CHATER FOUR
CONSTITUTIONAL AND STATUTORY RIGHTS

Contents

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I. ADVISEMENT OF RIGHTS

Advisement of rights must happen at various stages, including the detention hearing and initial hearing. See the chapters related to the various hearings for more information.

A. PREFERRED METHOD IS FOR THE JUDGE TO PERSONALLY ADVISE AND QUESTION

N.M. v. State, 791 N.E.2d 802, 806, n.3 (Ind. Ct. App. 2003) (In light of fact that the trial court is required to question children about whether they understand their rights, the preferred approach is for the judge to personally advise each child and his or her parents of their rights at the same time the judge questions whether they understand their rights.).

Bridges v. State, 260 Ind. 651, 654, 299 N.E.2d 616, 618 (Ind. 1973) (The nature of the juvenile procedure itself requires that the judge ensure that the juvenile understands the nature of the proceedings, the charges, and the rights, in order to affect the role that the juvenile courts were designed to play in our system of justice. An inquiry about waiver of rights would be meaningless unless the judge established that the juvenile and his parents, if available, knew what his rights were.).

T.D. v. State, 198 N.E.3d 1197 (Ind. Ct. App. 2022) (Court must adequately advise juvenile of rights in accordance with statute. Failure to do so before accepting an admission – which carries with it a waiver of those rights – is a deprivation of due process.)

PRACTICE POINTER: T.D. recognized, for the first time, that juvenile delinquency admissions are akin to adult guilty please and, for that reason, juveniles are entitled to Boykin v. Alabama advisements: "Juvenile admissions are equivalent to adult pleas of guilty. When an adult defendant pleads guilty, the record must demonstrate that the defendant was advised of his constitutional rights and knowingly and voluntarily waived them." Ponce v. State, 9 N.E.3d 1265, 1270 (Ind. 2014) (quotation omitted). Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), "requires that a trial court accepting a guilty plea must be satisfied that an accused is aware of his right against self-incrimination, his right to trial by jury, and his right to confront his accusers." Dewitt v. State, 755 N.E.2d 167, 171 (Ind. 2001)" An argument can be made on appeal or in a Trial Rule 60(B) motion that advisements were inadequate under both Ind. Code 31-32-5-1 and the United States Constitution, pursuant to Boykin. An important caveat is that juveniles are not entitled under Indiana law to jury trials in delinquency proceedings. A.S. v. State, 929 N.E.2d 881, 890 (Ind. Ct. App. 2010).

B. EN MASSE OR VIDEOTAPED ADVISEMENT

T.D. v. State, 198 N.E.3d 1197 (Ind. Ct. App. 2022) (where juvenile was shown "video on his rights" but court did not discuss juvenile's rights with him before he entered admission, waiver of rights statute was not followed, and court failed to ensure that the juvenile knowingly and voluntarily waived his rights).

N.M. v. State, 791 N.E.2d 802, 807 n.3 (Ind. Ct. App. 2003) (Given the special status of juveniles and the extra protection afforded them, we question whether such an advisement is adequate or appropriate.).

M.R. v. State, 605 N.E.2d 204, 206 (Ind. Ct. App. 1992) (En masse advisements of rights passes constitutional muster when coupled with trial judge's personal interrogation of defendant.).

C. WRITTEN ADVISEMENTS OF RIGHTS

N.M. v. State, 791 N.E.2d 802 (Ind. Ct. App. 2003) (advisement form signed by juvenile and parent, in absence of evidence juvenile paid attention to video played en masse, did not adequately advise juvenile and parent of constitutional right to appointed counsel at public expense).

J.M. v. State, 727 N.E.2d 703, 704 (Ind. 2000) (Written advisement of rights as basis of finding of advisement was adequate when signed by both the child and parent.).

Beldon v. State, 657 N.E.2d 1241, 1244 (Ind. Ct. App. 1995) (Where the child listened to en masse advisement and then signed waiver without presence of counsel, parent, or guardian, the wavier was improper and the guilty plea was not made knowingly, voluntarily, or intelligently.).

II. WAIVER OF ANY RIGHTS GUARANTEED TO THE CHILD

See also *Right to Remain Silent section for discussion on waiver and confessions.*

Pursuant to Ind. Code 31-32-5-1, any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:

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

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

  (a) That person knowingly or voluntarily waivers the right;
  (b) That person has no interest adverse to the child;
  (c) Meaningful consultation has occurred between that person and the child; and
  (d) The child knowingly and voluntarily joins with the waiver; or

(3) By the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:

  (a) The child knowingly and voluntarily consents to the waiver; and
  (b) The child has been emancipated under Ind. Code 31-34-20-6 or Ind. Code 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction.

R.R. v. State, 106 N.E.3d 1037, 1040 (Ind. 2018) (With regard to any constitutional or statutory rights the juvenile has, those rights can only be validly waived in accordance with Ind. Code 31-32-5-1. Id. at 1041. "[A] juvenile's waiver of rights requires a heightened showing[,]" and the "analysis begins and ends with the juvenile-waiver statute," found at Ind. Code 31-32-5-1. Id. at 1042.

Taylor v. State, 438 N.E.2d 275, 283 (Ind. 1982), *cert. denied* (quoting Buchanan v. State, 268 Ind. 503, 507, 376 N.E.2d 1131, 1134 (1978)) (Law provides certain basic rights for those suspected of

criminal offenses in order to protect them against unconscionable activity by the State. The State is required to respect those rights, to advise suspect of them and, in the case of a juvenile suspect, to afford juvenile and a mature person who has best interest of the suspect uppermost in his thoughts an opportunity to reflect upon the predicament before making what may be a critical decision.).

In re Gault, 387 U.S. 1, 28-29, 87 S.Ct. 1428 (1967); Patton v. State, 588 N.E.2d 494 (Ind. 1992) (Waiver of rights by children require special caution because of their immaturity.).

T.D. v. State, 198 N.E.3d 1197 (Ind. Ct. App. 2022) (Juvenile's purposed waiver of his right prior to admission was not knowing and voluntary because the record did not show that he was advised by the court of his rights, as required by Ind. Code 31-32-5-1. Advisement by video and by counsel is not sufficient.)

PRACTICE POINTERS:

Roper v. Simmons, 543 U.S. 551 (2005), J.D.B. v. North Carolina, 564 U.S. 261 (2011), and Miller v. Alabama, 567 U.S. 460 (2012), all contain research pertaining to child development and competence that can be used to bolster the argument for the need for extra care when accepting a waiver of rights from a child.

T.D. v. State, 198 N.E.3d 1197 (Ind. Ct. App. 2022), was an appeal from a denial of a Trial Rule 60(B) motion to set aside the juvenile court's delinquency and dispositional judgments but, because the decision did not hinge upon any evidence not available from the original juvenile court record, T.D. could be used to support a challenge to a delinquency order on direct appeal.

A. STRICT COMPLIANCE WITH STATUTE REQUIRED FOR VALID WAIVER

T.D. v. State, 198 N.E.3d 1197 (Ind. Ct. App. 2022) (strict compliance with the juvenile waiver of rights statute is required to safeguard those constitutional and statutory rights).

R.R. v. State, 106 N.E.3d 1037, 1042 (Ind. 2018) ("[A] juvenile's waiver of rights requires a heightened showing[,]" and the "analysis begins and ends with the juvenile-waiver statute," found at Ind. Code 31-32-5-1.).

