# CHAPTER 2
# JUDICIAL NOTICE
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# CHAPTER 2

# JUDICIAL NOTICE

## I. JUDICIAL NOTICE - RULE 201

### A. OFFICIAL TEXT:

**1. Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice:

(1) a fact that:

(a) is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction, or

(b) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(2) the existence of:

(a) published regulations of governmental agencies;

(b) ordinances of municipalities; or

(c) records of a court of this state.

**2. Kinds of Laws That May Be Judicially Noticed. A court may judicially notice a law, which includes:**

(1) the decisional, constitutional, and public statutory law;

(2) rules of court;

(3) published regulations of governmental agencies;

(4) codified ordinances of municipalities;

(5) records of a court of this state; and

(6) laws of other governmental subdivisions of the United States or any state, territory or other jurisdiction of the United States.

**3. Taking Notice. The court:**

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

**4. Timing.**

The court may take judicial notice at any stage of the proceeding.

**5. Opportunity to Be Heard.**

On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

**6. Instructing the Jury.**

In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

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## B. JUDICIAL NOTICE OF FACTS

A court may take judicial notice of a fact. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the trial court's territorial jurisdiction, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Indiana Rule of Evidence 201(a); Woods v. State, 654 N.E.2d 1153, 1155 (Ind. Ct. App. 1995).

**1. Test - Facts beyond dispute**

Judicial notice is appropriate if the purported fact is not subject to reasonable dispute. Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (quoting Rule 201(a)). The proponent of judicial notice bears the burden of demonstrating indisputability. 1 Mueller & Kirkpatrick § 49, at 262 (2d ed. 1994).

Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App. 1997) (at the defendant's request and in support of his motion to suppress a warrantless search, the trial court took judicial notice that the courts were open, and judges were available on the day the search was conducted*), disapproved of on other grounds by* Black v. State*,* 795 N.E.2d 1061 (Ind. 2003).

Smart v. State, 40 N.E.3d 963 (Ind. Ct. App. 2015) (only evidence that methamphetamine was a legend drug was trial court's judicial notice of such; however, whether methamphetamine qualified as a legend drug was not a fact "not subject to reasonable dispute" or a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

Ritz v. Indiana & Ohio R.R., Inc., 632 N.E.2d 769 (Ind. Ct. App. 1994) (while Indiana courts will take judicial notice of location of geographic features in general sense, their exact limits and boundaries have routinely been a matter of averment and proof).

Haley v. State*,* 736 N.E.2d 1250 (Ind. Ct. App. 2000) (trial court properly took judicial notice that a particular building near the site of an alleged drug deal was a school).

Dye v. State, 717 N.E.2d 5 (Ind. 1999) (not-yet-completed study examining the possible systematic exclusion of African Americans from jury venires was not a proper subject of judicial notice; the subject matter was neither generally known within the jurisdiction nor did the conclusions of such a study seem to be capable of accurate and ready determination by resort to sources that could not be reasonably questions).

Harden v. Whipker, 676 N.E.2d 19 (Ind. 1997) (the Indiana Supreme Court took judicial notice that police officer whose right to serve as both police officer and member of county council was being challenged had been defeated in his party primary election); See also Willner v. State, 602 N.E.2d 507, 509 (Ind. 1992).

Trs. of Ind. Univ. v. Spiegel, 186 N.E.3d 1151 (Ind. Ct. App. 2022) (Indiana Court of Appeals took judicial notice of series of executive orders issued during COVID-19 pandemic declaring a public health disaster emergency, imposing social-distancing and stay-at-home requirements, allowing educational institutions to continue operations, but only for purposes of facilitating distance learning, and allowing travel to or from educational institutions for the limited purposes of receiving materials for distance learning, meals, and related services).

