, *supra* (because of fundamental fairness of arresting officers and overriding atmosphere of respect during interrogation, plus no evidence of pressure, confession was admissible as voluntary despite failure of officials to allow juveniles to consult with parents prior to giving statements).

Chandler v. State, 419 N.E.2d 142 (Ind. 1981) (juvenile's confession was admissible where there was no evidence of force, coercion, or inducement).

Tingle v. State, 632 N.E.2d 345 (Ind. 1997) (fact that neither juvenile nor grandmother were informed of potential charges or penalties facing juvenile prior to waiver of rights and confession did not invalidate confession as involuntary).

For a detailed discussion on the Indiana statutory requirements for interrogations of juveniles, see p. 82, *Did the taking of the statement violate Indiana statutory requirements concerning interrogations of juveniles?*

b. Low IQ

A suspect's lower level of intelligence is not an absolute bar to a free and voluntary confession but is merely a factor to be considered by the trial court when coming to its decision on whether the jury may hear the confession. Haviland v. State, 677 N.E.2d 509 (Ind. 1997).

(1) Examples of involuntary confessions

Robbins v. State, 235 N.E.2d 199 (Ind. 1968) (where D had borderline I.Q., was not timely advised of her rights, and was suffering from mental disorder, her confession was involuntary).

Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860 (1961) (where D, who had mental age of nine, was held for five days of repeated questioning during which police employed coercive tactics, confessions made at end of such period were not voluntary and their use deprived D of due process).

(2) Confessions held voluntary despite low IQ

Thacker v. State, 477 N.E.2d 921, 922 (Ind. Ct. App. 1985) (D's confession was voluntary despite fact he had I.Q. of 67).

Goodman v. State, 453 N.E.2d 984 (Ind. 1983) (although D had only third grade education, his statement was voluntary).

c. Mental impairment

The mere fact that a defendant is mentally ill does not render his statement inadmissible *per se*; instead, it is just one of the factors to be considered by the trier of fact in determining the voluntariness of a statement. Pruitt v. State, 834 N.E.2d 90, 115 (Ind. 2005). While a finding of involuntariness cannot be predicated solely upon a defendant's mental instability, the mental state is relevant to the extent that it makes him more susceptible to mentally coercive police tactics. Smith v. Duckworth, 910 F.2d 1492 (7th Cir. 1990). Where evidence establishes that a defendant is "insane and incompetent," "of low mentality, if not mentally ill," or "has a history of emotional instability" and is subjected to coercive police tactics, the confession is likely involuntary. See, e.g., Blackburn v. Alabama, 361 U.S. 199 (1960).

(1) Confession deemed involuntary

State v. Banks, 2 N.E.3d 71 (Ind. Ct. App. 2013) (substantial evidence supported trial court's determination that D's confession that he murdered two women was involuntary and should be suppressed, where D was a seriously mentally ill inmate diagnosed with schizo affective disorder and housed apart from the general prison population; detective interviewed D at a time when he was involuntarily medicated, "out of it" (per psychologist's testimony) and in restraints during interrogation).

Russell v. State, 460 N.E.2d 1252 (Ind. Ct. App. 1984) (where D only testified he was sophomore at IUPUI, was not crazy and his signature was on waiver of rights form, State failed to prove beyond reasonable doubt that D's statement made while in LaRue Carter mental hospital was voluntary).

Smith v. Duckworth, 910 F.2d 1492 (7th Cir. 1990) (D's confession was involuntary where D was held for thirty days without being charged, was mentally unstable, questioned for total of nine hours before confessing, and allegedly was threatened with transfer to cell with detainee whom he feared; mental state is relevant if it makes D more susceptible to mentally coercive tactics).

Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274 (1960) (confession suppressed because D was probably insane at time of confession and police learned during interrogation of his history of mental problems which police exploited with coercive interrogation tactics; D was interrogated for 8 or 9 hours in a tiny room).

(2) Confession deemed voluntary

Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515 (1986) (confession was voluntary although psychiatrists concluded D confessed while in "psychotic state" in which he was experiencing "command hallucinations" and confessed because he was ordered to do so by the "voice of God"; police did not use coercive tactics). See also Pettiford v. State, 619 N.E.2d 925 (Ind. 1993).

Ferry v. State, 453 N.E.2d 207 (Ind. 1983) (fact that D initially was found incompetent to stand trial did not render his earlier confession involuntary).

Nichols v. State, 542 N.E.2d 572 (Ind. Ct. App. 1989) (where three psychiatrists testified that D's statements were voluntary, trial court did not err in denying D's motion to suppress).

Farris v. State, 901 N.E.2d 1123 (Ind. Ct. App. 2009) (where D's interrogation did not take place in custodial setting and officers questioning him were unaware of his disability and did not engage in coercion, Court could not say as a matter of law that D's confession was involuntarily given although he functioned at a second-grade level).

d. Intoxication/Drugs

Intoxication is a consideration in determining the voluntariness of a statement. Where the Defendant contends a statement is inadmissible due to a mental impairment, the degree of such impairment is critical to the determination of whether the Defendant voluntarily waived his rights. Thomas v. State, 443 N.E.2d 1197, 1199 (Ind. 1983). However, when a Defendant challenges the voluntariness of a confession solely because of the influence of drugs, the Defendant has the burden of presenting evidence to show that the amount and nature of the drugs consumed could have produced an involuntary confession. Gibson v. State, 515 N.E.2d 492, 494-95 (Ind. 1987); Wiseheart v. State, 491 N.E.2d 985, 992-93 (Ind. 1986) (imposing same requirement for involuntariness claim based on alcohol).

The court will "look to the totality of the circumstances to determine whether the consumption of alcohol or other drugs so affected the person giving the statement that the person was deprived of his free and independent will such that the statement was the product of an irrational mind or coercion." Houchin v. State, 581 N.E.2d 1228, 1231-32 (Ind. 1991). Also, some courts have held that intoxication, without police coercion, will not result in an involuntary confession. Crain v. State, 736 N.E.2d 1223, 1231 (Ind. 2000); Williams v. State, 669 N.E.2d 956 (Ind. 1996); Linthicum v. State, 511 N.E.2d 1026 (Ind. 1987).

A confession may be inadmissible if the defendant was so intoxicated or impaired as to be unconscious of what he was doing, or in a state of mania. Owens v. State, 754 N.E.2d 927 (Ind. 2001). In making this determination, courts consider: (1) whether the defendant appears calm, but alert, and responsive; (2) whether defendant speaks distinctly (not slurring) and seems oriented to his surroundings; and (3) telling the story in a logical

order. See Brooks v. State, 683 N.E.2d 574 (Ind. 1997); and Lambert v. State, 643 N.E.2d 349 (Ind. 1994). Courts also look at the amount of physical coordination a defendant shows during an interrogation, such as smoking a cigarette or handwriting statements. Houchin v. State, 581 N.E.2d 1228 (Ind. 1991).

(1) Confession deemed involuntary due to intoxication

Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745 (1963), *overruled on other grounds* (confession was involuntary where police physician had given D "truth serum" and confession was obtained by officers who knew D was drugged).

State v. Williams, 208 So.2d 172 (Miss. 1968) (trial court correctly excluded oral confessions made by D who was in an acute, rampant state of intoxication equivalent to a mania, despite passage of about eight hours between arrest and confession; D was so intoxicated he did not recognize someone he had known his entire life and could not tell whether it was day or night; D's deranged and imbalanced state could not have permitted rational waiver of constitutional rights).

Logner v. North Carolina, 260 F. Supp. 970 (M.D.N.C. 1966) (where D was so drunk that he was unable to put his car in reverse, had to be helped from his car, and initially was unable to make a statement, his confession under repeated interrogation was not voluntary).

Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968) (D was so intoxicated he had difficulty changing his shirt, filling his pipe, slurred his words and staggered around).

(2) Confession voluntary despite intoxication

Owens v. State, 754 N.E.2d 927 (Ind. 2001) (no error in admitting confession despite fact that, several hours before D confessed, he voluntarily smoked cigarette laced with embalming fluid, animal tranquilizer, ether and PCP).

Scalissi v. State, 759 N.E.2d 618 (Ind. 2001) (State met its burden of proving that D's confession was voluntary, intelligent, and freely made despite evidence that he had not slept night before, had been ingesting large quantities of alcohol, along with LSD, crank, methamphetamine, and marijuana, and had been struck and kicked in head a short time before making statement).

Houchin v. State, 581 N.E.2d 1228 (Ind. 1991) (officers' testimony that D told them the drugs had worn off and that D showed no signs of intoxication was sufficient to outweigh fact that D smoked marijuana and ingested LSD, Librium, and codeine before giving statement); see also Luckhart v. State, 736 N.E.2d 227 (Ind. 2000).

Simpson v. State, 506 N.E.2d 473 (Ind. 1987) (mere fact that BAC test provides presumptive evidence that one's motor skills are sufficiently impaired to safely drive car does not necessarily imply that mental processes are incapable of knowing/intelligent waiver of rights; where D's BAC was 0.127 forty minutes after confessing, confession was voluntary).

Johnson v. State, 584 N.E.2d 1092, 1099 (Ind. 1992) (although D was unsteady when he was arrested and at times mumbled and grew violent, D's statement was voluntary).

George v. State, 397 N.E.2d 1027 (Ind. Ct. App. 1979) (where D invited police officers into his home to talk, was coherent during their conversations despite D's testimony he had consumed two pints of whisky and over 24 cans of beer during day, and D's sisters testified that D sometimes acted normally even though he was heavily intoxicated, confession was voluntary).

Jackson v. State, 411 N.E.2d 609 (Ind. 1980) (although D testified he consumed both alcohol and drugs on morning he confessed, his confession was voluntary where police officers testified D did not appear intoxicated or to be under influence of drugs). See also Thomas v. State, 443 N.E.2d 1197 (Ind. 1983); Thomas v. State, 656 N.E.2d 819 (Ind. Ct. App. 1995).

Flowers v. State, 481 N.E.2d 100 (Ind. 1985) (D, under sedation and sleepy, spontaneously volunteered confession to officer whom he had known for eight years through Boys Club and who was guarding him at hospital following his arrest).

Schneider v. State, 155 N.E.3d 1268 (Ind. Ct. App. 2020) (D's alleged intoxication did not render his statement involuntary when detectives both testified that they did not notice any signs of intoxicated and a forensic toxicologist testified that a person with the levels of drugs found in D's system would have been "conscious of what [he was] doing and would not [have] be[en] in a state of mania").

e. Physical condition/pain

The physical condition of the Defendant is a circumstance the Court must consider when determining the voluntariness of the confession.

(1) Confession deemed involuntary

Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978) (where D was interrogated at hospital for several hours after being seriously wounded during exchange of gunfire with police, statement was involuntary because D's will was overborne).

Kokenes v. State, 13 N.E.2d 524 (Ind. 1938) (confession was unreliable where police cruelly beat and tortured D to influence him to confess).

(2) Confession deemed voluntary

Coleman v. State, 490 N.E.2d 711 (Ind. 1986) (although court considered fact that veins in D's arm had collapsed causing pain, it held that confession was voluntary).

Polk v. State, 467 N.E.2d 666 (Ind. 1984) (although court considered fact that D was in pain caused by untreated broken hand, it held confession was voluntary).

Poling v. State, 515 N.E.2d 1074 (Ind. 1987) (D's confession was not result of coercion, even though D was not given food or drink and was handcuffed to bench in waiting room for five hours, absent evidence that D desired food or drink, or that D was threatened or mistreated by police or that they pressured D to give statement).

Jordan v. State, 510 N.E.2d 655 (Ind. 1987) (D's statement was voluntary, where he did not claim he was in pain due to onset of methadone withdrawal or was unable to continue with his statement).

Malott v. State, 485 N.E.2d 879 (Ind. 1985) (D's four statements to police were volunteered; mere fact D had been shot, was handcuffed behind his back and was uncomfortable did not render statements inadmissible).

Maxwell v. State, 839 N.E.2d 1285 (Ind. Ct. App. 2005) (abrasion on D's forehead did not render him "a seriously and painfully wounded man on the edge of consciousness" as in Mincey).

Sage v. State, 114 N.E.3d 923 (Ind. Ct. App. 2020) (D understood, waived rights and gave voluntary statement to police while hospitalized and medicated for gunshot wounds he sustained during the offenses).

f. Race

Police may employ a number of interrogation techniques, including lying, to secure a confession, but may not "imply that a suspect's race precluded him from receiving a fair trial and an impartial jury." Bond v. State, 9 N.E.3d 134, 136 (Ind. 2014).