Bryant v. State, 802 N.E.2d 486, 493 (Ind. Ct. App. 2004), *trans. denied*; see also Whipple v. State, 523 N.E.2d 1363, 1369 (Ind. 1988) ("guardian" includes *de facto* guardian for purposes of the predecessor statute to Ind. Code 31-32-5-1 and does not conflict with the rule that strict compliance with the statute is necessary to safeguard the rights of juveniles); Wehner v. State, 684 N.E.2d 539, 540 (Ind. Ct. App. 1997) (Strict compliance with statute governing waiver of constitutional rights of child is required in order to protect those rights.).

1. State Has a Burden of Proof of Compliance with Statutory Waiver Requirements

Stewart v. State, 754 N.E.2d 492, 494 (Ind. 2001).

D.M. v. State, 949 N.E.2d 327, 334-35 (Ind. 2011) (citations omitted) "The State bears the burden of proving beyond a reasonable doubt that the juvenile received all of the protections of Indiana Code section 31–32–5–1 and that both the juvenile and his or her parent knowingly, intelligently, and voluntarily waived the juvenile's rights[.]".)

2. Waiver May Not be Implied

Gallegos v. Colorado, 370 U.S. 49, 54, *reh'g denied* (1960) (Waiver of child's rights may not be implied by child's talking to police. A child is not equal to the police or an adult in knowledge and understanding of consequences of questions and answers being recorded and is unable to know how to protect his own interests and constitutional rights. Aid of a more mature judgment is required to protect the child's rights.).

3. Waiver of One Right Does Not Waive All Constitutional Rights

D.D.B. v. State, 691 N.E.2d 486, 487 (Ind. Ct. App. 1998) (Waiver of one of child's constitutional rights does not constitute waiver of all constitutional rights. Statutory waiver provisions must be observed for each individual constitutional right.).

4. Child's Request for Rights Is Strong Indication that No Waiver Occurred

G.B. v. State, 715 N.E.2d 951, 954 (Ind. Ct. App. 1999) (A child was held to have not voluntarily waived her constitutional rights when the following exchange occurred: G.B.: "I want a lawyer or a public defender." Juvenile Court: "Your mom just waived your rights to an attorney, sign the paper." Record showed juvenile did not voluntarily join in the waiver, as statutorily required.).

PRACTICE POINTER: G.B. provides strong ammunition for arguments that any indication that either parent or child requests rights, even if waiver has been signed, supports claim that waiver was not knowing and voluntary.

B. VOLUNTARINESS

D.M. v. State, 949 N.E.2d 327, 339 (Ind. 2011) (Because Ind. Code 31-32-5-1 requires that both the child and the parent voluntarily waive the juvenile's rights, assessing the validity of the juvenile's waiver requires conducting two separate analyses – voluntariness of the child's waiver and voluntariness of the parent's waiver. If the child was separated from the parent, their experiences or situations may not be exactly the same.).

D.E. v. State, 962 N.E.2d 94, 96 (Ind. Ct. App. 2011) (Child and his counsel signed the plea agreement. Parent was present at plea hearing but did not agree with child's acceptance of plea agreement and would not sign plea agreement. The plea agreement was valid, as the child's and counsel's signatures are enough to satisfy Ind. Code 31-32-5-1.).

C. MEANINGFUL CONSULTATION

1. Rationale for Meaningful Consultation

Washington v. State, 456 N.E.2d 382, 383-84 (Ind. 1983) (Consultation requirement is designed to afford juvenile a stabilizing and comparatively relaxed atmosphere in which to make a serious decision that could affect the rest of his life.).

J.L. v. State, 5 N.E.3d 431, 438 (Ind. Ct. App. 2014) (cleaned up) ("The meaningful consultation requirement of the juvenile waiver of rights statute is a safeguard additional to

the requirement of adult waivers that they be knowingly, voluntarily, and intelligently made. The purpose of the meaningful consultation requirement is to afford the juvenile a stabilizing and comparatively relaxed atmosphere in which to make a serious decision that could affect the rest of his life.").

Foster v. State, 633 N.E.2d 337, 347 (Ind. Ct. App. 1994) (Meaningful consultation requirement is an extra safeguard for juveniles in addition to the requirement that waivers be knowingly, voluntarily, and intelligently made.).

2. Meaningful Consultation May Be Waived

Pursuant to Ind. Code 31-32-5-2 the child may waive the child's right to meaningful consultation under Ind. Code 31-32-5-1(2)(C) 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.

L.W. v. State, 199 N.E.3d 1225, 1230 (Ind. Ct. App. 2022) (A child may only validly waive the right to meaningful consultation with a parent, guardian, or custodian, Ind. Code 31-32-5-1(C), 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.") (citing Ind. Code § 31-32-5-2).

Estrada v. State, 969 N.E.2d 1032, 1043 (Ind. Ct. App. 2012), *trans. denied*.

Maxwell v. State, 456 N.E.2d 435, 436 (Ind. Ct. App. 1983) (Where rights waiver stated explicitly that juvenile was giving up right to meaningful consultation, waiver was explained to juvenile and his mother at same time, juvenile signed waiver, and mother, in addition to signing as a witness to son's signature, acknowledged over a second signature that she had a meaningful consultation with her son before they both signed waiver, juvenile waived his right to a meaningful consultation and statement made by juvenile thereafter was admissible).

Note: Reviewing court in Maxwell fails to deal with an obvious inconsistency in the facts, and there is no indication whether appellate counsel argued the significance of the inconsistency. The precedential value of Maxwell should be minimized if a similar situation arises. Maxwell has never been cited as authority by any other appellate cases.

3. Actual Consultation or Opportunity for Consultation Must Occur

Brown v. State, 751 N.E.2d 664, 670 (Ind. 2001) (*overruled in part on other grounds by* D.M. v. State, 949 N.E.2d 327 (Ind. 2011) (quoting Williams v. State, 433 N.E.2d 769, 772 (Ind. 1982)) (The meaningful consultation requirement will be met when the State demonstrates "actual consultation of a meaningful nature or … the express opportunity for such consultation, which is then forsaken in the presence of the proper authority by the juvenile, so long as the juvenile knowingly and voluntarily waives his constitutional rights.").

D.D.B. v. State, 691 N.E.2d 486, 487 (Ind. Ct. App. 1998) (citing Hickman v. State, 654 N.E.2d 278, 281 (Ind. Ct. App. 1995)) (Condition of meaningful consultation is fulfilled upon actual consultation of a meaningful nature or by express opportunity for such consultation, which is then forsaken in presence of proper authority by child, so long as child knowingly and voluntarily waives constitutional rights.).

Fowler v. State, 483 N.E.2d 739, 743 (Ind. 1985), *reh'g denied* (Once police have afforded opportunity for consultation, utilization of this opportunity for consultation and nature of discussion by parent and juvenile is within their discretion.).

Estrada v. State, 969 N.E.2d 1032, 1043 (Ind. Ct. App. 2012), *trans. denied* (Opportunity for meaningful consultation found when advisement of rights form adequately informed parent and child of child's rights, evidence showed child was informed of the right to speak with parent, child understood that right, child decided to talk to detective without taking advantage of right, and parent and child were advised that any statements made by the child could be used against her.)

a. Opportunity to consult should occur after advisement and before waiver of rights

Patton v. State, 588 N.E.2d 494, 496 (Ind. 1992) (The opportunity for the child and parent to consult must occur before the rights are waived as the purpose of the consultation is to allow the juvenile to make the decision about the waiver of rights in a comparatively relaxed and stable atmosphere.).