**2. Effect of judicial notice**

Judicial notice excuses the party having the burden of establishing a fact from the necessity of producing formal proof. Hutchinson v. State, 477 N.E.2d 850, 853 (Ind. 1985). However, the jury may, but is not required, to accept as true any fact of which judicial notice has been properly taken under Rule 201(f). The defendant has the right to present evidence to contest the fact of which judicial notice has been taken. The requirements of Rule 201 safeguard the reliability of evidence admitted under it. Therefore, the right to confrontation is not violated by the use of Rule 201. Haley v. State, 736 N.E.2d 1250 (Ind. Ct. App. 2000).

**3. Limitations to State's use of judicial notice**

Some facts, such as commonly known scientific facts, should be proved with other evidence and are not appropriate subjects for judicial notice.

Rhoades v. State, 675 N.E.2d 698, 702 (Ind. 1996) (courts should not judicially notice that marijuana metabolites in defendant's urine automatically establish the presence of metabolites in the defendant's blood; however, this inference may be supported by expert testimony).

Barnett v. State, 579 N.E.2d 84, 87 (Ind. Ct. App. 1991) (even if acetaminophen with codeine is recognized by chemists as a schedule III-controlled substance, the State may not rely on the doctrine of judicial notice to meet its evidentiary burden regarding the drug's chemical composition and characteristics).

A trial court should be extremely cautious in taking judicial notice of facts which are easily proven by admissible evidence. Sandy v. State, 501 N.E.2d 486, 488 (Ind. Ct. App. 1986).

## C. JUDICIAL NOTICE OF PUBLIC RECORDS

**1. Notice of records of other courts**

**a. Law after January 1, 2010**

Evidence Rule 201(b) was amended effective January 1, 2010, to allow trial courts to take judicial notice of "records of a court of this state." See Graham v. State, 947 N.E.2d 962 (Ind. Ct. App. 2011). The matter noted must be relevant within the meaning of Rule 401. Mizen v. State ex rel. Zoeller, 72 N.E.3d 458, 467 (Ind. Ct. App. 2017).

Fisher v. State, 878 N.E.2d 457, 463 n. 2 (Ind. Ct. App. 2007) (noting "growing trend of allowing trial courts to access and consider reliable information stored in court or other government records").

In re D.K., 968 N.E.2d 792, 796 (Ind. Ct. App. 2012) (court deciding petition to terminate parental rights took judicial notice of record from another court's CHINS hearing).

**b. Law before January 1, 2010**

Although the language of Indiana Rule of Evidence 201 did not seem to prohibit judicial notice of court records from another jurisdiction, the general rule was that trial courts could not take judicial notice of another court's records, nor could trial courts take judicial notice of their own records in another case previously before the court even on a related subject with related parties. See, e.g., Richeson v. State, 648 N.E.2d 384, 389 (Ind. Ct. App. 1995); Fisher v. State, 878 N.E.2d 457 (Ind. Ct. App. 2007).

Cf. Gray v. State, 871 N.E.2d 408, 412-13 (Ind. Ct. App. 2007) (implicitly holding that the trial court could have taken judicial notice of CCS from witness's case, but not facts subjected to dispute within CCS).

**2. Appellate courts**

The appellate court, by request or *sua sponte*, can take judicial notice of case files not entered into the record. However, judicial notice may not be requested on appeal, however, to fill gaps in the evidence. Best Lock Corp. v. Review Bd. of Indiana Dept. of Employment and Training Services, 572 N.E.2d 520, 528 n.5 (Ind. Ct. App. 1991). Taking judicial notice of facts subject to proof for the first time on appeal should be done with "extreme caution" and within the parameters of Evidence Rule 201. Pigman v. Ameritech Publ'g, Inc., 650 N.E.2d 67, 69 (Ind. Ct. App. 1995).

Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (Court reviewed docket entry, signed plea agreement and unsigned sentencing order in previous case not entered into record to determine accuracy of defendant's prior conviction).

Fisher v. State, 878 N.E.2d 457 (Ind. Ct. App. 2007) (on appeal from denial of petition for post-conviction relief, appellate court took judicial notice of record on original appeal when the pro se defendant tried, but was unable, to obtain the transcript to put into evidence at the post-conviction proceedings).