Bond v. State, 9 N.E.3d 134 (Ind. 2014) (finding D's confession involuntary based on officer's intentional misrepresentation of rights to a fair trial and impartial jury, and right not to be judged by or for the color of your skin carried out as leverage to convince D that his only recourse was to forego his claim of innocence and confess).

5. How long did the police detain the Defendant before extracting the confession?

A confession made during an unreasonable delay between the arrest and the initial hearing may be inadmissible under the Fourth Amendment and the Fourteenth Amendment. Although counsel will want to raise challenges under both Amendments, courts often do not distinguish between the two. "Although standards for determining admissibility are stated differently with reference to the Fourth and the Fifth [Fourteenth] Amendments, the standards are essentially the same." Kerr, 16 Indiana Practice § 7.5(d), 598 (1991). Both approaches consider the length of the delay and the reason for the delay.

NOTE: Title 18 U.S.C. 3501- read together with Fed. R. Crim. P. Rule 5(a), McNabb v. United States, 318 U.S. 332 (1943) and Mallory v. United States, 354 U.S. 449 (1957) - requires that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the Defendant before the magistrate judge to be told formally of the charges against him. Corley v. United States, 129 S. Ct. 1558 (2009). Indiana does not have a similar statute.

a. Due process standard – product of illegal detention

An unreasonable delay between arrest and initial hearing is a consideration in determining the voluntariness of a statement given during that time. Myers v. State, 510 N.E.2d 1360 (Ind. 1987). Under a due process analysis, courts not only look at the length of delay between the arrest and initial hearing, but also the length of delay between the arrest and statement. Kerr, 16 Indiana Practice § 7.5(c), 595-96 (1991). Under the Fourth Amendment, the determination of the illegality of a detention is only the first step in the analysis of whether the resulting confession should be suppressed. Suppression is only required if the statement resulted from the inherently coercive effect of the prolonged, illegal detention. Minnick v. State, 544 N.E.2d 471 (Ind. 1989).

Moss v. State, 900 N.E.2d 780 (Ind. Ct. App. 2009) (although detective's statement to D's fiancé (that D "couldn't" post bond) was misleading, there is no evidence that D ever invoked his right to offer bail and earn his release, nor is there any evidence that D ever asked to stop the interrogation so that he could raise bail; regardless of legality of D's detention vis-a-vis body attachments and bonds, police had an independent basis on which to hold D).

b. Length of delay

A delay longer than forty-eight hours is presumptively unreasonable and violates the Fourth Amendment. County of Riverside, Calif. v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661 (1991); Ind. Code § 35-33-7-1 (probable cause hearing must be held promptly). Delays in the probable cause hearings of less than 48 hours may be unreasonable if delay was for the purpose of justifying the original arrest. Id. Even though legal detention of a short duration may render a confession inadmissible, the possibility that the lawful detention has become unlawful increases as the length of the time of holding the person in custody increases. Taylor v. State, 406 N.E.2d 247 (Ind. 1980). Even where there is an unreasonable delay, a resulting confession can still be an admissible if it was voluntary and the product of the defendant's own free will. Peterson v. State, 674 N.E.2d 528 (Ind. 1996).

The time in which a period of detention starts is at the time in which a defendant is taken into custody, and not the time in which police conduct a "formal arrest." People v. Moore, 509 N.Y.S.2d 259 (N.Y. Sup. Ct. 1986).

Carpenter v. State, 383 N.E.2d 815 (Ind. 1978) (fact that D was detained for approximately 72 hours between arrest and arraignment did not make incriminating statements he made during that time inadmissible, where D was fully informed of his rights and made a voluntary, informed waiver of them).

c. Cause of the delay

Examples of unreasonable delay are delay for the purpose of gathering evidence to justify the arrest, delay motivated by ill will against the arrestee, or delay for delay's sake. County of Riverside, Calif. v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991). Thus, when a defendant is detained and the police delay bringing him before a magistrate for the sole purpose of investigating other criminal offenses rather than processing him on the warrantless arrest charge, the delay in processing may be unconstitutional and any confession obtained in the interim must be suppressed. United States v. Davis, 174 F.3d 941 (8th Cir. 1999). A delay following a request for counsel can serve as an effective denial of the right to counsel, in violation of due process. Blatz v. State, 369 N.E.2d 1086 (Ind. Ct. App. 1977).

(1) Confession involuntary due to delay

Hughes v. State, 385 N.E.2d 461 (Ind. Ct. App. 1979) (an illegal arrest followed by an illegal detention renders any subsequent confession involuntary, where the purpose of the illegal detention was nothing more than to buy the investigators more time to investigate the crime and find evidence to make a detention lawful; here, officers were aware of "deleterious" effects of detention on D's will to resist interrogation and delay was unreasonable).

Nacoff v. State, 267 N.E.2d 165 (Ind. 1971) (where D was held "incommunicado" for period of four-and-one-half days before making statement, statement was suppressed).

Blatz v. State, 369 N.E.2d 1086 (Ind. Ct. App. 1977) (where delay aided denial of counsel to indigent suspect after suspect had requested counsel, statement was involuntary).

People v. Moore, 509 N.Y.S.2d 259 (N.Y. Sup. Ct. 1986) (13-hour delay after D was fully processed and ready to be arraigned was unreasonable; in light of prosecutor's failure to provide justification for delay and officers' earlier unsuccessful attempt to obtain confession from D, it is clear that D was held solely to be interrogated before right to counsel attached).

(2) Confession voluntary despite delay

Griffith v. State, 788 N.E.2d 835 (Ind. 2003) (although 63 hours passed between D's arrest and his appearance before magistrate for determination of probable cause, trial court properly denied D's motion to suppress confession, because it occurred two days after D's initial hearing, during an interview which he requested).

Fortson v. State, 385 N.E.2d 429 (Ind. 1979) (although D was detained for unreasonable period of five days before being arraigned, and 30 hours before making statement, police were working within confines of existing local court system and their misconduct was not excessively flagrant).

Dowdell v. State, 374 N.E.2d 540 (Ind. Ct. App. 1978) (confession made more than six hours after initial detention was voluntary since delay was caused by father getting to station).

Possible argument: If police are routinely interrogating arrestees prior to initial hearings, argue that the police are violating the arrestees' Sixth Amendment right to counsel by trying to delay the process and take advantage of the unrepresented arrestees. See People v. Moore, 509 N.Y.S.2d 259 (N.Y.Misc. 1986).

Possible argument: Argue that under the Indiana Constitution, suppression is required when an arrestee is held longer than 48 hours without a justifiable reason. Ignoring the McLaughlin rule is equivalent to ignoring the warrant requirement. State v. Huddleston, 924 S.W.2d 666 (Tenn. 1996) (exclusionary rule requires suppression of any statement made during detention in violation of McLaughlin); but see Myers v. State, 510 N.E.2d 1360 (Ind. 1987) (violation of state law requiring that Defendant be promptly brought before magistrate is merely one factor to consider in totality of circumstances to determine whether statement was voluntary).

6. Did police use physical coercion or excessive force to obtain the confession?

A confession is inadmissible, almost *per se,* if a confession is obtained following excessive force, such as beating or torturing a suspect. Kokenes v. State, 13 N.E.2d 524 (Ind. 1938). Not only will the coerced confession be suppressed, but the application of excessive force to obtain the confession violates the Constitution and is immediately actionable under a § 1983 claim, even if the prosecutor never tries to use the confession at trial. Gonzalez v. Entress, 133 F.3d 551 (7th Cir. 1998).

Schneider v. State, 155 N.E.3d 1268 (Ind. Ct. App. 2020) (force used by several officers to help detective retrieve confession that D wrote but then attempted to cross out was not unreasonable).

State v. Jones, 191 N.E.3d 878, 885 (Ind. Ct. App. 2022) ("simply being handcuffed does not render a statement involuntary").

7. Did the confession follow illegal police practices?

a. Using illegally obtained evidence to extract the confession

Admissions made during or after an illegal search or seizure are not necessarily inadmissible. Confrontation with incriminating evidence does not amount to coercion. Mays v. State, 469 N.E.2d 1161 (Ind. 1984). However, it is a factor for the court to consider under the totality of the circumstances.

McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007) (although State and D agreed in advance that polygraph would be non-stipulated, D's resulting incriminating statements made during post-polygraph phase of examination were voluntary and admissible; confronting a suspect with polygraph results is not coercive or unreasonable).

b. Confession resulting from an illegal arrest

A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Triplett v. State, 437 N.E.2d 468 (Ind. 1982); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979).

c. Using an earlier illegal statement to obtain a subsequent statement

"After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed." Hendricks v. State, 371 N.E.2d 1312, 1313-14 (Ind. 1978). Nevertheless, a prior involuntary statement does not always render a second/subsequent confession inadmissible. A second statement may be admissible when there is a "break in the chain of events sufficient to insulate that statement from that which went before." Id.

Johnson v. State, 380 N.E.2d 1236, 1241 (Ind. 1978) (fact that D had "let the cat out of the bag" in her prior statements is only one factor to be considered in totality of circumstances when determining voluntariness, and thus admissibility, of his third statement).

The fact that Miranda warnings precede a second confession may not purge the taint of improprieties surrounding the first statement. The trial court should consider: 1) the temporal proximity of the illegality and the confession; 2) the presence of intervening circumstances; and 3) the flagrancy of official misconduct. Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254 (1975).

Abner v. State, 479 N.E.2d 1254 (Ind. 1985) (where D signed waiver form, 15 days had passed since involuntary confessions, and D had reason to know that immunity

agreement was no longer valid, there was break in chain of events sufficient to insulate statement from two prior inadmissible statements).

Bailey v. State, 473 N.E.2d 609 (Ind. 1985) (D's subsequent waiver and confession was voluntary although D responded to police officer's earlier question of "what are you doing here" when officer got on elevator with D).

Meadows v. State, 785 N.E.2d 1112, 1119 (Ind. Ct. App. 2003) (police officers, obtained in violation of Miranda, but may not use earlier statement to threaten or coerce D into giving a subsequent statement).

NOTE: For a discussion on the admissibility of statements made after an illegal arrest, see p. 99, *State's use of voluntary statements made after an illegal arrest or search*.

8. Did the police tape record the confession?

Indiana Evidence Rule 617 prohibits the admission of unrecorded statements during custodial interrogations in places of detention. There are seven exceptions to this rule, which can be found in Part V on p. 88.

Fansler v. State, 100 N.E.3d 250 (Ind. 2018) (motel room used for sting operation and custodial interrogation was not a "place of detention" requiring electronic recording).

Steele v. State, 975 N.E.2d 430 (Ind. Ct. App. 2012) (Indiana Evidence Rule 617 applies only to custodial interrogations made in a "place of detention," defined as "a jail, law enforcement agency station house, or any other stationary or mobile building owned by a law enforcement agency." As such, it did not apply where the custodial interrogation took place at a gas station and not a "place of detention.").

C. DID POLICE INTERVIEW DEFENDANT'S CHILDREN WITHOUT PARENTAL CONSENT?

A separate voluntariness issue is whether a defendant's fundamental due process rights under the Fourteenth Amendment prevent an interview of the defendant's children without the consent of the parent. A parent's fundamental right to raise a child without undue state intervention is not absolute but may be overridden by significant state interests such as protecting the welfare of children. See Ind. Code § 31-33-8-7 (allowing DCS to interview child in school or home without parental consent pursuant to court order or if there are exigent circumstances).

In re A.H., 992 N.E.2d 960 (Ind. Ct. App. 2013) (no violation of mother's due process rights; required by IC 31-33-8-7 to surrender children for interrogation; mother fought court order after testing clean and having home inspected).

III. DID THE TAKING OF THE STATEMENT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL?

A person who is undergoing police interrogation may have a right to the assistance of counsel under the Sixth Amendment that is separate and distinct from the right to counsel under the Fifth Amendment. Kerr, 16 Indiana Practice § 7.3(b), 582 (1991).

A. HAD THE DEFENDANT'S RIGHT TO COUNSEL ATTACHED AT THE TIME OF THE STATEMENT?

The Sixth Amendment right to counsel attaches when the prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings. Curry v. State, 643 N.E.2d 963 (Ind. Ct. App. 1994). However, the right to counsel under Article 1, Section 13 of the Indiana Constitution provides greater protection "because it attaches earlier—upon arrest, rather than only when 'formal proceedings have been initiated' as with the federal right." State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016) (*quoting* Taylor v. State, 689 N.E.2d 699, 703-04 (Ind. 1997)).