C.J. v. State, 141 N.E.3d 830, 837 (Ind. Ct. App. 2020), *trans. denied* (the brevity of the conversation between juvenile and his parent prior to waiver "impact[ed] whether [the juvenile's] waiver was knowing and intelligent because we expect people facing consequential decisions to take time to contemplate their options before making a decision.").

But see N.B. v. State, 971 N.E.2d 1247, 1257 (Ind. Ct. App. 2012) (Signing the waiver form should, under best practices, occur after the child and parent have had an opportunity for meaningful consultation. Juvenile came voluntarily to sheriff's department with family members. Juvenile and mother signed waiver form before meaningful consultation. Following consultation, juvenile gave statement, with no indication from juvenile or family members that the juvenile did not want to continue. Although waiver form insufficient to support finding of rights waiver, juvenile subsequently impliedly waived his rights.) .).

b. Private consultation outside of police presence and no video

D.M. v. State, 949 N.E.2d 327, 335 (Ind. 2011) (the "actual consultation of a meaningful nature" must occur in a relatively private atmosphere).

Washington v. State, 456 N.E.2d 382, 383-84 (Ind. 1983) (Consultation can only be meaningful in the absence of police pressure.).

Bryant v. State, 802 N.E.2d 486, 494 (Ind. Ct. App. 2004), *trans. denied* (Video/audio recording or police monitoring of consultation between child and parent or guardian does not comply with concept of "meaningful consultation".).

S.D. v. State, 937 N.E.2d 425, 431(Ind. Ct. App. 2010), *trans. denied* (Videotaping parental consultation was impermissible police presence and infringed on any privacy necessary for any meaningful consultation.).

Hall v. State, 264 Ind. 448, 452, 346 N.E.2d 584, 587 (1976), *reh'g denied* (Where record was unclear as to time allowed for consultation and whether child and adult sister were ever left alone prior to execution of waiver, no meaningful consultation could be found because of possibility of police pressure.).

But see;

Bluitt v. State, 269 Ind. 438, 381 N.E.2d 458 (1978) (Consultation sufficient even though FBI agents never left room, as child and father never requested opportunity to speak alone, officer testified that if such a request had been made it would have been permitted, and no evidence of police pressure.).

Fowler v. State, 483 N.E.2d 739, 743 (Ind. 1985) (Consultation was adequate where juvenile and mother were seated in laboratory reception area in police station, even though people were constantly coming and going through reception area and investigating officer remained standing on other side of sliding glass window through which he could look into reception room.).

Washington v. State, 456 N.E.2d 382, 383-84 (Ind. 1983) (Although consultation can only be meaningful in absence of police pressure, police officers are not required to leave juvenile alone with mother and grandmother where mother repeatedly expressed fear of son and juvenile became abusive enough that officer felt it necessary to restrain him. Statute does not require parent, relative, or guardian to place self in position of physical harm.).

PRACTICE POINTER: Get a copy of the interview recording, if it exists, to ensure that there is no evidence that the meaningful consultation period was videotaped or observed by law enforcement and ask the client and parent/guardian/custodian about how they were given an opportunity to consult privately. Also, become familiar with the local law enforcement interview process, including pre-interrogation interview that is not recorded.

c. Police cannot dictate how to use consultation time

D.M. v. State, 949 N.E.2d 327, 335 (Ind. 2011) (The interrogating officer cannot dictate or even recommend how the child and parent should use the consultation time.).

d. Does not extend to pre-trial identification

Mayfield v. State, 402 N.E.2d 1301, 1307 (Ind. Ct. App. 1980), *reh'g denied* (citing Kirby v. Illinois, 406 U.S. 682, 690 (1972) (No right exists for child to have parents present at pre-arrest identification of child by victim.).

e. State has burden to show consultation opportunity was given

D.M. v. State, 949 N.E.2d 327, 334 (Ind. 2011).

D.D.B. v. State, 691 N.E.2d 486, 487 (Ind. Ct. App. 1998) (State bears burden of proving requirement of meaningful consultation or opportunity for such has been satisfied.).

Fortson v. State, 270 Ind. 289, 298-99, 385 N.E.2d 429, 436 (1979), *reh'g denied* (The State need not show that the consultation was beneficial in helping the juvenile and the parent decide whether to waive the child's rights.).

G.B. v. State, 715 N.E.2d 951, 954 (Ind. Ct. App. 1999) (Child's request for a lawyer, to which court responded that child's mother had waived her right to an attorney, cast significant doubt on whether meaningful consultation had occurred between mother and daughter.).

Foster v. State, 633 N.E.2d 337, 348 (Ind. Ct. App. 1994), *trans. denied* (State met burden of proving meaningful consultation where rights waivers were executed only after 45-minute family consultation, even though prior admissions existed before advisements given.).

4. When Must Consultation Occur?

(A) Advisement of rights must proceed consultation

"A consultation can only be meaningful where both the juvenile and the parent are advised of the juvenile's rights prior to the consultation." D.M. v. State, 949 N.E.2d 327, 341-342 (Ind. 2011) (citing Douglas v. State, 488 N.E.2d 107, 111 (Ind. 1985)); see also Graham v. State, 464 N.E.2d 1, 11 (Ind. 1984), *reh'g denied* (Consultation must come after advisement of rights is given, so that two parties know what is at stake in waiver.).

(B) More than one consultation not required

Tippitt v. State, 266 Ind. 517, 364 N.E.2d 763, 765 (1977) (Once juvenile has had a meaningful consultation with parent and has waived right to remain silent and to assistance of counsel, and where questioning of juvenile has been discontinued, second opportunity for meaningful consultation is not required if police officers resume their questioning.).

PRACTICE POINTER: This may not be true if second period of questioning is about a different suspected crime. In such a case, argue that a new opportunity for meaningful consultation and a new waiver are required because the child is facing a different set of circumstances and consequences, and the child and parent, guardian, or custodian have not been informed of the delinquent act, as required for a knowing and voluntary waiver under Ind. Code 31-32-5-4(3), or of the consequences of the child's statements regarding the second suspected delinquent act, as required under Ind. Code 31-32-5-4(2).

(C) Parent need not be present at every conversation with police

Smith v. State, 400 N.E.2d 1137, 1140 (Ind. Ct. App. 1980) (Child requested mother to leave, implying that child may have waived any right that he might have had to presence of his mother by his own statements.).

Shepard v. State, 273 Ind. 295, 301-02, 404 N.E.2d 1, 5 (1980) (It is not necessary that parent or guardian be present at every instance in which child voluntarily talks to police, so long as parent or guardian has previously consulted with child. Waiver of rights was valid where after consultation and waiver father left to go to work but gave permission for continued questioning during which child confessed.).

Note: If there was persistent questioning of a juvenile without his parent being present or if there were evidence of coercion, force or inducement, Shepard may be inapplicable.

5. Length of Time the Child Was Held in Custody Before Meaningful Consultation

Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962) (Confession inadmissible where police held child for five days during which time he saw no lawyer, parent, or other friendly adult.).

Williams v. State, 433 N.E.2d 769, 773 (Ind. 1982) (State did not meet burden of showing knowing and voluntary waiver of rights where record reveals child was detained for five hours before being questioned in presence of father for one hour. Child was informed of rights and parent and child executed a consent to search form, but no consultation was provided. No evidence was presented to indicate that situation lacked coercive nature "normally present in custodial surroundings." However, the error was deemed harmless.).

Harden v. State, 576 N.E.2d 590, 593 (Ind. 1991) (Waiver and statement was voluntary even though child was left alone in room for over three hours without food or drink, where evidence did not indicate undue deprivation.).