Sharp v. State, 569 N.E.2d 962 (Ind. Ct. App. 1991) (appellate court took judicial notice of information against defendant in prior proceeding for purpose of determining whether subsequent convictions from which defendant was appealing violated double jeopardy despite defendant's failure to provide records from his former appeal for the court's review).

Freson v. Combs, 433 N.E.2d 55, 60 (Ind. Ct. App. 1982) ("documents or exhibits that a party desires to be judicially noticed must be offered and brought to the attention of the trier of fact (in this case the jury). To preserve error an offer must be made. If a request for judicial notice of documents is granted, the document must be admitted into evidence and then exhibited or read to the jury. Here, nothing of the kind was done, and no offer to prove was made").

**3. Notice of own records in same case**

The trial court may take judicial notice of the pleadings and filings in the case that is being tried, though not of the alleged facts alleged in the pleadings, if the requirements of Rule 201(a) have been met. Twin Lakes Regional Sewer Dist. v. Teumer, 992 N.E.2d 744, 749 (Ind. Ct. App. 2014).

Sanders v. State, 782 N.E.2d 1036, 1038 (Ind. Ct. App. 2003) (in evaluating the credibility of the defendant's testimony in a forgery case, the court took judicial notice that the defendant had written the court a letter containing statements that contradicted his trial testimony).

Brown v. State, 146 N.E.3d 1031 (Ind. Ct. App. 2020) (trial court may take judicial notice of pleadings signed by defendant, and a rebuttable presumption arises which requires the defendant to come forward with any evidence to dispute the presumption).

Withers v. State, 15 N.E.3d 660 (Ind. Ct. App. 2014) (attendance records were records of Drug Court, prepared under its supervision and as part of its treatment program for defendant; thus, trial court was authorized to take judicial notice of them pursuant to Evidence Rule 201(b)(5)).

French v. State, 778 N.E.2d 816, 822-23 (Ind. 2002) (defendant was convicted of the underlying felony by one jury, and later tried on the habitual offender enhancement in the same case by a different jury; trial court took judicial notice of the charging information and order of conviction during the habitual offender phase).

In some circumstances, a court can take judicial notice of proceedings that took place in that court when the proceedings arose from the same criminal incident. Vance v. State, 640 N.E.2d 51, 57 (Ind. 1994). Although incorporating testimony and evidence from a proceeding with greater procedural protections into a proceeding with lesser protections may be appropriate in certain circumstances, doing the opposite is not. L.H. v. State, 878 N.E.2d 425 (Ind. Ct. App. 2007).

Vance v. State, 640 N.E.2d 51 (Ind. 1994) (trial court properly incorporated testimony first waiver hearing into second waiver hearing where both hearings concerned charges relating to the same incident).

Miller v. State, 563 N.E.2d 578, 582 (Ind. 1990) (judicial notice of defendant's acknowledging existence of prior felony at his bond reduction hearing was allowed during the habitual offender phase to prove the defendant was not prejudiced by delayed addition of habitual allegation; defendant did not argue that this made him decide between constitutional rights).

But see L.H. v. State, 878 N.E.2d 425 (Ind. Ct. App. 2007) (trial court erred by incorporating evidence from child hearsay hearing into bench trial after which the State rested; Ind. Code 35-37-4-6(e) requires a hearing separate from the trial).

**4. Limitation**

Judicial notice should be limited to the fact of the record's existence, rather than to any facts found or alleged within the record.

Withers v. State, 15 N.E.3d 660, 664 (Ind. Ct. App. 2014) (judicial notice of attendance records does not mean that the facts within them were conclusive; the parties were free to contest the facts).

Gray v. State, 871 N.E.2d 408 (Ind. Ct. App. 2007) (although the court could take judicial notice of CCS from witness's cases, the court could not take notice of the facts within the CCS which were in dispute, such as what time jurors began deliberating, what time they returned with a verdict, and what time the defendant was in a holding cell).

Twin Lakes Regional Sewer Dist. v. Teumer, 992 N.E.2d 744, 749 (Ind. Ct. App. 2014) (facts within report, namely damages calculated by court-appointed appraisers, were not suitable for judicial notice).