1. Was the statement given during a criminal prosecution?

The Sixth Amendment right to counsel attaches only in criminal prosecutions; there is no such right in administrative actions. Davis v. State, 367 N.E.2d 1163 (Ind. Ct. App. 1977).

Crump v. State, 740 N.E.2d 564 (Ind. Ct. App. 2000) (D did not have right to counsel at Community Corrections administrative hearing concerning termination of his work release).

2. Had the Defendant been charged at the time of the statement?

a. Under the Sixth Amendment

"Once the adversarial judicial process has been started, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings." Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009).

NOTE: Pursuant to Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404 (1986), law enforcement was prohibited from initiating an interview of a Defendant after he had been charged. However, in Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009), the Supreme Court expressly overruled Jackson and held that a Defendant's request for counsel at an arraignment or initial hearing does not invoke his right to counsel at an interrogation.

Thus, law enforcement may attempt to talk with charged defendants, although arguably the officer must advise the Defendant of his right to counsel and the Defendant must waive such.

b. Under Article I, § 13 of the Indiana Constitution

Article 1, Section 13 of the Indiana Constitution guarantees that an accused has the right "to be heard by himself and counsel" in all criminal prosecutions. Unlike the Sixth Amendment, the right to counsel under the Indiana Constitution attaches earlier—upon arrest, rather than only when formal charges are filed against the accused. State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016).

Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (law enforcement officials have a duty under Ind. Constitution to inform a custodial suspect immediately when an attorney hired by suspect's family to represent him is present at police station seeking access to him; courts have specifically distinguished between attempts to contact client in person, as in this case, and attempts over the phone, as in Ajabu v. State, 693 N.E.2d 921 (Ind. 1998)).

Caraway v. State, 891 N.E.2d 122 (Ind. Ct. App. 2008) (D's right to counsel attached immediately prior to detective's request to sign polygraph stipulation agreement;

court declined to follow result reached in Kochersperger v. State, 725 N.E.2d 918 (Ind. Ct. App. 2000) that the right to counsel cannot attach earlier than at the initiation of criminal proceedings).

Compare with Oberst v. State, 935 N.E.2d 1250 (Ind. Ct. App. 2010) (where D's attorney accompanied him to an interview during which D confessed, D did not have IAC claim against attorney because D did not have a Sixth Amendment right to counsel at the time of the interview because the State had yet to file charges).

Rodenbush v. State, 17 N.E.3d 934 (Ind. Ct. App. 2014) (Oberst does not control; although D gave his statement to police before charges were filed against him, trial court had conducted D's initial hearing, thus D had right to counsel at time he was advised by attorney to give statement to police).

Wroe v. State, 16 N.E.3d 462 (Ind. Ct. App. 2014) (to the extent right to counsel under Indiana Constitution sometimes attaches before charges are filed, D waived right by signing polygraph stipulation which contained clear provision regarding waiver of right to counsel).

3. Did the subject of the interrogation concern the charged offense?

a. Under the Sixth Amendment

The Sixth Amendment right to counsel is offense-specific and cannot be invoked for future prosecutions because it does not attach until prosecution commences. McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204 (1991). Thus, a Defendant who invokes his Sixth Amendment right to counsel has not invoked his Sixth Amendment right to counsel on unrelated or even factually related matters that have not yet been charged. Little v. State, 694 N.E.2d 762 (Ind. Ct. App. 1998).

Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335 (2001) (Sixth Amendment right to counsel does not attach to uncharged crimes, even though they may be factually related to a charged offense, unless they would be considered same offense under Blockburger double jeopardy test).

Jewell v. State, 957 N.E.2d 625 (Ind. 2011) (Article 1, Section 13 of the Indiana Constitution provides more protection than Texas v. Cobb (above); under Indiana Constitution, the right to counsel also attaches to police questioning regarding offenses which are inextricably intertwined with the charge on which counsel is already representing D).

State v. Ashley, 661 N.E.2d 1208 (Ind. Ct. App. 1995) (although D had already invoked his Sixth Amendment right to counsel on unrelated charges, where D had not been charged with crime related to statements at time that statements were made to informant during jail visit, there was no violation of D's Sixth Amendment right to counsel).

Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990) (use of undercover police officer posing as cellmate to elicit statement from D about murder unrelated to charge on which D was incarcerated did not violate the Sixth Amendment).

b. Under the Indiana Constitution

Article 1, Section 13 of the Indiana Constitution provides more protection than Texas v. Cobb (above). Under the Indiana Constitution, the right to counsel also attaches to police questioning regarding offenses which are inextricably intertwined with the charge on which counsel is also representing the Defendant. Jewell v. State, 957 N.E.2d 625 (Ind. 2011).

Brunson v. State, 394 N.E.2d 229 (Ind. Ct. App. 1979) (Indiana's right to counsel under Art.1, § 13 has a history of being interpreted more broadly than the Sixth Amendment).

Leonard v. State, 86 N.E.3d 406 (Ind. Ct. App. 2017) (D's right to counsel on pending charges did not shield him from police questioning about his plan to murder a witness against him in the pending prosecution).

4. Was the confession given during a "critical stage" of the proceedings?

The Sixth Amendment right to counsel attaches at any critical stage of the criminal prosecution, such as where counsel's absence might derogate from the accused's right to fair trial. Callis v. State, 684 N.E.2d 233 (Ind. Ct. App. 1997). The proper test for determining whether particular proceeding is "critical stage," to which assistance of counsel guarantee applies, is whether D is confronted with intricacies of law or advocacy of public prosecutor or prosecuting authorities. Id.

a. Post-indictment interrogation

Interrogation is a critical stage at which a Defendant has the right to counsel. Montejo v. Louisiana, 129 S.Ct. 2079, 2085 (2009) (*citing* Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964)).

Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964). (D's Sixth Amendment rights are violated when police obtain incriminating statements from jailhouse informant who engaged D in conversation and developed relationship of trust and confidence with D such that D revealed incriminating information dealing with charged crime when counsel was not present).

Fellers v. United States, 540 U.S. 519, 124 S. Ct. 1019 (2004) (trial court erred in admitting D's statements that were "deliberately elicited" from police at D's home after he was indicted for conspiracy to distribute methamphetamine; Sixth Amendment right to counsel was triggered by indictment, and D had not waived his right to counsel at time he made statements).

Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977) (Sixth Amendment was violated where a detective deliberately and designedly set out to elicit information from the suspect who had been charged).

Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135 (1986) (where police failed to inform murder suspect of telephone calls from attorney, who had been contacted by suspect's sister, but did inform attorney that they would not be questioning suspect nor placing him in lineup that evening, D's Sixth Amendment right was not violated although police obtained statement less than one hour later; D's right to counsel had not attached because D had not yet been charged).

To determine if an interrogation is actually occurring, see p. 18, *Were the police interrogating the Defendant?*

b. Polygraph examinations

Polygraph examinations and post-polygraph interrogations are critical stages of the proceedings, and thus, the Defendant has the right to counsel at a polygraph examination taken after he has been charged. Greenlee v. State, 477 N.E.2d 917 (Ind. Ct. App. 1985); Casada v. State, 544 N.E.2d 189 (Ind. Ct. App. 1989). However, a Defendant may waive his Sixth Amendment right to counsel after being properly advised. Kochersperger v. State, 725 N.E.2d 918 (Ind. Ct. App. 2000).

There is a split in Indiana courts as to whether the right to counsel can attach in a pre-indictment interrogation and polygraph. Callis v. State, 684 N.E.2d 233 (Ind. Ct. App. 1997) (right to counsel had not yet attached at the time of the pre-charge polygraph); compare with Caraway v. State, 891 N.E.2d 122 (Ind. Ct. App. 2008) (disagreeing with Kochersperger and holding that D's right to counsel attached immediately prior to detective's request to sign polygraph stipulation agreement; absence of D's right to an attorney in this critical pre-charge stage derogated his right to a fair trial).

Regardless, under Article 1, Section 13 of the Indiana Constitution, the right to counsel attaches upon arrest rather than upon filing of charges against the defendant. State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016).

> Wroe v. State, 16 N.E.3d 462 (Ind. Ct. App. 2014) (to the extent right to counsel under Indiana Constitution sometimes attaches before charges are filed, D waived right by signing polygraph stipulation which contained clear provision regarding waiver of right to counsel).

c. Psychiatric interviews

Where issues concerning guilt and/or punishment are addressed at a psychiatric interview, the interview is a critical stage of the proceeding. However, when the Defendant requests counseling, it is assumed that counsel has consulted with the Defendant about the nature of the interview. Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906 (1987).

> Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981) (where issue of future dangerousness was addressed in competency interview, the interview was critical stage of proceeding and counsel should have been advised of scope of interview in order to help client decide whether to participate).
>
> Esmond v. State, 20 N.E.3d 213 (Ind. Ct. App. 2014) (court order compelling D to submit to psychiatric examination does not transform the examination into a critical stage of prosecution with right to presence of counsel).

NOTE: When the court orders an individual to participate in psychiatric treatment or counseling, regardless of whether that individual is charged with a crime, if Miranda warnings are not given, any statement made cannot later be used against her. See p. 1, *Was the interrogator a government agent?*

d. Presentence investigation interviews

Because a presentence interview with a probation officer is not a critical stage of the proceedings, the Defendant need not have assistance of counsel at that interview. Emerson v. State, 724 N.E.2d 605 (Ind. 2000); Lang v. State, 461 N.E.2d 1110 (Ind. 1984); Burch v. State, 450 N.E.2d 528 (Ind. 1983).

NOTE: Although the Sixth Amendment may not apply to these interviews, request to be present. Argue that you cannot provide effective representation to your client without being present. A.B.A., CRIMINAL JUSTICE PROSECUTION AND DEFENSE FUNCTION STANDARDS § 4.81 (3rd ed.) (attendance by counsel at pre-sentence interview may be required as minimum standard of effectiveness of counsel); Ind. Public Defender Council, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, § 8.3, commentary at p. 203 (counsel should consider being present for interview). Moreover, some courts have held that it is error to deny counsel's request to be present. United States v. Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1990). Fed. R. Crim. Pro. 32(b)(2) gives the Defendant the right to have counsel present.

e. Spontaneous declaration

The Government must be interrogating or taking some action against Defendant in order for the Sixth Amendment to apply. The Defendant must demonstrate that police and informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Kuhlman v. Wilson, 477 U.S. 436, 106 S.Ct. 2616 (1986). For further discussion, see p. 80, *Did the police send in a jail cell informant?*

B. DID THE POLICE ADVISE THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

A person being interrogated by law enforcement officers after being charged with an offense must be "made sufficiently aware" of his Sixth Amendment right to counsel. Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988). Warnings administered pursuant to Miranda are sufficient to convey this warning. Id. Failure to inform a defendant that he has been charged with a crime with respect to which he is making a statement does not invalidate an otherwise valid Miranda warning that was given at the interrogation where the statement was made. Johnson v. State, 851 N.E.2d 372 (Ind. Ct. App. 2006).

C. DID THE DEFENDANT INVOKE HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

A defendant's request for counsel at initial hearing or arraignment does not invoke his right to counsel for subsequent interviews or interrogations. Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (overruling Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1404 (1986)). However, when a defendant whose Sixth Amendment right to counsel has attached has retained an attorney and that attorney makes his representation of the defendant known to State, the Sixth Amendment right to counsel has been invoked. Finney v. State, 786 N.E.2d 764 (Ind. Ct. App. 2003).

For more on the invocation of the right to counsel, see p. 40, *Was the Defendant trying to invoke the right to counsel?*

NOTE: There are a couple ways of dealing with Montejo. First, early in the proceedings, attorneys can file an invocation of the Defendant's right to counsel at all interviews, interrogations, or contact with police. It would help to have a client's signature on the pleading. Although Justice Scalia states that a defendant may not assert his right to counsel or

privilege against self-incrimination before an attempt to interrogate takes place, Indiana provides a broader right to counsel than does the Sixth Amendment. Just as an attorney in Indiana can invoke a client's right to counsel by showing up at the police station, arguably an attorney should be able to invoke the right to counsel by filing a motion. Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at police station seeking access to him). Moreover, the pleading could request the court to order the prosecutor to inform the police they cannot contact the represented Defendant. Arguably, a prosecutor has an ethical duty to tell police officers not to talk about the case with a represented defendant. Although the majority of the Supreme Court states that the Rules of Professional Conduct apply to attorneys, and not police officers, this may not be true in Indiana. See Rule 5.3 discussing the responsibility regarding non-lawyer agents. The commentary to Rule 4.2 prohibiting lawyers from talking with represented individuals also suggests that the Rule applies to "investigative agents." The commentary also states "when communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule." For the same reasons, a prosecutor or law enforcement officer should not seek to have a cell mate act as their agent.