6. Length of Consultation

C.J. v. State, 141 N.E.3d 830, 837 (Ind. Ct. App. 2020), *trans. denied* (The extent to which the conversation aids in the waiver decision is a circumstance among many others which the trial court may consider in arriving at its decision as to whether the waiver is voluntary and knowing. The brevity of the conversation between child and Mother impacted whether child's waiver was knowing and intelligent because people facing consequential decisions take time to contemplate their options before making a decision.)

Garrett v. State, 265 Ind. 63, 351 N.E.2d 30, 33-34 (1976), *reh'g denied* (Amount of time necessary for meaningful consultation depends not just on seriousness of offense but also on mental abilities of child and parent. Child and mother needed more than a mere moment under scrutiny of interrogator to consider the rights and waiver where interrogator was acquainted with the child and his circumstances and child had only limited communicative skills.).

Foster v. State, 633 N.E.2d 337, 348 (Ind. Ct. App. 1994), *trans. denied* (Consultation between parents and sons, including 45-minute family conference after advisement of rights,

was meaningful and sufficient where there was no indication of police putting time pressures on them.).

Chandler v. State, 275 Ind. 624, 632, 419 N.E.2d 142, 147 (1981) (Ten minutes was adequate amount of time for meaningful consultation between parent and child charged with felony murder.).

Fortson v. State, 270 Ind. 289, 385 N.E.2d 429, 436-37 (1979), *reh'g denied* (15 minutes adequate amount of time for meaningful consultation between parent and child charged with first degree murder.).

Smith v. State, 580 N.E.2d 298, 300 (Ind. Ct. App. 1991), *trans. denied* (20 minutes of private consultation was clearly adequate.).

7. Focus Is Child's Rights, Not Parent's Rights

Andrews v. State, 441 N.E.2d 194, 198 (Ind. 1982) (Primary focus should be on child's rights, not that of the parents. A trusting atmosphere, rather than an atmosphere riddled with animosity, would be more conducive to a meaningful consultation between the juvenile and an adult.).

D. ADULT ADVISORS IN WAIVER PROCESS

1. Definitions

a. Custodial parent

"Custodial parent," for purposes of Ind. Code 31-14-13-8, Ind. Code 31-14-15, Ind. Code 31-16-6-1.5, Ind. Code 31-16-12.5, Ind. Code 31-17-2-22, and Ind. Code 31-17-4, means the parent who has been awarded physical custody of a child by a court. Ind. Code 31-9-2-30.

Stewart v. State, 754 N.E.2d 492, 495 (Ind. 2001) (Other statutory definitions of parent point towards conclusion that "custodial parent" is one who has been adjudicated by court to have legal custody of child or who actually resides with an unemancipated child. Therefore, a biological or adoptive "parent" is not a proper adult for purposes of meaningful consultation unless custodial.).

b. Custodian

"Custodian" for purposes of the juvenile law, means a person with whom a child resides. Ind. Code 31-9-2-31(a).

Sevion v. State, 620 N.E.2d 736, 739 (Ind. Ct. App. 1993) (Where the child's mother had placed the child in the custody of an 18-year-old, consultation with that custodian was proper. Custodian can act as consulting adult for child where adult is trusted by child and feels sufficiently secure in role to accompany him to police station and to sign papers as child's guardian.).

Tingle v. State, 632 N.E.2d 345, 352 (Ind. 1994) (Juvenile's grandmother was eligible as custodian for purposes of waiver of right to remain silent, as juvenile was living with grandmother at time of crime.).

c. Guardian

"Guardian," for purposes of the juvenile law, means a person appointed by court to have care and custody of a child, the child's estate, or both. Ind. Code 31-9-2-49(b).

Whipple v. State, 523 N.E.2d 1363, 1369 (Ind. 1988) (Where child accused of killing parents consulted with grandfather prior to waiving rights, even though grandfather did not technically qualify under any of relevant definitions of persons who may serve as a consulting adult, guardian could be interpreted to include de facto guardians acting in loco parentis.).

d. Parental Substitute – note: this is not included in the waiver statute

Andrews v. State, 441 N.E.2d 194, 198 (Ind. 1982) (In some circumstances a parental substitute may be more valuable to child and of more assistance to child for purposes of evaluating whether to waive important constitutional rights than assistance of parent. Primary focus should be on juvenile's rights, not those of parents.).

e. Grandparent

Andrews v. State, 441 N.E.2d 194, 198 (Ind. 1982) (Waiver of rights proper where child indicated that he trusted his grandmother and refused to see mother whom he had not seen for three years.).

Tingle v. State, 632 N.E.2d 345, 352 (Ind. 1994) (Grandmother with whom child lived at time of the crime was child's custodian for purpose of consultation.).

f. Sibling

Barker v. State, 440 N.E.2d 664, 668 (Ind. 1982), *reh'g denied* (The sister, being eighteen years of age, did not show the interest or concern that might be expected of a parent or guardian. However, given the totality of the circumstances surrounding the confession, including the waiver, the length and nature of the interrogation, the age of the child, the lack of mental or physical disability, the confession could be used for impeachment purposes.).

g. "Witness" may not be adequate role

Garrett v. State, 265 Ind. 63, 68, 351 N.E.2d 30, 33-34 (1976) (Designation of mother on waiver form as only a "witness" obfuscated advisory rule intended by law, and thus kept mother and son from realizing that she was to be an active participant in decision whether to speak to the police without an attorney present.).

But see Sills v. State, 463 N.E.2d 228, 231 (Ind. 1984) (*overruled in part on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995)) (Waiver of rights by both parent and child was sufficiently proved where father testified that he did not object to

but in fact encouraged child to give statements, even though the father only signed on the line in the form provided for a witness.).

2. Adult's Mental Capacity May Be relevant to Meaningful Consultation

Brown v. State, 751 N.E.2d 664, 671 n.8 (Ind. 2001) (*overruled in part on other grounds by* D.M. v. State, 949 N.E.2d 327 (Ind. 2011) (Fact that father was paranoid schizophrenic and antisocial did not affect his ability to provide meaningful advice, as detective testified that father said he understood, and father had appeared with children before in juvenile court.).

Fortson v. State, 270 Ind. 289, 385 N.E.2d 429, 436 (1979) (Mother, who was outpatient in a mental health clinic, provided meaningful consultation in part because she did not appear ill, was in control of herself and aware of surrounding and son's rights, and had provided such assistance on previous occasions.).

PRACTICE POINTER: Defense counsel who knows child's parent or guardian to be mentally incompetent or unstable should continue to argue that the parent could not provide meaningful consultation and could not voluntarily and knowingly waive the child's rights. Consider the holding in Brown and Fortson to emphasize that the parent's previous experience with the child in juvenile court is irrelevant to his or her mental competence at the time of the consultation in question, as mental competence is not a static concept. Caselaw emphasizing the requirement of strict adherence to the waiver of rights statute and the need for heightened protections for juveniles may be helpful.

3. Person Acting as Advisor May Not Have Adverse Interest to Child

Person (the child's custodial parent, guardian, custodian, or guardian ad litem) acting as advisor to child during the waiver of any rights may not have an interest adverse to the child. Ind. Code 31-32-5-1(2)(B).