## D. JUDICIAL NOTICE OF LAW: RULE 201(b)

A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, (5) records of a court of this state and (5) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States. Indiana Rule of Evidence 201(b). It is proper for the trial court to take judicial notice of the law and so instruct the jury. Chandler v. State, 581 N.E.2d 1233, 1238 (Ind. 1991).

### 1. Case law and statutes

#### a. Uniform Judicial Notice of Foreign Law Act

Every court in Indiana shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. Ind. Code 34-38-4-1. The court may inform itself of such laws in the manner as the court considers proper. The court may call upon counsel to aid the court in obtaining this information. Ind. Code 34-38-4-2. The determination of these laws shall be made by the court and not by the jury, and is reviewable. Ind. Code 34-38-4-3. Any party may also present to the trial court any admissible evidence of such laws, but to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken of the evidence, reasonable notice shall be given to the adverse parties, either in the pleadings or otherwise. Ind. Code 34-48-4-4.

Mann v. State, 754 N.E.2d 544, 549 (Ind. Ct. App. 2001) (under Ind. Code 34-38-4-3, the trial court, and not the jury, should decide whether another state's operating while intoxicated law is "substantially similar" to Indiana OWI law; trial court erred by not taking judicial notice of Ohio law); see also Tavake v. State, 131 N.E.3d 696 (Ind. Ct. App. 2019).

Mayo v. State, 681 N.E.2d 689, 693 (Ind. 1997) (a court may take judicial notice of the law of another state at any stage of the proceeding), *criticized by* O'Brien, Evidence Law: Survey of Recent Developments in Indiana Evidence Law 31 Ind.L.Rev. 589, 593 (1998).

**PRACTICE POINTER:** Where there is conflict between a statute and a Rule of Evidence, the Rule of Evidence should apply. McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998). Here, under both Rule 201(d) and Ind. Code 34-38-4-1, the trial court must take judicial notice of law when requested by a party. However, if there is no request by a party, Rule 201(c) leaves it to the discretion of the trial court whether to take judicial notice. If a conflict between Rule 201(c) and Ind. Code 34-38-4-1 exists, Rule 201(c) applies.

**b. Examples of case law and statutes**

**(1) In-state law- Rule 702(b) reliability foundation**

Possible means by which reliability may be established include judicial notice or sufficient foundation to convince the trial court that the relevant scientific principles are reliable. McGrew v. State, 682 N.E.2d 1289, 1290 (Ind. 1997). However, when there is no Indiana case finding a specific methodology or reasoning is reliable, there is nothing of which to take judicial notice. West v. State, 805 N.E.2d 909 (Ind. Ct. App. 2004).

West v. State, 805 N.E.2d 909, 913 (Ind. Ct. App. 2004) (trial court could not take judicial notice of reliability of Draeger test detecting anhydrous ammonia because there was no Indiana case in which the test's reliability had been established).

**(2) Out-of-State statutes -Prior felony convictions for enhancements or habitual**

The Indiana Court of Appeals has held that under Ind. Code 34-38-4-3, the trial court, and not the jury, should decide whether another state's operating while intoxicated law is "substantially similar" to Indiana OWI law and take judicial notice of the out-of-state law. Mann v. State, 754 N.E.2d 544, 549 (Ind. Ct. App. 2001); but see Indiana Constitution, Article 1 § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts.")

Similarly, the courts can take judicial notice of out-of-State law to establish that a prior out-of-State conviction is a felony conviction.

Stewart v. State, 688 N.E.2d 1254 (Ind. 1997) (under I.R.E. 201(b), trial court properly took judicial notice of Kentucky law providing that a conviction for possession of a handgun by convicted felon was classified as a Class D felony and the Indiana Supreme Court, on appeal, took judicial notice of the Kentucky law that the sentence for a Class D felony was not less than one year nor more than five years).