Second, it can be argued that the police must obtain a voluntary waiver of a defendant's right to counsel when interviewing that defendant even if the defendant is not in custody. Justice Scalia hints that a non-custodial interrogation may not be a critical stage of a proceeding involving the right to counsel. However, a person being interrogated by law enforcement officers after being charged with an offense must be "made sufficiently aware" of his Sixth Amendment right to counsel. Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988).

Moreover, under the Indiana Constitution, custodial interrogation is not a prerequisite to the right to counsel. Pirtle v. State, 323 N.E.2d 634 (Ind. 1975); Sims v. State, 413 N.E.2d 556 (Ind. 1980) (Indiana Constitution provides right to counsel for person who is in custody and being asked to consent to a search). If an unrepresented person in custody but not being interrogated is entitled to be advised of his right to an attorney, then so should a represented person, being interrogated, but not in custody.

D. DID THE DEFENDANT WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

Waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. The key inquiry is: Was the accused who waived her Sixth Amendment rights during post-indictment questioning made sufficiently aware of the right to have counsel present during questioning and of the possible consequences of the decision to forgo counsel? Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988).

1. Improperly advised of right to counsel - involuntary statement

Heffner v. State, 530 N.E.2d 297 (Ind. 1988) (trial court erred in admitting statement made by D after he indicated he wanted counsel, in response to police-initiated questioning; D's incriminating statement followed officer's intimation that his right to counsel was contingent upon payment of retainer and resulted from three- and one-half-hour police-initiated interrogation).

Bradford v. State, 927 S.W.2d 329 (Ark. 1996) (Miranda waiver was insufficient to waive Sixth Amendment interrogation rights where counsel was appointed at initial hearing; D had

not requested assistance of counsel and was unaware that, at her initial appearance, court had appointed public defender to represent her).

2. Right to counsel waived by Defendant

Sater v. State, 441 N.E.2d 1364 (Ind. 1982) (where D asked to speak with police officer and made statement without any police interrogation, D waived his right to counsel even though he was not advised of his rights before the statement was made). See also Weaver v. State, 583 N.E.2d 136 (Ind. 1991); Gilliam v. State, 650 N.E.2d 45 (Ind. Ct. App. 1995).

E. HOW DID THE POLICE RESPOND TO THE DEFENDANT'S REQUEST FOR COUNSEL?

1. Did the police make subsequent attempts to get the Defendant to waive his rights or talk?

Once "an accused ... ha[s] expressed his desire to deal with the police only through counsel" he should "not [be] subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further conversation." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880 (1981); Jolley v. State, 684 N.E.2d 491 (Ind. 1997). Thus, once the Sixth Amendment right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective.

Heffner v. State, 530 N.E.2d 297 (Ind. 1988) (trial court erred in admitting statement made by D after he indicated he wanted counsel, in response to police-initiated questioning; D's incriminating statement followed officer's intimation that his right to counsel was contingent upon payment of retainer and resulted from three- and one-half-hour police-initiated interrogation).

Storey v. State, 830 N.E.2d 1011 (Ind. Ct. App. 2005) (D's subsequent written confession to detective was induced by another officer's speech on way to station which violated D's Fifth Amendment right to counsel; confession to detective was involuntary considering entire interrogation).

Finney v. State, 786 N.E.2d 764 (Ind. Ct. App. 2003) (where D unmistakably evidenced his desire to deal with authorities only through his attorney, trial court abused its discretion in denying D's motion to strike police officer's testimony regarding statement D made to him; officer's question re: why D fled was impermissible police-initiated interrogation).

2. Did the police send in a jail cell informant?

a. Was the cell mate an agent of the State?

The government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged. Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964). A Defendant's Sixth Amendment right is violated when police obtain incriminating statements from a jailhouse informant who engaged the Defendant in conversation and developed a relationship of trust and confidence with the Defendant such that the Defendant revealed incriminating information when counsel was not present. United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980). Moreover, the police may not obtain incriminating statements from the Defendant by employing an

accomplice who agrees to cooperate with the police. Maine v. Moulten, 474 U.S. 159, 106 S. Ct. 477 (1985).

However, even if a Defendant's Sixth Amendment right is breached and statements must be suppressed, incidental incriminating statements pertaining to other uncharged crimes to which the Sixth Amendment right has not yet attached are admissible at a trial of those offenses. Maine v. Moulton, 474 U.S. 159, 180 n. 16, 106 S. Ct. 477 (1985).

(1) Improper use of informant - confession involuntary

United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183 (1980) (D's incriminating statements made to paid informant who, while confined in same cellblock as D, had been told by government agents to be alert to any statements made by federal prisoners but to not initiate conversations with or question D regarding charges against D, were inadmissible as being "deliberately elicited" from D in violation of D's Sixth Amendment right to counsel).

Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477 (1985) (State violated D's Sixth Amendment right to counsel when it arranged to record conversations between D and co-D; fact that D initiated conversations and that State advised co-D to "be himself," "act normal" and "not incriminate" D are insufficient to excuse Sixth Amendment violation).

United States v. Bender, 221 F.3d 265 (1st Cir. 2000) (where D had invoked his right to counsel, statements that were elicited by jail cell informant and tended to implicate D in charged offense could not be used against him at trial on charged offense).

Commonwealth v. Franciscus, 710 A.2d 1112 (Pa. 1998) (although informer's first contact with police was unsolicited, pattern developed involving obtaining statements from several fellow inmates and receiving rewards from police each time, including favorable testimony at sentencing and money in his commissary fund; thus, use of informant violated Sixth Amendment right to counsel and Pennsylvania Constitution). But see Commonwealth v. Ogrod, 839 A.2d 294 (Pa. 2003).

(2) Proper use of informant - confession voluntary

Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394 (1990) (use of undercover police officer posing as cellmate to elicit statement from D about murder unrelated to charge for which D was incarcerated did not violate Sixth Amendment). See also Haak v. State, 695 N.E.2d 944 (Ind. 1998).

Dodson v. State, 502 N.E.2d 1333 (Ind. 1987) (court rejects D's contention that jail informant (Myers) was induced by police to elicit incriminating statement from D; D knew Myers was trustee; although charges against Myers were reduced, the plea agreement was entered into before Myers obtained statement from D).

Hobbs v. State, 548 N.E.2d 164 (Ind. 1990) (where police never made deal with cell mate but asked him to jot down any statements D made about murder, cell mate was not agent of State; there was no violation of right to counsel).b

Frederick v. State, 755 N.E.2d 1078 (Ind. 2001) (D did not show that police intentionally elicited information from D in violation of Massiah).

b. Did the cell mate elicit the statements?

Spontaneous statements not elicited by government action may later be used against a Defendant. The Defendant must demonstrate that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Kuhlman v. Wilson, 477 U.S. 436, 106 S. Ct. 2616 (1986).

Dier v. State, 442 N.E.2d 1043 (Ind. 1982) (where D told fellow prisoner about robbery and death of victim and prisoner volunteered information to police, prisoner's reception of incriminating statements were "mere fortuitous circumstance which state could not be held to have deliberately elicited or foreseen"; no Sixth Amendment violation).

Jewell v. State, 672 N.E.2d 417 (Ind. Ct. App. 1996) (evidence provided by inmate who collected but did not induce incriminating statements was not subject to suppression).

Kuhlman v. Wilson, 477 U.S. 436, 106 S. Ct. 2616 (1986) (where police instructed informant not to question D, but to "keep his ears open" for names of D's accomplices and D later made incriminating statements which were reported to police, D's Sixth Amendment right to counsel was not violated).

Rutledge v. State, 525 N.E.2d 326 (Ind. 1988) (where Gideon member who was allowed to visit inmates said nothing about confession to police for over two months, and then did so only when asked to corroborate cellmate's account of D's confession, D's right to counsel was not violated).

3. Did the police notify the attorney about an interrogation or interview?

a. When has Defendant waived his right to counsel?

The mere fact that a Defendant is represented by an attorney does not mean that law enforcement officials cannot procure a statement from the Defendant without notice to the attorney. Stater v. State, 441 N.E.2d 1364, 1365 (Ind. 1982) (*citing* Kern v. State, 426 N.E.2d 385 (Ind. 1981)).

But see Finney v. State, 786 N.E.2d 764 (Ind. Ct. App. 2003) (where D unmistakably evidenced his desire to deal with authorities only through his attorney, trial court abused its discretion in denying D's motion to strike police officer's testimony regarding statement D made to him; officer's question re: why D fled was impermissible police-initiated interrogation).

Gilliam v. State, 650 N.E.2d 45 (Ind. Ct. App. 1995) (where D waived his Sixth Amendment right to counsel by contacting police and signing waiver of rights, police were not required to notify attorney of interrogation).

b. When Defendant is participating in a court-ordered interview?

The Sixth Amendment right to counsel is violated where a psychiatrist's testimony concerning an examination is admitted into evidence when counsel was not advised of the scope of the interview. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981). However, where defense counsel requests the examination, the court presumes that counsel has consulted with the defendant regarding the nature of the examination, and

thus there is no violation of the Sixth Amendment right to counsel for failing to notify counsel of the examination. Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906 (1987).

IV. DID THE TAKING OF THE STATEMENT VIOLATE INDIANA STATUTORY REQUIREMENTS CONCERNING INTERROGATIONS OF JUVENILES?

In addition to Miranda requirements, there are statutory requirements that have to be met before a juvenile can validly waive his rights. Pursuant to Ind. Code 31-32-5-1, a juvenile who is not emancipated may not unilaterally waive his Miranda rights. Rather, his rights may be waived only:

(1) by counsel retained or appointed if the child knowingly and voluntarily joins with the waiver; or

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

A. that person knowingly and voluntarily waives the right,
B. that person has no interest adverse to child,
C. meaningful consultation has occurred between that person and the child, and
D. the child knowingly and voluntarily joins with the waiver.

The State bears the burden of showing not only that the juvenile knowingly and voluntarily waived his rights, but also that the requirements of the Juvenile Code were met. Graham v. State, 464 N.E.2d 1 (Ind. 1984). Strict compliance is mandated by the statute. Whipple v. State, 523 N.E.2d 1363 (Ind. 1988).

Foster v. State, 633 N.E.2d 337 (Ind. Ct. App. 1994) (although juvenile may be charged as adult, juvenile waiver statutes still apply to interrogation). See also Beldon v. State, 657 N.E.2d 1241 (Ind. Ct. App. 1995).

A. COMPLIANCE EXCUSED IF NOT IN POLICE CUSTODY OR QUESTIONED BY POLICE

When police officers are not present at and involved in a suspect's interview, students are neither in custody nor under interrogation, unless school officials are acting as agents of the police. B.A. v. State, 100 N.E.3d 225 (Ind. 2018). Courts should consider a child's age when determining whether a child is in custody under Miranda. J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011).

B.A. v. State, 100 N.E.3d 225 (Ind. 2018) (under the totality of circumstances, although Vice Principal did most of the questioning, B.A. was subjected to custodial interrogation because three school uniformed resource officers participated in his interview. "[T]he consistent police presence would place considerable coercive pressure on a reasonable student in B.A.'s situation. So this case lies solidly on the "custody" end of the student-confinement spectrum." B.A.'s statements should have been suppressed under both Miranda and Indiana's juvenile waiver statute).

G.J. v. State, 716 N.E.2d 475 (Ind. Ct. App. 1999) (when a juvenile was not in police custody at the time of questioning, not in a coercive environment, and not questioned by a law enforcement officer, the meaningful consultation safeguard did not apply).

P.M. v. State, 861 N.E.2d 710 (Ind. Ct. App. 2007) (although juvenile was in police custody at time he made incriminating statements, he was not being subject to interrogation at time; it

was employee of theft victim who questioned D, not police, thus protections of Ind. Code 31-32-5-1 did not apply); see also S.G. v. State, 956 N.E.2d 668 (Ind. Ct. App. 2011).