PRACTICE POINTER: Defense counsel should question the adult who purportedly had meaningful consultation with the child and joined the child in his or her waiver of rights to determine what conversations, if any, that adult had with police officers before consulting with the child. The appellate court suggested that a conflict could exist in Garrett v. State, 265 Ind. 63, 351 N.E.2d 30, 34 (1976), where an officer invited child's mother to encourage her son to confess and during the heated interrogation which followed the making of written waiver, she did tell him to speak the truth. For this reason, the need for an opportunity for a frank exchange of views between mother and son was indicated. If counsel can establish that the adult assisting the child ceased to become child's advisor and, instead, became a police agent for purposes of inducing a confession, the child may have been deprived of his right to meaningful consultation. Further, the court must consider whether the adult understood the potential consequences of the allegation(s) against the child and the potential consequences of the child waiving his or her rights. If evidence exists that the adult was misled and relied upon a faulty understanding of the situation when advising the child, that may support an argument that the waiver was invalid.

1. **If child is a ward of DCS, DCS caseworker may have adverse interest to act as an advisor**

   Borum v. State, 434 N.E.2d 581, 583-84 (Ind. Ct. App. 1982) (Delinquency petition was filed by an attorney for a county DCS against a child who was a ward of DCS. When a caseworker joined the child in waiver of her rights at initial hearing, waiver was invalid because of adverse interest of the state representative. Meaningful consultation statute is intended to require a non-attorney adult without adverse interests to advise child.).

PRACTICE POINTER: DCS can no longer file a delinquency petition, but a DCS employee can play a crucial role in the dispositional process.

2. **If child is incorrigible and parent may have adverse interest**

   Borum v. State, 434 N.E.2d 581, 583-84 (Ind. Ct. App. 1982) (quoting the commentary to the prior waiver of rights statute) (A parent who refers a child to court as an incorrigible, and who, therefore, is chief witness against child, obviously would not qualify as person who can join child in waiving rights.).

3. **Advisor who may have been at scene of crime may have adverse interest**

   Sevion v. State, 620 N.E.2d 736, 739 (Ind. Ct. App. 1993) (State must respect rights of juveniles and strive to provide consultation with person who does not stand to benefit by cooperating with police and by encouraging juvenile to act in a manner adverse to his interests. Where adult with whom juvenile resides may also be witness to the crime, a guardian ad litem or attorney must be appointed to advise child.).

4. **Adverse interest of parent rarely found**

   N.B. v. State, 971 N.E.2d 1247, 1254 (Ind. Ct. App. 2012) (Where mother was not alleged victim but could have faced criminal liability for Neglect of a Dependent, mother did not have adverse interests to juvenile and her ability to act in accordance with juvenile's interests were not affected.).

   M.R. v. State, 605 N.E.2d 204, 207 (Ind. Ct. App. 1992) (Child's mother did not have interest adverse to child when she brought him to police station after he violated probation by running away and again after he had escaped from police station. Child was not charged as an incorrigible and mother was not a key state's witness in any of charges filed against him.).

   Taylor v. State, 438 N.E.2d 275, 284-85 (Ind. 1982) (Extreme cases of hostility between parent and child might render consultation between parent and child inadequate. However, court found mother was appropriate person to assist child and had no interest adverse to his, even though child objected to her being his advisor and he had not lived with his mother for over a year, where he had been living with his uncle who had also been arrested with the juvenile for the same offense and his father's whereabouts were unknown.).

Fortson v. State, 270 Ind. 289, 298, 385 N.E.2d 429, 436 (1979), *reh'g denied* (Confession was properly admitted where juvenile argued that mother appeared ill, but evidence appeared otherwise.).

Graham v. State, 464 N.E.2d 1, 4 (Ind. 1984), *reh'g denied* (Testimony presented at court hearing demonstrated that although child's relationship with father was often strained if not hostile, father did not necessarily have an interest adverse to child.).

Whipple v. State, 523 N.E.2d 1363, 1370 (Ind. 1988) (Grandfather of child murder defendant was proper consulting adult, where grandfather was his sister's guardian, had relationship with child, and advised child to waive right to remain silent and tell the truth. Although grandfather was distraught over killing of daughter and son-in-law, he could still safeguard best interests of the child, expressed love and concern for child and hoped to get him psychiatric help, and had no financial interest to gain by grandson's conviction.).

5. Encouragement to be truthful does not indicate adverse interest

Douglas v. State, 481 N.E.2d 107, 111 (Ind. 1985) (Father's encouragement that son be truthful with police does not indicate that father has an adverse interest which would undermine voluntariness of child's waiver of rights.).

Buchanan v. State, 268 Ind. 503, 507, 376 N.E.2d 1131, 1134 (1978) (Juvenile had adequate consultation despite fact that father told his son to tell the truth. Father was not acting in concert with police and was therefore a proper person to advise juvenile.).

Harden v. State, 576 N.E.2d 590, 593 (Ind. 1991) (Fact that during twenty minutes together, father only told child that police officers said it would be easier on child if he talked, did not mean that child was not provided meaningful consultation.).

4. Written Waiver Form

Deckard v. State, 425 N.E.2d 256, 257 (Ind. Ct. App. 1981) (Where, although the juvenile's mother was present when he signed the waiver, there was nothing on the face of the waiver to establish that his mother knowingly and intelligently waived his rights, the waiver was improperly executed, and the search based on that waiver was therefore illegal.).

III. RIGHT TO REMAIN SILENT

Also see *section on Waiver of Any Rights Guaranteed to the Child*

For a complete discussion of confessions, see the Indiana Public Defender Council Confessions Handbook

A. PROVISIONS FOR RIGHT TO REMAIN SILENT

1. U.S. Constitution Fifth Amendment

No person. … shall be compelled in any criminal case to be a witness against himself…

Horan v. State, 642 N.E.2d 1374, 1375 (Ind. 1994) (quoting Carter v. Kentucky, 450 U.S. 288, 305 (1981) (Fifth Amendment is applicable to the states through the Fourteenth Amendment.).

2. Indiana Constitution Article I, Section 14

No person, in any criminal prosecution, shall be compelled to testify against himself.

3. Indiana Statutory Law

A child charged with a delinquent act is entitled to refrain from testifying against the child. Ind. Code 31-32-2-2(2).

4. Applicability to Juvenile Court Proceedings

a. In General

In re Gault, 387 U.S. 1, 42-55, 87 S.Ct.1428 (1967); J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394 (2011); J.D.P. v. State, 857 N.E.2d 1000 (Ind. Ct. App. 2006), *trans. denied* (The privilege against self-incrimination and the use of compelled statements also applies to juvenile delinquency proceedings.).

b. Juvenile Mental Health Statute Confers Use & Derivative Use Immunity

State v. I.T., 4 N.E.3d 1139, 1147 (Ind. 2013):

Juvenile Mental Health Statute, Ind. Code 31-32-2-2.5(b), bars child's statement to mental health evaluator from being admitted into evidence, except for probation revocation proceeding or modification of disposition decree. During treatment ordered for probation, I.T. revealed more delinquent behavior that would be Class B felony child molesting if committed by an adult, and State used the admissions to file additional allegations of delinquency. Evidence derived from I.T.'s statements was protected by use immunity and derivative use immunity to encourage child to participate "openly in treatment to reduce their likelihood of reoffending."

B. SPECIAL PROCEDURE FOR CUSTODIAL INTERROGATIONS

Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682 (1980) (The special procedural safeguards outlined in Miranda are not required where a suspect is simply taken into custody, but rather where the subject is taken into custody and subjected to interrogation.).

C.L.M. v. State, 874 N.E.2d 386, 390 (Ind. Ct. App. 2007) (When juvenile who is not in custody and being interrogated gives a statement to the police or other state actor, neither Miranda safeguards nor juvenile waiver statute is implicated. In this case, statement was obtained in violation of Miranda and was not harmless, so reversal was warranted).