But see Straub v. State, 567 N.E.2d 87 (Ind. 1991) (the Supreme Court reversed habitual offender finding because the State failed to prove that Defendant's prior conviction in Ohio was the equivalent of a felony in Indiana; the State made no showing that documentary evidence which might have clarified this issue was unavailable and did not ask the trial court to take judicial notice of Ohio Statutes).

**c. Incorporation of out-of-State law into Indiana statute**

A statute may adopt a part or all of another law or statute, state or federal, by a specific reference to the section sought to be incorporated.

The effect of the incorporation by reference is the same as if the law or statute or the part thereof adopted had been written into the adopting statute. Porod v. State, 878 N.E.2d 415, 417-18 (Ind. Ct. App. 2007) (*citing* State v. Doane, 262 Ind. 75, 311 N.E.2d 803 (1974)).

> Porod v. State, 878 N.E.2d 415 (Ind. Ct. App. 2007) (court did not have to take judicial notice of "orange book" that lists legend drugs to prove Ritalin was a legend drug because Indiana statutory definition of legend drug incorporated federal statute which incorporated "orange book").

**PRACTICE POINTER:** When the defense wants judicial notice of the law of another state:

Defense: Your honor, the defense requests the court to take judicial notice that under the statutes of the state of Illinois, the crime of grand theft is punishable by less than one year of incarceration.

State: Objection, your honor. The State hasn't seen this statute, and I have spoken to the defendant's probation officer in Illinois who says that grand larceny is a felony in Illinois.

Defense: Your honor, under Rule 201(b) and Ind. Code 34-38-4-1, the court is required to take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States. I have here a copy of the Illinois Statute showing that the crime of grand theft in Illinois is called a felony, but the maximum punishment on conviction is less than one year of incarceration.

**2. Administrative rules**

**a. Discretionary under Rule 201(b); Mandatory under statute**

While Rule 201(b) gives a court discretion to judicially notice administrative rules, Ind. Code 4-22-9-3 requires a court to take judicial notice of a rule adopted in conformity with Ind. Code 4-22-2. The mandate of Ind. Code 4-22-9-3 has been upheld, at least with respect to cases involving rules adopted that set standards, procedures, and certification of breathalyzer instruments. Mullins v. State, 646 N.E.2d 40, 46 (Ind. 1995).

**Note:** The statutory mandates for judicial notice may be subject to challenge on the grounds that they infringe upon judicial discretion, see Rule 101(a). A party asserting the Rules of Evidence do not apply has the burden of establishing that with the court. Hawkins v. Auto Owners Ins. Co., 608 N.E.2d 1358 (Ind. 1993), *overruled in part by* Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994).

**b. Regulations are to be judicially noticed**

Courts are permitted to take judicial notice of Indiana law under Rule 201, and courts are required to take judicial notice of the regulations concerning breath testing under Indiana statutes. Sales v. State, 715 N.E.2d 1009 (Ind. Ct. App. 1999), *aff'd on transfer* 723 N.E.2d 416 (Ind. 2000).

> Berry v. State, 720 N.E.2d 1206 (Ind. Ct. App. 1999) (conviction for operating vehicle with BAC > .10% reversed where the trial court failed to take judicial notice of effect of breath test regulations, i.e., that machine alcohol in percentage of blood, and instruct jury accordingly). See also Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994); Mullins v. State, 646 N.E.2d 40 (Ind. 1995).

**3. Ordinances**

Under Rule 201(b)(4) judicial notice may be taken of codified ordinances of municipalities. CGC Enterprises v. State Bd. of Tax Comm'rs, 714 N.E.2d 801, 803 (Ind.Tax Ct. 1999).

## E. TRIAL COURT'S DISCRETION

### 1. Mandatory

#### a. When requested

A court must take judicial notice if a party requests it and the court is supplied with the necessary information. Indiana Rule of Evidence 201(c)(2).

However, there are limitations to mandatory judicial notice, such as the fact or case to be judicial noticed must be relevant.