State v. C.D., 947 N.E.2d 1018 (Ind. Ct. App. 2011) (at school administrator's request and in administrator's presence, juvenile was examined by a school security officer in police uniform; juvenile was not undergoing custodial interrogation because officer was acting to fulfill an educational purpose, i.e., to keep possibly intoxicated students out of the classroom).

D.Z. v. State, 100 N.E.3d 246 (Ind. 2018) (where assistant principal alone met with and interrogated a juvenile student after investigating with police officer to identify vandalism suspect, Miranda warnings were not required; no evidence suggests that police directed or encouraged the assistant principal to act on their behalf. Regardless, Miranda warnings were not required because no evidence shows D.Z. even knew that the assistant principal had talked to the officer to create a "coercive atmosphere").

A.A. v. State, 706 N.E.2d 259 (Ind. Ct. App. 1999) (where juvenile was not in custody, procedural safeguards do not apply; at time D confessed to molestation, he and mother had voluntarily appeared at interview and they were told they were free to leave at any time and could speak with an attorney, so safeguards did not apply).

K.F. v. State, 961 N.E.2d 501 (Ind. Ct. App. 2012) (where juvenile was never interrogated by police but rather made statements to mom at the police station, juvenile was not subjected to custodial interrogation).

B. COMPLIANCE EXCUSED IF SUSPECT'S AGE IS UNCERTAIN

Stone v. State, 377 N.E.2d 1372 (Ind. 1978) (compliance with adult waiver rules was sufficient where police made good faith and diligent effort to determine age of suspect but were frustrated in such effort by misstatement of suspect as to age).

C. COMPLIANCE WITH INDIANA LAW REQUIRED REGARDLESS OF WHERE STATEMENT WAS TAKEN

Stidham v. State, 608 N.E.2d 699 (Ind. 1993) (although Illinois does not require guardian or parent to be present for waiver of Miranda rights of suspect under eighteen, Indiana does require such protections, and therefore, admission of confession of juvenile taken in Illinois under its procedures was error).

NOTE: Even if the State complied with the statutory requirements for juvenile interrogations, there still may be a Fifth, Sixth or Fourteenth Amendment violation. For example, see A. A. v. State, 706 N.E.2d 259 (Ind. Ct. App. 1999).

D. JUVENILE MUST BE AFFORDED A MEANINGFUL CONSULTATION WITH AN ADULT PRIOR TO WAIVING RIGHTS

For a more detailed discussion of a juvenile's waiver of rights, see the IPDC's Juvenile Delinquency Manual, 2023 edition.

1. With whom did the juvenile consult prior to waiver?

The juvenile must have the opportunity to consult with her custodial parent, guardian, custodian, or guardian ad litem. Ind. Code § 31-32-5-1. At a minimum, a "custodial" parent

means either a person who has been adjudicated by a court to have legal custody of the child, or a parent who actually resides with the unemancipated juvenile. Stewart v. State, 754 N.E.2d 492 (Ind. 2001).

Stewart v. State, *supra* (juvenile D's waiver of rights was invalid because his biological father, who signed waiver, had never been awarded custody by a court, D did not reside with him and was born out of wedlock).

Andrews v. State, 441 N.E.2d 194 (Ind. 1982) (where D had run away from adoptive parents, was living with natural grandmother, and refused to speak with adoptive mother, grandmother was properly considered "de facto guardian").

Carlisle v. State, 443 N.E.2d 826 (Ind. 1983) (where mother could not come, D's eighteen-year-old sister could be considered guardian).

The adult who joins child in consultation and waiver of rights must have no interest adverse to the child. Ind. Code § 31-32-5-1.

Borum v. State, 434 N.E.2d 581 (Ind. Ct. App. 1982) (case worker from Dept. of Public Welfare, child's legal guardian, was not appropriate consulting adult where caseworker had initiated proceedings against child by filing delinquency petition and Dept. was represented by attorney who functioned as prosecuting agent of State).

Garrett v. State, 351 N.E.2d 30 (Ind. 1976) (designation of mother as witness obfuscated role intended by law for her to play at point of waiver, namely, that of advisor; such obfuscation kept both mother and son from realizing that she was to be active participant in decision whether to speak to police without attorney present).

Trowbridge v. State, 717 N.E.2d 138 (Ind. 1999) (fact that D's mother notified authorities regarding her concern about D's involvement in victim's murder was insufficient to render her interests adverse to D for purposes of consultation and waiver of juvenile's rights).

K.F. v. State, 961 N.E.2d 501 (Ind. Ct. App. 2012) (fact that mom was also victim of crime did not make statements inadmissible, although court expressed concern over whether a parent who is also a victim can provide meaningful consultation prior to waiver of rights).

N.B. v. State, 971 N.E.2d 1247 (Ind. Ct. App. 2012) (fact that Mother was facing potential criminal liability for neglect of a dependent resulting in death for Juvenile's shooting of his six-year-old brother did not create an adverse interest between Mother and Juvenile; Mother faced potential criminal liability for leaving children alone with rifle regardless of whether the six-year-old shot himself or was shot by Juvenile).

Graham v. State, 464 N.E.2d 1 (Ind. 1984) (where juvenile's relationship with his father was strained but not violent, there was insufficient evidence to show that child's father had interest adverse to child).

Buchanan v. State, 376 N.E.2d 1131 (Ind. 1978) (although father told son to tell truth, confession was proper because father was not acting in concert with police). See also Douglas v. State, 481 N.E.2d 107 (Ind. 1985).

2. Notification of school arrest

Unless certain emergency circumstances exist, a law enforcement officer who arrests or takes into custody a child on school property or at a school-sponsored activity must make a reasonable attempt to notify or request a school administrator to notify the child's: (1) parent, guardian, or custodian; or (2) an emergency contact. Ind. Code § 31-37-4-3.5 (effective July 1, 2023).

3. Was the consultation meaningful?

The consultation requirement is satisfied when the State demonstrates actual consultation of a meaningful nature or the express opportunity for such consolation, which is then forsaken in the presence of the proper authority by the juvenile, so long as the juvenile knowingly and voluntarily waives their constitutional rights. Williams v. State, 433 N.E.2d 769, 772 (Ind. 1982). The mere presence of a parent, standing alone, does not satisfy the statute, and at a minimum, the record must affirmatively demonstrate that the juvenile and the parent or guardian were afforded a meaningful opportunity to consult together. Hall v. State, 346 N.E.2d 584 (Ind. 1976). To determine whether the consultation between the adult and the juvenile was meaningful, the question is whether the child and the adult were aware of the child's rights in order to discuss them intelligently. Patton v. State, 588 N.E.2d 494 (Ind. 1992). The usual and better practice is to provide the opportunity for consultation after advising the juvenile and his or her parents of the rights to be waived and before the waiver of rights, but this is not required. Cherrone v. State, 726 N.E.2d 251 (Ind. 2000); D.M. v. State, 949 N.E.2d 327 (Ind. 2011).

S.D. v. State, 937 N.E.2d 425 (Ind. Ct. App. 2010) (where juvenile and his guardian knew they were being recorded during their consultation, the consultation was not meaningful, and the introduction of the juvenile's statement constituted fundamental error).

J.L. v. State, 5 N.E.3d 431 (Ind. Ct. App. 2014) (juvenile's decision to proceed with questioning without consulting with his mother was not voluntary and knowingly made where he was never told that the video camera would be turned off and the detective would leave the room during consultation with his mother).

N.B. v. State, 971 N.E.2d 1247 (Ind. Ct. App. 2012) (fact that waiver form was signed before meaningful consultation did not invalidate consent where the totality of the circumstances illustrated a voluntary waiver).

Hall v. State, 346 N.E.2d 584 (Ind. 1976) (there was inadequate proof that child had been permitted opportunity for meaningful consultation with his guardian since meaningful consultation can only occur in absence of neutralizing pressures which result from police presence and record was unclear whether child and his sister were ever left alone prior to execution of waiver).

Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (police monitoring and videotaping of consultation between juvenile and his parent or guardian does not comply with concept of meaningful consultation).

Washington v. State, 456 N.E.2d 382 (Ind. 1983) (where mother told officer she was afraid of being left alone with son and son screamed out that he committed crime, there was no need for meaningful consultation).

Fowler v. State, 483 N.E.2d 739 (Ind. 1985) (court rejected D's contention that level of privacy afforded D and his mother was insufficient to permit meaningful consultation).

D.M. v. State, 949 N.E.2d 327 (Ind. 2011) (juvenile's consultation with mother was meaningful despite officer's statements that mother must sign waiver before talking to child).

Graham v. State, 464 N.E.2d 1 (Ind. 1984) (inadmissibility of first statement (because officer inadvertently forgot to allow private consultation) did not render second statement (made after private consultation) automatically inadmissible; DeBruler & Prentice, J.J., dissented).

Patton v. State, 588 N.E.2d 494 (Ind. 1992) (although detectives did not leave waiver of rights form with them while consultation was taking place, juvenile was afforded meaningful consultation because rights were repeatedly explained to D and mother, and there was no evidence of coercion, force or inducement by police).

Hall v. State, 870 N.E.2d 449 (Ind. Ct. App. 2007) (meaningful consultation requirement was met where parents consulted with D for 25 minutes after D had been alone, handcuffed, and not wearing any shoes in interrogation room for 5 hours prior to consultation).

4. Did the juvenile waive his right to meaningful consultation?

The child may waive the child's right to meaningful consultation under Ind. Code § 31-35-5-1 if: (1) the child is informed of that right; (2) the child's waiver is made in the presence of the child's custodial parent, guardian, custodian, guardian ad litem, or attorney; and (3) the waiver is made knowingly and voluntarily. Ind. Code § 31-32-5-2. This statutory provision allows the juvenile and adult to decline the opportunity for consultation. Carter v. State, 686 N.E.2d 1254 (Ind. 1997).

E. DID THE GUARDIAN AND JUVENILE VOLUNTARILY WAIVE THE JUVENILE'S RIGHTS?

Following consultation, both the child and the parent must knowingly waive the rights of the child. Ind. Code § 31-32-5-1; Callahan v. State, 527 N.E.2d 1133 (1988); Whipple v. State, 523 N.E.2d 1363 (Ind. 1988). In determining whether any waiver of rights during custodial interrogation was made knowingly and voluntarily, the juvenile court shall consider all the circumstances of the waiver, including the following: (1) the child's physical, mental, and emotional maturity; (2) whether the child or the child's parent, guardian, custodian, or attorney understood the consequences of the child's statements; (3) whether the child and the child's parent, guardian, or custodian had been informed of the delinquent act with which the child was charged or of which the child was suspected; (4) the length of time the child was held in custody before consulting with the child's parent, guardian, or custodian; (5) whether there was any coercion, force, or inducement; and (6) whether the child and the child's parent, guardian, or custodian had been advised of the child's right to remain silent and to the appointment of counsel. Ind. Code § 31-32-5-4.

Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1209 (1960) (waiver of rights by juvenile may not be implied by child's talking with police).

Bridges v. State, 299 N.E.2d 616 (Ind. 1973) (where juvenile and mother are advised by probation officer that counsel is unnecessary, waiver of rights was not voluntary, and confession cannot be used against juvenile in subsequent trial or hearing).

Deckard v. State, 425 N.E.2d 256 (Ind. Ct. App. 1981) (because parent was present when juvenile signed waiver, but parent did not sign waiver, State failed to establish that parent joined in D's waiver of rights).

R.W. v. State, 975 N.E.2d 407 (Ind. Ct. App. 2012) (where juvenile signed waiver of rights form but mother did not, admission of his confession to attempted burglary was fundamental error because confession was only evidence that juvenile intended to commit a felony once he broke into residence).

N.M. v. State, 791 N.E.2d 802 (Ind. Ct. App. 2003) (written advisement signed by D and D's mother that did not refer to right to have attorney appointed if they could not afford one and videotape informing them of rights while waiting in juvenile court were not sufficient to make D's waiver of counsel intelligent and voluntary).

Sills v. State, 463 N.E.2d 228 (Ind. 1984), *overruled on other grounds* (evidence established father joined in waiver; father signed form, albeit on line designated "witness"; father testified at suppression hearing that he did not object to son giving statement to officers and in fact encouraged him to do so).

Estrada v. State, 969 N.E.2d 1032 (Ind. Ct. App. 2012) (D's statements to police detective were admissible because her mother knowingly and voluntarily waived D's rights and both mother and daughter signed the form saying they understood it; Spanish translation of advisement of rights form adequately informed mother and daughter of daughter's rights).