Under Ind. Code 31-32-5-4, 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:

A. The child's physical, mental, and emotional maturity.

B. Whether the child or the child's parent, guardian, custodian, or attorney understood the consequences of the child's statements.

C. 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.

D. The length of time the child was held in custody before consulting with the child's parent, guardian, or custodian.

E. Whether there was any coercion, force, or inducement.

F. 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.

1. Advisement of Rights – Miranda Safeguards

Miranda v. Arizona, 384 N.E.2d 436, 445-67, 86 S.Ct. 1602 (1966); Luna v. State, 788 N.E.2d 832, 833 (Ind. 2003) (An individual held for interrogation must be clearly informed that the has the right to consult with a lawyer and to have the lawyer with him during the interrogation, as well as the right to remain silent and that anything stated can be used against him.).

a. Four requirements for admissibility

Miranda v. Arizona, 384 N.E.2d 436, 445-67, 86 S.Ct. 1602 (1966); D.M. v. State, 949 N.E.2d 327, 334 (Ind. 2011) (There are four requirements that must be satisfied before a juvenile's statements made during a custodial interrogation can be used in the State's case-in-chief:

A. Both the juvenile and his/her parent must be adequately advised of the juvenile's rights;

B. The juvenile must be given an opportunity for meaningful consultation with his/her parent;

C. Both the juvenile and his/her parent must knowingly, intelligently, and voluntarily waive the juvenile's rights;

D. The juvenile's statements must be voluntary and not the result of coercive police activity.).

b. Exact wording of advisement of rights not set by law

California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (The Court has not dictated the exact words in which the Miranda warnings must be conveyed.); See also Sauerheber v. State, 698 N.E.2d 796, 803 (Ind. 1998).

Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195, 1198 (2010) (Warning of rights was adequate where defendant was advised 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 [his] rights at any time [he] want[ed] during th[e] interview." The warnings in combination conveyed the right to have an attorney present at all times.).

PRACTICE POINTER: Request the exact language used for the Miranda warning, such as the waiver of rights form or the card issued to law enforcement officers by the Indiana Law Enforcement Academy. If the child is learning disabled, consider requesting an evaluation that includes a language assessment, such as the Miranda Rights Comprehension Instruments (MRCI-II). A speech pathologist may also be used to evaluate the child's unique language disabilities and ability to understand the language of the Miranda warning.

2. Custodial Interrogation Rights Law Enforcement Involvement

S.G. v. State, 956 N.E.2d 668, 676 (Ind. Ct. App. 2011) (It is well established in case law defining 'interrogation' and 'custody' that the two cannot exist without the presence of a law enforcement officer.).

K.F. v. State, 961 N.E.2d 501, 512-13 (Ind. Ct. App. 2012) (Juvenile waiver statute was not applicable because juvenile was not subjected to an interrogation when she spoke to her mother, who was the alleged victim, although juvenile was at the police station at the time of the statement. Mother was not acting as an agent for the police.).

B.A. v. State, 100 N.E.3d 225, 232-33 (Ind. 2018) (cleaned up) (Whether the presence of law enforcement rendered the encounter "custodial" is addressed on a case-by-case basis:

- The number of officers present and how they are involved.
- Whether the setting is a traditional school-discipline environment or is police dominated.
- What the student is told about the interview.
- The length of the interview.
- The student's age.
- Whether the student is arrested after the interview.
- The relationship between the parties, including whether police officers act as teachers, counselors, or law enforcement agents. Some schools embrace all three roles for their resource officers, while in other schools one role dominates.

This list is not exhaustive given Miranda's totality-of-the-circumstances test, but it offers some factors that may be relevant in the school setting.

Of course, a bright-line rule for custody would be easier for schools, police, and courts to apply in these close cases. But despite its challenges, we cannot replace Miranda's custody spectrum with a simple, clear line. Such a line could not account for each case's nuances, as Miranda's totality-of-the-circumstances test requires.")

a. School officials alone do not trigger Miranda protections

S.G. v. State, 956 N.E.2d 668, 676 (Ind. Ct. App. 2011) (A principal acting alone and without invoking or outwardly benefiting from the authority of any law enforcement officer may question a student without complying with Miranda's requirements.).

State v. C.D., 947 N.E.2d 1018, 1022 (Ind. Ct. App. 2011) (Principal questioned child in presence of police officer, who was present at the request of the principal. Police officer stated that he thought the child was under the influence of marijuana. Child admitted to smoking the prior day, after which the child was suspended from school and his backpack was searched. Statement was admissible because questioning was related to educational function or school purpose and not to further a criminal investigation.).

G.J. v. State, 716 N.E.2d 475, 477 (Ind. Ct. App. 1999) (Child was not subjected to custodial interrogation when the dean questioned him. No meaningful consultation was required.).

S.G. v. State, 956 N.E.2d 668, 679-80 (Ind. Ct. App. 2011) (Under certain circumstances a police officer's presence in conjunction with a school officer's questioning may be significant. However, no violation where child brought to principal's office by officer at principal's request. Child was asked about theft of a cellphone by principal and immediately suspended. Officer did not participate in questioning in any way.).

D.Z. V. State, 100 N.E.3d 246, 248 (Ind. 2018) ("[W]hen police officers aren't present, a clear rule applies: students are neither in custody nor under interrogation, unless school officials are acting as agents of the police.").

b. Police officer cannot avoid Miranda by using an agent

Sears v. State, 668 N.E.2d 662, 668 (Ind. 1996) (Police cannot avoid their duty under Miranda by attempting to have someone act as their agent in order to bypass the Miranda requirements.).

D.Z. V. State, 100 N.E.3d 246, 248 (Ind. 2018) ("[W]hen police officers aren't present, a clear rule applies: students are neither in custody nor under interrogation, *unless school officials are acting as agents of the police*.") (emphasis added).

3. Was the Child in Custody?

J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 2397 (2011) (*citing* Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457 (1995)) (Whether a suspect is "in custody" for Miranda purposes is an objective determination involving two discrete inquiries: "first, what were the circumstances surrounding the interrogation; and the second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." A child's age is a proper consideration in the Miranda custody analysis, so long as the child's age is known to the officer at the time of the police questioning or would have been apparent to a reasonable officer.).

Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382 (1991); Torres v. State, 673 N.E.2d 472, 474 (Ind. 1996) (Child is in custody when reasonable person under the same circumstances would believe that she was under arrest or was not free to leave.).

State v. O.E.W., 133 N.E.3d 144, 154-55 (Ind. Ct. App. 2019), *trans. denied* (cleaned up) (In concluding that the juvenile was in custody at the time he was interrogated and that suppression was warranted, the court applied a "helpful list of factors commonly considered by courts in determining whether a person was in custody for purposes of Miranda", which

includes: "whether and to what extent the person has been made aware that he is free to refrain from answering questions; whether there has been prolonged, coercive, and accusatory questioning, or whether police have employed subterfuge in order to induce self-incrimination; 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 whether the suspect could reasonably believe that he has the right to interrupt prolonged questioning by leaving the scene.").

S.D. v. State, 937 N.E.2d 425, 430-31 (Ind. Ct. App. 2010) (A reasonable person would believe he was not free to leave where he had been interrogated alone for one and one-half hours and been held in an interview room for two and one-half hours and near the end of the interview the detective sat close to the child and spoke in a low voice.).

Gauvin v. State, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007), *trans. denied* (Whether a person was in custody depends upon the objective circumstances, not upon subjective views of the interrogating officers or the subject being questioned.).

C.L.M. v. State, 874 N.E.2d 386, 390 (Ind. Ct. App. 2007) (For an interrogation to be custodial in nature, one does not necessarily have to be under arrest, if the persons freedom of action has been deprived in any significant way.).