> Grimes v. State, 693 N.E.2d 1361 (Ind. Ct. App. 1998) (the trial court properly decided not to take judicial notice of a published case and instruct on that case because evidence in the defendant's case did not support judicial notice or the instruction; however, the trial court did permit the defendant to argue from the case in closing arguments).
>
> Hubbell v. State, 58 N.E.3d 268 (Ind. Ct. App. 2016) (PCR court did not abuse its discretion when it declined petitioner's request to take judicial notice of the direct appeal record and voir dire transcripts; however, under circumstances, PCR court's refusal to obtain the certified copy of the direct appeal record denied petitioner a fair hearing).

#### b. Required by statute

Whenever a statute requires judicial notice, the court must take judicial notice of the law or fact described by the statute. Baran v. State, 639 N.E.2d 642, 646 (Ind. 1994).

### 2. Discretionary - notice required

A court may take judicial notice, whether requested or not. Indiana Rule of Evidence 201(c). Thus, a court has discretion to, *sua sponte*, take judicial notice. Hornback v. State, 693 N.E.2d 81 (Ind. Ct. App. 1998). Whenever a court takes judicial notice, whether it be on the court's own motion or at the motion of a party, the court should notify the parties that it will take judicial notice, and if judicial notice is taken during a jury trial, the jury must be instructed according to Rule 201(f). Baran v. State, 639 N.E.2d 642, 648 (Ind. 1994).

## F. PROCEDURE FOR TAKING JUDICIAL NOTICE

### 1. Court may hear evidence

The court can hear evidence to inform it on matters as to which it takes judicial notice. Young v. State, 413 N.E.2d 1083, 1086 (Ind. Ct. App. 1980); Miller, 12 *Indiana Evidence* 214 § 201.302 (4th ed. 2016).

***Note:*** Rule 103(d) directs that argument on judicial notice be conducted, to the extent practicable, outside the jury's hearing.

**2. Party's opportunity to be heard: Rule 201(e)**

On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard. Indiana Rule of Evidence 201(e). This is so because judicial notice excuses the party having the burden of establishing a fact from the necessity of producing formal proof. Baran v. State, 639 N.E.2d 642, 648 (Ind. 1994). The party must request the opportunity to be heard, but may make the request after judicial notice has been taken if the party had no prior notice. Miller, 12 *Indiana Evidence* 218 § 201.501 (4th ed. 2016).

Myers v. State, 718 N.E.2d 783 (Ind. Ct. App. 1999) (post-conviction court erroneously took judicial notice of pre-sentence investigation report from original proceeding, despite fact that court never expressly indicated it was doing so, where court obtained a copy of the report before the hearing and questioned petitioner at hearing regarding information contained therein; error was not fundamental).

H.B. v. J.R. (In re P.R.), 940 N.E.2d 346 (Ind. Ct. App. 2010) (trial court took judicial notice of the protective order file after the hearing was concluded. Mother did not make a timely request to be heard following the court taking judicial notice; the fact that mother was appealing the trial court's action did not constitute a timely request to be heard because she had to make that request to the trial court. Court held that "the better course of action would have been for the court to have given the parties notice and an opportunity to be heard before taking judicial notice and issuing its order").

**3. Jury instruction required: Rule 201(f)**

In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. Indiana Rule of Evidence 201(f).

**a. Pattern Jury Instruction**

The Court has taken judicial notice that _____. You may, but are not required to, accept this as true. Indiana Pattern Jury Instructions -- Criminal, 12.3700 (4th ed., 3/16).

**b. Jury can reject judicially noticed facts**

In criminal cases, the jury is not required to accept as conclusive a judicially noticed fact. See Rule 201(f); Haley v. State, 736 N.E.2d 1250 (Ind. Ct. App. 2000). A judicially noticed fact simply creates a rebuttable presumption sufficient to establish a prima facie case unless defendant offers competent evidence to the contrary. Sumpter v. State, 306 N.E.2d 95 (Ind. 1974), *appeal after remand,* 340 N.E.2d 764 (Ind. 1976).