Smith v. State, 400 N.E.2d 1137 (Ind. Ct. App. 1980) (juvenile D's confession was admissible, even though part of confession was made when juvenile's mother was out of room at juvenile's request because purpose of requiring parent's presence is not to witness statement, but rather to assist in decision whether to give it). See also Tippitt v. State, 364 N.E.2d 763 (Ind. 1977).

Carter v. State, 686 N.E.2d 1254 (Ind. 1997) (fact that guardian is not informed that juvenile is suspect does not automatically make waiver involuntary).

F. VOLUNTARINESS OF STATEMENT UNDER THE FOURTEENTH AMENDMENT DUE PROCESS PROVISION

In all cases involving juvenile confessions, it must be determined whether there were neutralizing pressures which rendered confessions involuntary and whether those pressures resulted from police presence. Bluitt v. State, 381 N.E.2d 458 (Ind. 1978). Juveniles are treated differently than adults because: (1) a child is not equal to police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interest or how to get the benefits of his constitutional rights; (2) a child cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions; (3) a child has no way of knowing what the consequences of a confession are without the advice as to the child's rights -- from someone concerned with securing him those rights-- and without aid of a more mature judgment as to the steps he should take in the predicament in which the child finds himself; (4) a lawyer or an adult relative or friend can give the protection which the child's own immaturity does not. Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1209 (1960).

G. POLICE DECEPTION AND JUVENILE STATEMENTS

Ind. Code § 31-30.5-1-6 (effective July 1, 2023) provides that a statement made by a juvenile during custodial interrogation in response to a materially false statement from a law enforcement officer regarding evidence or penalties/leniency is inadmissible against the juvenile unless the misstatement was based on reasonable good faith belief that the information was true at the time it was communicated to the juvenile, or to any evidence discovered as a result of the juvenile's statement.

V. WAS THE STATEMENT RECORDED PURSUANT TO IND. EVID. RULE 617?

Indiana Evidence Rule 617 prohibits the admission of unrecorded statements during custodial interrogations. Noting how electronically recorded interrogations assist courts and can be used as a potent law enforcement tool for guilt or innocence, the rule reads in part, "In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial." The rule specifically mandates that an audio-video recording be made within a jail, law enforcement agency station house, or facility owned and operated by law enforcement. The exact definitions for "place of detention" and "electronic recording" can be found in Rule 617.

There are seven exceptions to the rule, which include the following:

1. Statements made as part of routine processing or "booking";
2. Statements made when the suspect does not agree to be electronically recorded;
3. When there is an equipment malfunction (e.g., Weed v. State, 192 N.E.3d 247 (Ind. Ct. App. 2022);
4. When the interrogation takes place in another jurisdiction (e.g., Weed v. State, 192 N.E.3d 247 (Ind. Ct. App. 2022);
5. When law enforcement officers reasonably believe the crime under investigation is not a felony;
6. The statement made is spontaneous and not in response to a question;
7. Substantial exigent circumstances exist which prevent the recording.

There are no due process implications for failing to comply with Indiana Evidence Rule 617, because Article 1, Section 12 of the Indiana Constitution does not require law enforcement officers to record custodial interrogations in places of detention. Stoker v. State, 692 N.E.2d 1386 (Ind. Ct. App. 1998). Thus, an operator error or equipment malfunction by police when attempting to record a statement renders the statement admissible under the good-faith exception found in Evidence Rule 617(a)(3). Cherry v. State, 57 N.E.3d 867 (Ind. Ct. App. 2016).

Rule 617 applies only to custodial interrogations made in a place of detention, with a place of detention being defined as a jail, law enforcement agency station house, or any other stationary or mobile building owned by a law enforcement agency. In determining whether a location can be considered a "place of detention" requiring an electronic recording under Indiana Evidence Rule 617, Courts should analyze the control law enforcement has over the premises, the frequency of use to conduct custodial interrogations and the purpose for which law enforcement uses the space.

Fansler v. State, 100 N.E.3d 250 (Ind. 2018) (motel room used for sting operation and custodial interrogation was not a "place of detention" requiring electronic recording).

Johnson v. State, 117 N.E.3d 581 (Ind. Ct. App. 2018) (because probation officer's conversation with juvenile was not an interrogation, the statement not being recorded did not violate Rule 617).

Rule 617 does not impose an affirmative duty on law enforcement officers to transport a person to a place of detention before conducting a custodial interrogation.

Steele v. State, 975 N.E.2d 430 (Ind. Ct. App. 2012) (D's policy arguments for imposing such a duty should be directed to the Evidence Rules Review Committee, which may recommend to the Indiana Supreme Court that the rule be amended accordingly).

Statements made during a "Custodial Interrogation in a Place of Detention" which do not comply with Rule 617 may still be used against the Defendant for purposes of impeachment.

Cutler v. State, 983 N.E.2d 217 (Ind. Ct. App. 2013) (State may impeach a testifying D by using a prior custodial statement that was recorded but was not "available at trial" as required by Indiana Evidence Rule 617(a)).

VI. CAN THE INTERROGATION BE USED AGAINST THE DEFENDANT?

A. CAN THE STATE USE AN ILLEGALLY OBTAINED CONFESSION AGAINST THE DEFENDANT?

When a statement is obtained in violation of the constitution or statutory rules governing the interrogation, the exclusionary rule bars its admission at trial. However, the exclusionary rule only applies where the deterrence benefits outweigh the substantial costs associated with the rule. Grubb v. State, 734 N.E.2d 589 (Ind. Ct. App. 2000).

NOTE: Although the State cannot usually use an illegally obtained confession at trial, the Defendant may always introduce evidence that a legally obtained confession was coerced. The Constitution guarantees a Defendant a meaningful opportunity to present a complete defense, whether rooted directly in the Due Process Clause of Fourteenth Amendment or in Compulsory Process and Confrontation Clauses of Sixth Amendment. This opportunity includes evidence surrounding the taking of a confession. Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142 (1986). Even if the confession is admissible, the Defendant is entitled to introduce evidence of police conduct surrounding the taking of the statement. Taylor v. State, 479 N.E.2d 1310 (Ind. 1985).

1. Use of illegally obtained confessions for impeachment purposes

"Although an illegally obtained confession may be inadmissible as evidence at a trial, the confession may nevertheless be admissible for the limited purpose of impeachment if the defendant testifies at the trial." Kerr, 16 Indiana Practice § 7.7, 604 (1991).

However, the impeachment exception to the exclusionary rule applies only to the Defendant and not to other witnesses the defense may call. As "expanding the exception to encompass the testimony of all defense witnesses would not further the truth-seeking value with equal force but would appreciably undermine the deterrent effect of the exclusionary rule…" James v. Illinois, 493 U.S. 307, 319 (1990).

a. Statements obtained in violation of the Fifth Amendment (Miranda)

Statements obtained in violation of Miranda rights are generally admissible to impeach. Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215 (1975); Harris v. New York, 401 U.S. 222,

91 S. Ct. 643 (1971); Page v. State, 689 N.E.2d 707 (Ind. 1997); Gauvin v. State, 878 N.E.2d 515 (Ind. Ct. App. 2007).

However, where Miranda rights are intentionally violated at the behest of a prosecutor, statements made cannot even be used for impeachment purposes. State v. Sosinski, 750 A.2d 779 (N.J. Super. Ct. App. Div. 2000). But see United States v. Acosta, 111 F.Supp.2d 1082, 1096 (E.D. Wis. 2000) (finding that the suppression of statements for impeachment purposes in Sosinski was based on prosecutor's violation of New Jersey's Rules of Professional Conduct, not the suspect's constitutional or Miranda rights).

NOTE: A Defendant who testifies at trial may not be impeached by the fact that he or she remained silent after being arrested and after being advised of his Miranda rights. Bevis v. State, 614 N.E.2d 566 (Ind. Ct. App. 1993). Moreover, to impeach the Defendant with his post-Miranda silence can be fundamental error. Taylor v. State, 699 N.E.2d 270 (Ind. Ct. App. 1998).

Monegan v. State, 721 N.E.2d 243 (Ind. 1999) (the State improperly questioned an officer about D's post-arrest and post-Miranda silence, but questioning was found to be harmless and therefore not fundamental error).

b. Involuntary statements obtained in violation of the Fourteenth Amendment

An involuntary statement cannot be used for impeachment purposes. The State must establish voluntariness before using the statement for impeachment purposes. Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408 (1978); Rowe v. State, 444 N.E.2d 303 (Ind. 1983). Involuntary statements obtained under coercion or duress are inadmissible for all purposes. Newton v. State, 456 N.E.2d 736 (Ind. Ct. App. 1983).

c. Statements obtained in violation of the Sixth Amendment Right to Counsel

The State may use a confession obtained in violation of Sixth Amendment as impeachment if the Defendant testifies at the trial contrary to the prior statement. Michigan v. Harvey, 494 U.S. 344, 110 S. Ct. 1176 (1990); Hogan v. State, 966 N.E.2d 738 (Ind. Ct. App. 2012). The fact the prior statement made by the Defendant has been ordered suppressed does not give the Defendant license to testify contrary to the prior statement without any fear of contradiction. Mills v. State, 498 N.E.2d 1236 (Ind. 1986).

Kansas v. Ventris, 129 S. Ct. 1841 (2009) (D's confession to an informant, elicited in violation of the Sixth Amendment, was admissible to impeach his inconsistent testimony at trial).

Mills v. State, 198 N.E.3d 720 (Ind. Ct. App. 2022) (Article I, Section 13 of the Indiana Constitution did not prohibit the use of D's statement to impeach his trial testimony where he initiated and knowingly, freely, and voluntarily gave the statement to law enforcement and waived his right to counsel; D failed to show any reason why, unlike the federal constitution, the Ind. Constitution should be interpreted to disallow admission of a statement that a defendant knowingly and voluntarily gave to law enforcement after appointment of counsel).

d. Statements obtained in violation of the juvenile statutory waiver rules

A voluntary statement procured in violation of the Indiana statutes requiring meaningful consultation between a juvenile and a parent or guardian may be used for impeachment purposes. Ind. Code § 31-32-5-3; Barker v. State, 440 N.E.2d 664 (Ind. 1982).

Possible argument: Although Ind. Code § 31-32-5-3 allows statements that violate Ind. Code § 31-32-5-1 to be used for impeachment purposes if made knowingly and voluntarily, involuntary statements cannot be used even for impeachment purposes. Rowe v. State, 444 N.E.2d 303 (Ind. 1983). Argue that a child's statement should always be presumed to be involuntary if made without any consultation with a parent or guardian, because of the inherently coercive relationship between police officers' interrogators and children, and that case law supports special treatment of child confessions. See, e.g., In Re Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967) (admissions and confessions of juveniles require special caution); Lewis v. State, 288 N.E.2d 138 (Ind. 1972) (law requires certain safeguards to make juvenile confession voluntary). Only statements procured by minor or technical violations of the statute, while still allowing consultation, should be admissible for impeachment purposes. See, e.g., Bryant v. State, 802 N.E.2d 486 (Ind. Ct. App. 2004) (police monitoring and videotaping of consultation between juvenile and his parent or guardian does not comply with concept of meaningful consultation).

e. Statements obtained under grant of immunity

Under the Fifth Amendment privilege against self-incrimination, the Defendant's testimony before a grand jury under the grant of immunity cannot constitutionally be used to impeach the Defendant's testimony in a later criminal trial. New Jersey v. Portash, 440 U.S. 450, 99 S. Ct. 1292 (1979). Even though the immunized statement cannot be used during the guilt phase of trial, a clean-up statement is admissible to impeach a Defendant during the penalty phase of trial. Van Cleave v. State, 517 N.E.2d 356 (Ind. 1987).

2. Use of illegally obtained confessions in probation revocation hearings

Generally, illegally obtained confessions are admissible at probation revocation hearings.

Grubb v. State, 73N.E.2d 589 (Ind. Ct. App. 2000) (although police may have obtained probationer's taped confession to two child molests in violation of Miranda, trial court properly allowed State to use confessions to revoke his probation in another matter).

NOTE: Just as an involuntary confession cannot be used to impeach a Defendant, arguably an involuntary confession also cannot be used to revoke an individual's probation. See Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, (1978).

3. Harmless error rule applies

The harmless error rule applies to the admission of involuntary confessions. Because of the profound impact a confession has on the jury, a reviewing court should exercise extreme caution before finding its admission harmless. Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991).