Yarborough v. Alvarado, 541 U.S. 652, 665, 124 S.Ct. 2140 (2004) (State court could reasonably find that 17-year-old suspect was not in custody, even though interview lasted two hours and occurred at police station and suspect was not informed he was free to leave, as parents rather than police transported child to station, suspect was not required to appear at a certain time, parents remained in lobby during interview, police were not coercive or threatening and twice asked suspect if he wanted to take a break.).

Borton v. State, 759 N.E.2d 641, 646 (Ind. Ct. App. 2001) (Statements juvenile volunteered to officers indicating that he was victim/eyewitness were not product of coercive police activity and were not given during custodial interrogation.).

G.J. v. State, 716 N.E.2d 475, 477 (Ind. Ct. App. 1999) (Questioning of student by school official is not custodial interrogation, and therefore consultation safeguards, including meaningful consultation, do not apply.).

A.A. v. State, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999) (As a general rule, when a juvenile who is not in custody gives a statement to the police, neither the safeguards of Miranda warnings nor the Juvenile Waiver Statute are implicated. Child was not in custody because he was not under arrest or physically restrained, was told he was free to leave before each interview and appeared voluntarily with his mother. Police officer's statements tended to elicit an incriminating response from child, and therefore child was under interrogation. Confession was not voluntary.).

Thompson v. State, 692 N.E.2d 474, 476 (Ind. Ct. App. 1998) (Where child voluntarily came to police station to make statement and signed waiver of rights form, he was not in custody and waiver statute did not apply.).

Sevion v. State, 620 N.E.2d 736 (Ind. Ct. App. 1993) (Where child suspected of gang-related killing arranged time to provide statement to police, had no charges filed against him, and was free to go at any time, interview was non-custodial, and statements were admissible).

4. Was the Child Being Interrogated?

The term "interrogation" has been defined as a process of questioning by law enforcement officials, which lends itself to obtaining incriminating statements. A.A. v. State, 706 N.E.2d 259, 261 (Ind. Ct. App. 1999) (citing Jenkins v. State, 627 N.E.2d 789, 796 (Ind. 1993), *reh'g denied*).

Ross v. State, 151 N.E.3d 1287, 1290 (Ind. Ct. App. 2020), *trans. denied* ("Under Miranda, interrogation includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response from the suspect.")

White v. State, 772 N.E.2d 408, 412 (Ind. 2002) (citing Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682 (1980)) (Under Miranda, 'interrogation' includes express questioning and words or actions on the part of the police that the police know are reasonably likely to elicit an incriminating response.).

Robey v. State, 555 N.E.2d 145, 148 (Ind. 1990) (citing Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682 (1980)) (The safeguards outlined in Miranda also apply to the functional equivalent of interrogation by the police.).

P.M. v. State, 861 N.E.2d 710, 713-14 (Ind. Ct. App. 2007) (Although juvenile was in police custody at time he made incriminating statements, he was not being subjected to interrogation at time. It was an employee of the theft victim who questioned the child, not the police. Thus, the protections of Ind. Code 31-32-5-1 did not apply.).

Moore v. State, 723 N.E.2d 442, 450 (Ind. Ct. App. 2000) (Although juvenile was placed in back of police cruiser and was not free to leave, officer questioned him with regards to what he believed to be an accident and therefore juvenile was not subject to custodial interrogation and waiver statute did not apply. However, court admonished officers to cease questioning and read an individual his Miranda rights the moment that officer knows or should know that the investigation will turn into one that is criminal in nature.).

A.A. v. State, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999) (Police officer's statements tended to elicit an incriminating response from the child, and therefore child was under interrogation.).

Stidham v. State, 608 N.E.2d 699, 700-01 (Ind. 1993) (Where at time of arrest, child voluntarily stated to police, "We killed him," and when the police officer asked who had been killed, child replied, "Some queer." Statements were considered voluntary.).

Grass v. State, 570 N.E.2d 32, 33 (Ind. 1991) (Where child was in detention but not a suspect, and voluntarily made statements to a newspaper reporter despite a police officer saying he should first speak with an attorney, child's statements were not result of custodial interrogation.).

C. CHILD HAS RIGHT TO HAVE PARENTS PRESENT DURING CUSTODIAL INTERROGATION

G.J. v. State, 716 N.E.2d 475, 477 (Ind. Ct. App. 1999) (A child has the right to have his parents present during custodial interrogations.).

D. RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION

Jolley v. State, 684 N.E.2d 491, 492 (Ind. 1997) (*quoting* Miranda v. Arizona, 384 U.S. 436, 469, 86 S.Ct. 1602, (1966)) (The right to have counsel present during custodial interrogations 'is indispensable' to the protection of the Fifth Amendment privilege against self-incrimination.).

Taylor v. State, 689 N.E.2d 699, 703-04 (Ind. 1997) (The Indiana Constitution affords essentially the same protection regarding custodial interrogations as the U.S. Constitution.).

1. If Child Requests Counsel, Questioning Must Stop

Jolley v. State, 684 N.E.2d 491, 492 (Ind. 1997) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880 (1981)) (When a suspect asserts his right to counsel during custodial questioning, the police must stop until counsel is present, or the suspect reinitiates communications with the police and waives his right to counsel.).

But see Edmonds v. State, 840 N.E.2d 456, 460 (Ind. Ct. App. 2006), *trans. denied* (citing David v. United States, 512 U.S. 452, 459 (1994) ("If a suspect makes a request for counsel that is ambiguous or equivocal and, if in light of the circumstances, a reasonable officer would not understand the statement to be a request for an attorney, then the police are not required to stop questioning the suspect. The Supreme Court in Davis noted that 'it will be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney' when a suspect makes an ambiguous statement, but it declined to adopt a rule requiring officers to ask clarifying questions.").

2. Form of Request for Counsel

Davis v. U.S., 512 U.S. 452, 459, 114 S.Ct. 2350 (1994) (Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.).

Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560 (1979) (Respondent's request to see his probation officer did not constitute a per se invocation of his Fifth Amendment rights, but in this particular case, given the juvenile's age and experience, the statement may indicate that the request was meant to invoke the right to remain silent.).

Jolley v. State, 684 N.E.2d 491, 492 (Ind. 1997) (*citing* Davis v. U.S., 512 U.S. 452, 459, 114 S.Ct. 2350 (1994)) (While the suspect need not invoke any magic words, the cessation of police questioning is not required 'if a suspect makes a reference to an attorney that is ambiguous or equivocal. A statement is considered ambiguous or equivocal when 'a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel'.").

Lewis v. State, 966 N.E.2d 1283, 1288 (Ind. Ct. App. 2012) ("Can I get a lawyer?" constituted an unequivocal invocation of the Fifth Amendment right to counsel. Much as the question, "Can I get the car tonight?" would be universally understood as a request to borrow the car tonight, and not as a theoretical question regarding one's ability to borrow the car tonight, we have little trouble concluding that Lewis's question would be understood by any reasonable police officer as an unequivocal request for counsel." "Can" means 'to be able to' and expresses certainty... "Could" is better for a sense of uncertainty or a conditional statement." The Chicago Manual of Style sec 5.220, at 270 (16th ed. 2010) (emphases added). The use of "could" by the suspect in Powell, therefore, may be interpreted as an expression of doubt regarding the suspect's intent to request an attorney, whereas Lewis's use of "can" in asking, "Can I get a lawyer?" is more reasonably interpreted as an intentional request for such.).