Haley v. State, 736 N.E.2d 1250, 1252-53 (Ind. Ct. App. 2000) ("We find that although judicially noticed facts are contradictory to the right of confrontation, they are admissible so long as the requirements of Indiana Rule of Evidence 201 are met. By satisfying the requirements of this evidence rule, the reliability of the judicially noticed facts is safeguarded, and thus, their admission does not violate the constitutional right of confrontation… Further, when a court takes judicial notice in

a criminal case, the court shall instruct the jury it may, but is not required to, accept as conclusive any fact judicially noticed").

Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994) (reversing defendant's conviction for operating a vehicle with a blood alcohol content of at least .10% and remanding for a new trial because the trial court failed to expressly take judicial notice of the regulations concerning breath testing and instruct the jury accordingly). But see Sturgis v. State, 654 N.E.2d 1150 (Ind. Ct. App. 1995).

Sumpter v. State, 306 N.E.2d 95 (Ind. 1974), *appeal after remand,* 340 N.E.2d 764 (Ind. 1976) (even though trial court took judicial notice of defendant's sex, an element of the crime charged, judge's finding was not necessarily conclusive of the issue).

**c. Failure to instruct / waiver**

Where the petitioner did not request an appropriate jury instruction on judicial notice and did not allege the judicially noticed fact was inaccurate, the trial court's failure to give a jury instruction regarding a judicially noticed fact was not fundamentally unfair. French v. State, 778 N.E.2d 816, 822-23 (Ind. 2002).

**4. Judicial notice may be taken at any stage of proceedings - Rule 201(d)**

Judicial notice may be taken at any stage of the proceeding. Indiana Rule of Evidence 201(d). The Indiana Supreme Court took judicial notice of case files not entered into the record from a previous case in front of the same trial court. Horton v. State, 51 N.E.3d 1154 (Ind. 2016).

Mayo v. State, 681 N.E.2d 689, 693 (Ind. 1997), *criticized by* O'Brien, Evidence Law: Survey of Recent Developments in Indiana Evidence Law, 31 Ind. L. Rev. 589, 593 (1998) (appellate court took judicial notice that Alabama statute classified escape as Class C felony, the sentence for which was "not more than 10 years or less than 1 year and 1 day" and thus, escape was felony under Indiana habitual offender statute). But see Straub v. State, 567 N.E.2d 87 (Ind. 1991).

Banks v. Banks, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012), *trans. denied* (judicial notice may be taken at any stage of the proceeding, including appeals; however, judicial notice may not be used on appeal to fill evidentiary gaps in the trial record).

Moreover, the Court of Appeals has taken judicial notice of its own records in a different, but related appeal. Sharp v. State, 569 N.E.2d 962, 966 (Ind. Ct. App. 1991); Fisher v. State, 878 N.E.2d 457 (Ind. Ct. App. 2007).

However, on appeal, judicial notice cannot be used to fill evidentiary gaps. Dollar Inn, Inc. v. Slone, 695 N.E.2d 185, 188 (Ind. Ct. Ap. 1998).

Dollar Inn, Inc. v. Slone, 695 N.E.2d 185 (Ind. Ct.App. 1998) (court of appeals would not take judicial notice of evidence concerning AIDS transmission on appeal in negligent infliction of emotion distress action based on fear of contracting AIDS where Appellant was raising, on appeal, the denial of Motion for Summary Judgment and sufficiency).

Poore v. State, 685 N.E.2d 36, 39 (Ind. 1997) (the Supreme Court vacated Defendant's habitual offender finding based on vacation of his underlying prior offense; in a footnote, the Court stated that [in habitual offender phase of the trial] "the State gets only one opportunity to present sufficient evidence to support the enhancement").

**Note:** Arguably, appellate court's taking judicial notice infringes on the jury's constitutional right to determine both the facts and the law, and on the defendant's right to jury trial.

## G. SPECIAL PROCEEDINGS

### 1. Post-conviction relief

Before January 1, 2010, post-conviction courts could not take judicial notice of the transcript of the evidence from the original proceedings absent exceptional circumstances. See, e.g., Bahm v. State, 789 N.E.2d 50 (Ind. Ct. App. 2003). But Ind. R. Evid. 201 now permits courts to take judicial notice of "records of a court of this state," beyond those in the cases before them. If the PCR court, on its own initiative or at the request of a party, takes judicial notice of other court records in ruling upon a PCR petition, those records should be made part of the PCR record for appeal purposes.