A reviewing court must determine that the admission of a confession did not contribute to the conviction, i.e., the error was unimportant in relation to everything else the jury considered on the issue in question. Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006). Thus, if the confession had such a profound impact on the jury that one may, justifiable doubt the jurors' ability to put it out of their mind even if told to do so, it is not harmless. Id. But if there is

enough evidence outside of the involuntary confession to sustain a conviction, then the error is harmless, and the defendant may not be entitled to relief.

Anderson v. State, 961 N.E.2d 19 (Ind. Ct. App. 2012) (State proved beyond a reasonable doubt that the error in admitting D's confession was harmless as to murder conviction, in light of overwhelming evidence).

Bryant v. State, 959 N.E.2d 315 (Ind. Ct. App. 2011) (even if admission of D's incriminating statement violated Miranda, the admission was harmless because D's statement that he possessed marijuana he found in a police car was merely cumulative to fact that officers found the marijuana between D's buttocks).

B. CAN THE DEFENDANT'S ASSERTION OF HER RIGHTS BE USED AGAINST HER?

1. State can use a Defendant's pre-arrest, pre-Miranda silence

If a suspect has not been put under arrest or in custody and has not been given Miranda warnings, the State's use of his silence at trial as substantive evidence of guilt does not violate the Fifth Amendment privilege against self-incrimination. The suspect seeking Fifth Amendment protection must expressly invoke it at the time he or she relies upon it. Salinas v. Texas, 133 S. Ct. 2174 (2013).

Mira v. State, 3 N.E.3d 985 (Ind. Ct. App. 2013) (testimony about D's pre-arrest, pre-Miranda silence did not violate his Fifth Amendment right against self-incrimination; such testimony only violates this right only if D unambiguously invoked his right to remain silent).

Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124 (1980) (State can use the D's pre-arrest silence to impeach her credibility when D testifies on her own behalf at trial); see also Hilliard v. State, 609 N.E.2d 1167, 1169-70 (Ind. Ct. App. 1993).

Lainhart v. State, 916 N.E.2d 924 (Ind. Ct. App. 2009) (prosecutor properly questioned D about the fact that D remained silent and did not go to the police to make a statement after being charged with the offense but before being arrested on the charge).

Nichols v. State, 55 N.E.3d 854 (Ind. Ct. App. 2015) (a failure to follow up with or contact police does not support a finding that suspect invoked right to remain silent; thus, no error in admitting evidence that defendant did not attend an interview with a detective); see also Owens v. State, 937 N.E.2d 880, 884-94 (Ind. Ct. App. 2012).

2. State cannot use the Defendant's post-arrest, pre-Miranda silence

It is a violation of the Fifth Amendment for the State to use defendant's post-arrest, pre-Miranda silence as substantive evidence in the State's case-in-chief. Peters v. State, 959 N.E.2d 347 (Ind. Ct. App. 2011).

Akard v. State, 924 N.E.2d 202 (Ind. Ct. App. 2010), *aff'd in part and reversed in part on other grounds*, 937 N.E.2d 811 (Ind. 2010) (State improperly asked two police officers if D made any statements or asked any questions when he was arrested after the officers entered his apartment but before he was given any Miranda warnings).

3. State cannot impeach the Defendant with her post-Miranda silence

A Defendant cannot be impeached by her post-Miranda silence. It would be fundamentally unfair to allow the Defendant's silence to be used to impeach her explanation subsequently given at trial after the Defendant had been impliedly assured, by Miranda warnings, that her silence would carry no penalty. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976). However, a prosecutor may introduce a defendant's post-Miranda silence in limited circumstances, e.g., to rebut Defendant's claim that he cooperated with police, as long as it is not used to exploit a defendant's constitutional rights. Vitek v. State, 750 N.E.2d 346 (Ind. 2001). In order to "open the door," the evidence relied on must leave the trier of fact with a false or misleading impression of the facts related. Ludack v. State, 967 N.E.2d 41 (Ind. Ct. App. 2012).

Kubsch v. State, 784 N.E.2d 905, 913-14 (Ind. 2003) (a person's silence after being given Miranda warnings may not be used for impeachment purposes even though the person was not in custody at the time the Miranda warnings were given).

Houchen v. State, 632 N.E.2d 791 (Ind. Ct. App. 1994) (damage cause by detective's volunteered testimony that he had asked D if he wanted to take polygraph so prejudiced D that, even had defense counsel objected and jury been admonished, devastating harm to D's case could not have been alleviated).

Vitek v. State, 750 N.E.2d 346 (Ind. 2001) (prosecutor was permitted to bring in evidence of D's refusal to give videotaped statement after defense counsel suggested on cross-examination that D cooperated with police). See also Wentz v. State, 766 N.E.2d 351 (Ind. 2002).

Cameron v. State, 22 N.E.3d 588 (Ind. Ct. App. 2014) (defense counsel's comments during closing argument that the victim stabbed D opened the door to the prosecutor's statement that defendant did not say anything to the arresting officer about being wounded).

Ludack v. State, 967 N.E.2d 41 (Ind. Ct. App. 2012) (on cross, detective was asked whether D had admitted the molesting; D opened the door to detective testifying that D just asked to stop talking and did not admit nor deny allegation of molestation).

Pennycuff v. State, 745 N.E.2d 804 (Ind. 2001) (D's post-Miranda silence may only be used to rebut impression of cooperation and use of silence cannot be obvious reach beyond fair limits to impeach D's explanatory story as recent fabrication). See also United States v. Shue, 766 F.2d 1122 (7th Cir. 1985).

Sobolewski v. State, 889 N.E.2d 849 (Ind. Ct. App. 2008) (by asking D why he had not informed the police about alleged exculpatory information while awaiting trial, the prosecutor was clearly attempting to impeach D's credibility with his post-arrest silence, which is impermissible; held, harmless error).

Teague v. State, 891 N.E.2d 1121 (Ind. Ct. App. 2008) (State's questions on cross-examination of D and in its closing argument were not limited to D's pre-Miranda silence; rather, State specifically referred to D's entire period of pre-trial, post-Miranda silence after D told exculpatory story for first time at trial).

However, evidence or testimony of Defendant's post-Miranda silence can be admitted if its

intent is not to subvert the defense.

Anderson v. Charles, 447 U.S. 404, 100 S. Ct. 2180 (1980) (prosecutor may inform the jury about the entire sequence of questioning preceding a post-arrest statement, even though the suspect declined to answer some of the queries).

Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142 (1986) (permissible to introduce D's silence as way of showing that D's rights had been honored and that resulting statement was voluntary).

Splunge v. Parke, 160 F.3d 369 (7th Cir. 1998) (a jury's knowledge that the suspect initially remained silent is not a problem, when that knowledge is not used to subvert the defense in Doyle's fashion).

Note: In analyzing whether a Doyle violation is harmless beyond a reasonable doubt, Indiana Courts examines five factors: (1) the use to which the prosecution puts the post-arrest silence; (2) who elected to pursue the line of questioning; (3) the quantum of other evidence indicative of guilt; (4) the intensity and frequency of the reference; and (5) the availability to the trial court of an opportunity to grant a motion for mistrial or give a curative instruction. Robinette v. State, 741 N.E.2d 1162, 1165 (Ind. 2001). Where a Doyle violation is not properly objected to, or even raised on appeal, courts will apply the fundamental error analysis to determine if a new trial is necessary to cure the defect. Sobolewski v. State, 889 N.E.2d 849 (Ind. Ct. App. 2008).

4. State cannot use the Defendant's assertion of her rights as evidence of sanity

Raising the insanity defense does not open the door to testimony obtained in violation of the Defendant's Miranda rights. The Defendant's post-arrest and post-Miranda silence cannot be used as evidence of sanity. Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634 (1986).

Robinette v. State, 741 N.E.2d 1162 (Ind. 2001) (despite trial court giving limiting instruction and instruction to disregard videotaped statement, admission of D's four-hour interrogation during which she asserted her right to remain silent nearly fifty times was reversible error; her assertion of her rights cannot be used to prove sanity).

Lynch v. State, 632 N.E.2d 341 (Ind. Ct. App. 1994) (evidence that a murder defendant, after being given his Miranda rights at initial police interrogation, invoked his right to be questioned only in the presence of an attorney, was not admissible for purpose of showing that D was sane).

Barcroft v. State, 26 N.E.3d 641 (Ind. Ct. App. 2015) (trial court's reliance on D's post-Miranda request for counsel as evidence of her sanity was fundamental error).

Myers v. State, 27 N.E.3d 1069 (Ind. 2015) (where convoluted request for attorney was made to mother before D was read his Miranda rights, it was not a due process violation to use the request as evidence of D's sanity).

C. CAN A LEGALLY OBTAINED CONFESSION BE SUPPRESSED?

Under some circumstances, a legally obtained confession may be inadmissible. For example, in Barker v. Commonwealth, 379 S.W.3d 116 (KY 2012), the Kentucky Supreme Court exercised its supervisory power to announce a rule that, when a probationer testifies at a revocation or

modification hearing triggered by his arrest for a new crime, his testimony cannot be substantively used at his subsequent trial for that offense.

1. Use of non-testifying co-Defendant's confession in joint trials

Where a non-testifying co-Defendant's confession incriminating the Defendant is not directly admissible against the Defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the Defendant, and even if the Defendant's own confession is admitted against him. Bruton v. United States, 391 U.S. 123, 88 S.Ct.1620 (1968). However, the Defendant's confession may be considered at trial to assess whether the co-Defendant's statements are supported by sufficient "indicia of reliability" to be directly admissible against him (assuming the unavailability of the co-Defendant), despite the lack of opportunity for cross-examination. The Defendant's confession may also be considered on appeal to assess whether any Confrontation Clause violation was harmless. Cruz v. New York, 481 U.S. 186, 107 S. Ct. 1714 (1987).

> Garland v. State, 719 N.E.2d 1184 (Ind. 1999) (counsel's failure to object to admission of Co-D's videotaped statement at joint trial constituted ineffective assistance of counsel and rendered result of proceeding unreliable and unfair).

A Co-Defendant's confession is admissible when all references to the Defendant's existence have been removed and the confession is incriminating as to the Defendant only when linked with other evidence. Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702 (1987) The issue turns on whether the confession was incriminating on its face and expressly implicates a defendant, or if the confession only amounted to evidence requiring linkage that becomes incriminating only when linked with evidence introduced later at the trial. Id.

> Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151 (1998) (use at a joint trial of non-testifying co-D's confession that has been redacted so as to replace D's name with space or word "deleted" violated Sixth Amendment right to confrontation).

The Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but also any reference to his or her existence. Gray v. Maryland, 523 U.S. 185 (1998): Samia v. United States, 599 U.S.___, ___S.Ct.___(2023). The limiting instruction must advise the jury to use the redacted confession against the relevant defendant only, and not to consider it with any other defendant, even when it may be linked with other evidence at trial. Taggart v. State, 595 N.E.2d 256 (Ind. 1992). However, the co-defendant who made the statement has the right to request that the whole statement be admitted under the doctrine of completeness, if the statement, as redacted, is misleading. Evans v. State, 643 N.E.2d 887, 881 (Ind. 1994). If the co-defendant seeks admission of the entire statement under the doctrine of completeness, and the other co-defendant objects to the admission of the statement under the Bruton doctrine, the State must: (1) seek a severance; (2) forfeit the ability to enter any of the statement into evidence; or (3) redact all portions of the statement which refer to the objecting defendant. Norton v. State, 772 N.E.2d 1028 (Ind. Ct. App. 2002). The defendant who has the Bruton objection may waive any objection and join in the request for admitting the whole statement. Id.

2. Use of non-testifying co-Defendant's confession in separate trials

An accused's Sixth Amendment right to confrontation is violated by the admission into evidence of a non-testifying accomplice's confession. Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999). A non-testifying accomplice's confession that inculpates Defendant is not

within a firmly rooted exception to the hearsay rule as defined in Confrontation Clause jurisprudence and cannot be admitted merely because it is a statement against penal interests. Id.

An out-of-court statement by a co-defendant or any other person which implicates both the declarant and D is inadmissible against D under Indiana Evid. R. 804(b). Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006).

3. State must have independent proof of the charged crime other than the Defendant's confession (corpus delicti)

Out-of-court statements are not admissible unless there is independent proof of corpus delicti. Elliot v. State, 450 N.E.2d 1058 (Ind. Ct. App. 1983). To establish the corpus delicti, there must be independent evidence that supports an inference that the crime charged was committed. Winters v. State, 727 N.E.2d 758 (Ind. Ct. App. 2000). But the corpus delicti rule does not require the State to "make out a prima facie case as to each element of the offense charged." Shinnock v. State, 76 N.E.3d 841, 843 (Ind. 2017); Johnson v. State, 653 N.E.2d 478 (Ind. 1995). Circumstantial evidence may be sufficient to corroborate a confession. Moore v. State, 492 N.E.2d 1 (Ind. 1986).