Graham v. State, 947 N.E.2d 962, 965 (Ind. Ct. App. 2011) (if judicially noticed records of other courts are not made part of the PCR record, "it places a substantial burden upon this court on appeal to either track down those records and have them transmitted to this court, or to attempt to decide the case without the benefit of those records").

Mitchell v. State, 946 N.E.2d 640 (Ind. Ct. App. 2011) (amended Evidence Rule 201(b)(5) understood to allow a post-conviction court to judicially notice the transcript of evidence from petitioner's underlying criminal proceedings to appraise counsel's performance and evaluate claims of ineffective assistance).

State v. Lime, 619 N.E.2d 601, 604 (Ind. Ct. App. 1993) (where both parties treated judicially noticed transcripts as evidence, appeals court declined to reverse grant of post-conviction relief on grounds that transcripts were never properly admitted).

Fisher v. State, 878 N.E.2d 457 (Ind. Ct. App. 2007) (on appeal from denial of petition for post-conviction relief, appellate court took judicial notice of record on original appeal when the pro se defendant tried, but was unable, to obtain the transcript to put into evidence at the post-conviction proceedings).

**PRACTICE POINTER:** *To request the court to take judicial notice:*

Defense: Your honor, the defense requests the court to take judicial notice that on July 21, 2016, the courts in this county were open and judges were in the courthouse that day.
Court: Judicial notice is taken.

Defense: Your honor, defense requests an instruction to the jury that the court may take judicial notice of a fact, and that the jury may, but is not required to, accept as conclusive any fact judicially noticed.

*To object to the taking of judicial notice:*

Defense: Your honor, the defense objects to the court's taking judicial notice and requests a side-bar to argue its objection [at sidebar]

Your honor, the defense objects to judicial notice that if a metabolite of marijuana is found in the urine, it is also present in the blood. Under Rule 201(a) of the Rules of Evidence, a judicially noticed fact must be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The prosecution bears the burden of proving such a fact through the use of expert testimony under Rule 702(a).

If the court refuses a request to take judicial notice, other evidentiary objections may be appropriate, such as authentication (Rule 902), hearsay (Rule 802), exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay (Rule 403), reliability of expert scientific testimony (Rule 702(b)), and disclosure of facts or data underlying expert opinion (Rule 705).

**2. Probation revocation**

Evidence Rule 201(b) was amended effective January 1, 2010, to allow trial courts to take judicial notice of "records of a court of this state." Prior to the 2010 amendment, the rule prohibiting a court from taking judicial notice of its own records in another case previously before the court was not strictly applied in probation revocation hearings. See, e.g., Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995); Bonds v. State, 729 N.E.2d 1002, 1006 n.3 (Ind. 2000). To take judicial notice, the requirements of Rule 201 still must be met.

Christie v. State, 939 N.E.2d 691 (Ind. Ct. App. 2011) (in probation revocation hearing, trial court properly took judicial notice of court records showing a new conviction in different Indiana court).

Patterson v. State, 659 N.E.2d 220, 223 (Ind. Ct. App. 1995) (trial court did not err in failing to take judicial notice of file in criminal case which was basis of probation revocation; letter in file regarding probationer's mental condition would not constitute fact "not subject to reasonable dispute . . . [as] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

Moore v. State, 102 N.E.3d 304 (Ind. Ct. App. 2018) (taking judicial notice of conviction court had just entered before probation revocation hearing did not violate right to due process; trial court gave defendant the opportunity to present evidence and argument at the hearing, but he chose not to, instead only arguing about what sanction should be imposed).

Whatley v. State, 847 N.E.2d 1007 (Ind. Ct. App. 2006) (trial court did not err when it took judicial notice of probable cause affidavit from a criminal proceeding filed against defendant in same court).