When a defendant is charged with possession of a controlled substance—or possession of a controlled substance or similar is an element of the offense—a defendant's statement identifying the substance, standing alone, is insufficient to show that the substance was actually contraband. Warthan v. State, 440 N.E.2d 657 (Ind. 1982).

> But see: Crittendon v. State, 106 N.E.3d 1100 (Ind. Ct. App. 2018) (State presented sufficient evidence to support D's conviction for possession of a narcotic drug that D admitted consuming, despite State's failure to introduce the heroin into evidence).

a. Failure to establish corpus delicti - examples

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963) (uncorroborated co-D's confession could not serve as sufficient corpus delicti to support admission of D's confession).

Moore v. State, 497 N.E.2d 242 (Ind. Ct. App. 1986) (where store did not observe D take item nor did it have record of theft, there was no independent proof other than D's confession that theft occurred; thus, confession was inadmissible).

Reynolds/Herr v. State, 582 N.E.2d 833 (Ind. Ct. App. 1991) (because State failed to prove by testing that substance was controlled substance, D's confession to possession of controlled substance was inadmissible).

Johnson v. State, 150 N.E.3d 647 (Ind. Ct. App. 2020) (insufficient evidence to support the inference that a crime had been committed with regard to battery with a deadly weapon before D's out-of-court confession regarding that charge was admitted into evidence).

b. Corpus delicti established

Elliott v. State, 450 N.E.2d 1058 (Ind. Ct. App. 1983) (blood splattered around house and on D, along with human blood found underneath D's fingernails, gave rise to reasonable

inference victim was shot in her home during struggle and was sufficient to establish corpus delicti independent of D's statements).

Johnson v. State, 653 N.E.2d 478 (Ind. 1995) (evidence that victim suffered subdural hematoma establish corpus delicti that robbery occurred).

Douglas v. State, 481 N.E.2d 107 (Ind. 1985) (nature of injuries, co-D's confession, and identification of D as perpetrator established corpus delicti of intent to commit robbery and burglary).

Coleman v. State, 465 N.E.2d 1130 (Ind. 1984) (exact felony or attempted felony need not be established prior to admitting D's confession in felony-murder trial).

Jones v. State, 701 N.E.2d 863 (Ind. Ct. App. 1998) (production of victim's body is not required in murder prosecution if circumstantial evidence shows that death did occur).

Weida v. State, 693 N.E.2d 598 (Ind. Ct. App. 1998) (evidence that D and passenger of truck were drinking from late afternoon, two left in D's truck which ended up in ditch, and both were present and intoxicated at accident scene was sufficient proof of corpus delicti to admit D's statement that he was driving).

Light v. State, 547 N.E.2d 1073, 1080 (Ind. 1989) (corpus delicti was sufficiently established by forensic pathologist's testimony that victim showed injuries consistent with D's confessed beating, despite D's claim that expert witness did not specifically state opinion based on reasonable medical certainty). See also Richardson v. State, 794 N.E.2d 506 (Ind. Ct. App. 2003) (expert testified victim died of manual strangulation).

Shanabarger v. State, 798 N.E.2d 210 (Ind. Ct. App. 2003) (independent evidence aside from D's confession existed to support murder conviction, including fact that D was left alone with child on night prior to death; D had a $100,000 life insurance policy on child and spoke about spending the money; and plastic wrap containing DNA material consistent with child's was admitted into evidence).

Williams v. State, 837 N.E.2d 615 (Ind. Ct. App. 2005) (State established that fire was "incendiary" in nature, sufficient to prove corpus delicti of arson).

Hawkins v. State, 884 N.E.2d 939 (Ind. Ct. App. 2008) (corpus delicti for a confession in murder case was established by opinion evidence that the victim was shot in a truck and that the shooting was then covered up; if circumstantial evidence shows that a death did occur, State does not have to produce the body of the victim).

Seal v. State, 105 N.E.3d 201 (Ind. Ct. App. 2018) (independent evidence of penetration unnecessary for admission of D's confession to level 1 felony child molesting, where four-year-old complaining witness testified that D touched her more than one time on the skin of her vagina; in a footnote, Court suggested it is time for Indiana Supreme Court to consider updating or replacing the corpus delicti rule with a "trustworthiness" standard adopted in other jurisdictions).

c. Corpus delicti rule applies to confessions, not mere statements

The corpus delicti rule only applies when a confession occurs; mere statements by a Defendant may be admitted, to establish elements of a crime without independent proof.

Lawson v. State, 803 N.E.2d 237 (Ind. Ct. App. 2004) (D's statement that he was less than twenty-one was admissible and sufficient to establish age element of illegal consumption of alcohol because D did not admit to drinking beer, and corpus delicti rule only applies to confessions).

d. Multiple offenses

Where the Defendant confesses to several crimes of varying severity within single criminal episode, the confession is admissible as to all crimes if there is independent evidence of the principal offense. Willoughby v. State, 552 N.E.2d 462 (Ind. 1990); Roach v. State, 119 N.E.3d 170 (Ind. Ct. App. 2019). However, where the defendant is charged with multiple crimes, but within separate criminal episodes, the State is required to establish corpus delicti to each individual crime, if each occurred over separate criminal episodes.

Oberst v. State, 748 N.E.2d 870 (Ind. Ct. App. 2001) (where victim testified to only one incident of sexual intercourse, trial court erred in admitting D's confession into evidence because State did not establish corpus delicti for one of two counts of sexual misconduct with minor and variance between charging information and proof at trial was material).

Hurt v. State, 570 N.E.2d 16 (Ind. 1991) (corpus delicti rule does not have to be applied to each offense; here, victim was found naked, bloody, near death and with multiple stab wounds, and blood consistent with victim's blood was found on D's clothing; this was sufficient to establish that crime had been committed even though there was no direct evidence that crime of rape had occurred).

e. Timing of proof and scope of corpus delicti

Although desirable to first establish corpus delicti before showing a confession or statement against interest by the Defendant, such is not necessary, as a matter of order of proof is within the sound discretion of the trial judge. Sluss v. State, 436 N.E.2d 907 (Ind. Ct. App. 1982).

The State does not have to prove corpus delicti in order to admit a defendant's confession to a prior act which is being introduced under Evidence Rule 404(b). Wilkes v. State, 917 N.E.2d 675 (Ind. 2009).

4. State's use of physical evidence from an illegally-obtained confession

Under the Fourth Amendment, failure to give Miranda warnings before interrogating a suspect in custody does not require suppression of any physical evidence obtained as a result of the suspect's unwarned but voluntary statements. United States v. Patane, 542 U.S. 630, 124 S. Ct. 2620 (2004); Hirshey v. State, 852 N.E.2d 1008 (Ind. Ct. App. 2006).

State v. Jones, 191 N.E.3d 878 (Ind. Ct. App. 2022), *trans. denied* (admission in evidence of drugs found in the defendant's bra because of a Miranda violation did not violate the Indiana State Constitution; text of self-incrimination clause is concerned only with testimonial evidence presented at a criminal trial, it is not designed to prevent the admission of nontestimonial evidence resulting from its violation).But see Commonwealth v. Martin, 444 Mass. 213, 827 N.E.2d 198 (2005) and State v. Knapp, 700 N.W.2d 899 (Wisc. 2005) (fruit of poisonous tree doctrine applied under state

constitution, where physical evidence was obtained as a direct result of an intentional Miranda violation).

5. State's use of voluntary statements made after an illegal arrest or search

Statements made following an illegal arrest or search are inadmissible unless the original taint is removed. Miranda warnings alone are not sufficient. Factors important in determining whether a voluntary statement purged the taint of the illegally seized person or evidence are the time lapse between the arrest/admission, the presence of intervening circumstances and the purpose of the official misconduct. Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254 (1975). Indirect fruits of illegal search or arrest must be suppressed when they bear sufficiently close relationship to underlying illegality. Id.

Taylor v. State, 464 N.E.2d 1333 (Ind. Ct. App. 1984) (where only 45 seconds elapsed from police arriving at scene and holding D at gunpoint, statement made to police did not purge taint of illegal arrest).

Joseph v. State, 975 N.E.2d 420 (Ind. Ct. App. 2012) (where officers entered D's home, handcuffed him, and searched his home without a warrant or probable cause, the fact that the police Mirandized D prior to interrogating him at the station did not remove the taint of the illegal entry and the statements should have been suppressed).

N.S. v. State, 25 N.E.3d 198 (Ind. Ct. App. 2015) (accomplice's statement was fruit of illegal search and there was no source independent of the illegal search).

Timmons v. State, 734 N.E.2d 1084 (Ind. Ct. App. 2000) (although D's statement made outside home was independent of unlawful warrantless arrest in his home, police observation of D's intoxicated demeanor outside of home after illegal entry into home was fruit of illegal entry).

Dennis v. State, 736 N.E.2d 300 (Ind. Ct. App. 2000) (even assuming police did not have probable cause to arrest D for public intoxication because he was not in public place, D's threatening remarks to officers were separate from illegal arrest and were not fruit of illegal arrest).

When a defendant is unlawfully arrested in their home without a warrant, the exclusionary rule does not bar the admission of a defendant's subsequent statement as long as there was, at a minimum, probable cause for the arrest at the time the police violated the defendant's fourth amendment rights by crossing the threshold of the suspect's home. New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640 (1990).

Cox v. State, 696 N.E.2d 853 (Ind. 1998) (voluntary statement made to police at station will not be suppressed due to illegal entry into D's home to make arrest as long as police had probable cause to arrest D).

The attenuation exception to the fruit of the poisonous tree doctrine applies to claims challenging the reasonableness of a search or seizure under Article 1, Section 11 of the Indiana Constitution. The attenuation inquiry begins, but is not limited to, consideration of: (1) the timeline between the illegality and acquisition of the derivative evidence; (2) intervening circumstances occurring over that timeline; and (3) the initial police misconduct. Courts should also consider other circumstances that strengthen or weaken attenuation.

Wright v. State, 108 N.E.3d 307 (Ind. 2018) (D's consent to search his computer was invalid, but his incriminating statements to FBI agents two days later were sufficiently independent and attenuated from the illegal search).

6. Admission of interrogating officer's and/or the Defendant's statements in violation of the Indiana Rules of Evidence

a. Interrogating officer's opinion regarding the Defendant's guilt during interview

Ind. R. Evid. 704(b) states that a witness may not testify to opinions concerning intent, guilt, or innocence in a criminal case. The same reasoning underlying Rule 704(b)'s prohibition of opinions of guilt during live in-court testimony applies to statements offered at trial that were made at another time or place. Smith v. State, 721 N.E.2d 213 (Ind. 1999).

Smith v. State, *supra* (trial court erred in admitting portion of taped police interview with D where detective offered opinion of D's guilt, in which he stated, "I thought it was you").

Bostick v. State, 773 N.E.2d 266 (Ind. 2002) (trial court did not abuse its discretion in admitting transcript of D's interview with police; Sullivan and Boehm, JJ., dissenting, believed that officer's twelve explicit assertions of fact of D's guilt during interview were inadmissible under Rule 704(b) and therefore interview was inadmissible under Rule 403).

Lampkins v. State, 778 N.E.2d 1248 (Ind. 2002) (although jury should have been advised that detective's statements intended to elicit information from D were not evidence, admission of statements was harmless); see also Wilkes v. State, 917 N.E.2d 675, 686 (Ind. 2010).

b. Prejudicial effect of interview/interrogation outweighs its probative value

Mote v. State, 775 N.E.2d 687 (Ind. Ct. App. 2002) (trial court committed reversible error in admitting redacted videotape recording of D and polygraph examiner made prior to D's scheduled polygraph test; videotape contained improper references to D's prior arrests and/or convictions in violation of I.R.E. 404(b); improper references to D's prior misconduct without admonishment caused jury's determination of guilt or innocence to be prejudiced to point of placing D in position of grave peril to which he should not have been subjected).

c. Custodial interrogation recording requirement

See part V. on page 88 regarding Ind. Evid. R. 617, which prohibits the admission of unrecorded statements during custodial interrogations.

TABLE OF AUTHORITIES

Cases