U.S. v. Lee, 413 F.3d 622, 626 (7th Cir. 2005) ("Can I have a lawyer?" was found to be similar to other statements recognized by the courts as proper invocations of the right to an attorney. Unless the police obtained further clarification from the suspect that this question was actually an unequivocal request for an attorney, they should have halted the interrogation.).

Powell v. State, 898 N.E.2d 328, 332 (Ind. Ct. App. 2008), *trans. denied* ("Could I see about getting a lawyer or something man" during a custodial interrogation was ambiguous and not sufficiently clear as to constitute a request for an attorney. Officers immediately followed up and asked defendant if he, in fact, wanted an attorney. When directly asked, the defendant did not say yes or clarify that he wanted counsel.).

Anderson v. State, 961 N.E.2d 19, 26 (Ind. Ct. App. 2012) ("I really would like to talk to an attorney or something" was an unequivocal invocation of the right to counsel. The addition of the words "or something" did not qualify or equivocate Anderson's clear statement.).

Taylor v. State, 689 N.E.2d 699, 703 (Ind. 1997) ("I guess I really want a lawyer, but, I mean, I've never done this before, so I don't know" was found to be an expression of doubt and not a request for counsel.).

Davis v. U.S., 512 U.S. 452, 462, 114 S.Ct. 2350 (1994) ("Maybe I should talk to a lawyer" was found to be an ambiguous request for counsel.).

Collins v. State, 873 N.E.2d 149, 156 (Ind. Ct. App. 2007), *trans. denied* ("Do I need an attorney" and later "I probably need an attorney" were not unequivocal requests for an attorney.).

State v. Battering, 85 N.E.3d 605, 608 (Ind. Ct. App. 2017), *reh'g denied* ("the specific facts and circumstances surrounding Battering's statement that he was "done with answering questions right now," we conclude that Battering's statement demonstrated an unequivocal invocation of the Fifth Amendment right to remain silent.").

E. WAIVER OF RIGHT TO REMAIN SILENT

1. Form of Waiver of Right to Remain Silent

Berghuis v. Thompkins, 560 U.S. 370, 383-84 (2010); North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979); D.M. v. State, 949 N.E.2d 327, 339 (Ind. 2011) (An express oral or written statement is not required to establish a knowing or voluntary waiver of rights – valid waivers may be implied.).

A. Written waiver is strong proof of valid waiver, but not sufficient alone

North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979); D.M. v. State, 949 N.E.2d 327, 339 (Ind. 2011) (A written waiver is certainly strong proof that a valid waiver occurred but can be challenged. A written waiver is neither necessary nor sufficient to establish that a person voluntarily waived his or her Miranda rights.).

B. Written waiver form should be clear

D.M. v. State, 949 N.E.2d 327, 339 (Ind. 2011) (When waiver of rights forms are used, they should be clear and unequivocal. Had a clearer form been used in this case, any putative confusion likely would have been resolved as soon as the form was read.).

c. Valid implied waiver following uncoerced statement

Berghuis v. Thompkins, 560 U.S. 370 (2010) (Generally, a valid implied waiver occurs where a suspect has been advised of his or her Miranda rights and has acknowledged an understanding of those rights and makes an uncoerced statement without taking advantage of them. Had Thompkins said that he wanted to remain silent or that he did not want to talk, he would have invoked his right to end the questioning.).

2. Meaningful Consultation Required Prior to Waiver of Rights

See *section on meaningful consultation in Waiver of Any Rights Guaranteed to the Child.*

Pursuant to Ind. Code 31-32-5-1(2), any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only 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 the child;
c. Meaningful consultation has occurred between that person and the child; and
d. The child knowingly and voluntarily joins with the waiver.

3. Waiver of Right to Remain Silent Must Be Knowing and Voluntary

Pursuant to Ind. Code 31-32-5-4, 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.

(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.

4. Two Separate Analyses – Child Must Join In the Waiver – Parents May Not Act Alone

D.M. v. State, 949 N.E.2d 327, 339 (Ind. 2011) (Assessing the validity of a juvenile's waiver of his rights requires conducting two separate voluntariness analyses – the voluntariness of the juvenile's waiver and the voluntariness of the parent's waiver.).

5. Voluntariness

In re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428 (1967) (The "greatest care must be taken to assure that the admission [of an adolescent] was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.").

Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515 (1986) (The relinquishment of the right to remain silent must have been voluntary in the sense that it was a free and deliberate choice, rather than intimidation, coercion, or deception.).

D.M. v. State, 949 N.E.2d 327, 334 (Ind. 2011) (The juvenile's statements must be voluntary and not the result of coercive police activity.).

F. STATE HAS BURDEN OF PROOF THAT CHILD RECEIVED ALL PROTECTIONS

D.M. v. State, 949 N.E.2d 327, 334-35 (Ind. 2011); (The State bears the burden of proving beyond a reasonable doubt that the juvenile received all of the protections of IC 31-32-5-1 and that both the juvenile and his or her parent knowingly, intelligently, and voluntarily waived the juvenile' rights.).

G. TEST FOR ADMISSIBILITY OF CONFESSION IS TOTALLY OF CIRCUMSTANCES

Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 2572 (1979); see also Gallegos v. Colorado, 370 U.S. 49, 55, 82 S.Ct. 1209, 1213 (1962) (Proper test in determining admissibility of confessions in juvenile cases is same test applied in adult criminal cases, namely totality of the circumstances.).

Graham v. State, 464 N.E.2d 1, 4 (Ind. 1984), *reh'g denied* (The totality of the circumstances test has been adopted in Indiana.).

C.J. v. State, 141 N.E.3d 830, 836 (Ind. Ct. App. 2020), *trans. denied* ("We evaluate the validity of a Miranda waiver by looking at the totality of the circumstances. This includes considering the juvenile's physical, mental, and emotional maturity; whether the juvenile or his parent understood the consequences of speaking with law enforcement; whether the juvenile and his parent were informed of the delinquent act for which the juvenile was suspected; the length of time the juvenile was held in custody before consulting with his parent; whether law enforcement used any force, coercion, or inducement; and whether the juvenile and his parents had been advised of the juvenile's Miranda rights.") (citations omitted).

PRACTICE POINTERS: Determine whether two separate arguments must be made to challenge admissibility of a confession: (1) was the waiver of the right to remain silent involuntary or improper and (2) was the statement itself involuntary. Consider if the two events – the waiver and the actual statement – were separated by any length of time and/or if there was possible coercion or duress.

1. Child's Physical, Mental, and Emotional Maturity

See also *the Resources Appendix for research articles on juvenile comprehension of Miranda warnings*.

J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 2406 (2011) (So long as the child's age is known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. That is not to say that a child's age will be determinative, or even a significant, factor in every case.).

Gallegos v. Colorado, 370 U.S. 49, 54, 72 S.Ct. 1209 (1962) ("No matter how sophisticated a juvenile subject of police interrogation cannot be compared to an adult subject in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights… and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.").

PRACTICE POINTERS: Roper v. Simmons, 543 U.S. 551 (2005), J.D.B. v. North Carolina, 564 U.S. 261 (2011), and Miller v. Alabama, 567 U.S. 460 (2012), all contain research pertaining to child development and competence.

a. Child must present evidence if contesting waiver due to physical, mental, or emotional maturity

Cherrone v. State, 726 N.E2d 251, 255 (Ind. 2000) (*overruled* on other grounds by D.M. v. State, 949 N.E.2d 327 (Ind. 2011) (Although burden of proving voluntary waiver rests with the State, the court found that the child failed to point to anything that established that his physical, mental, or emotional maturity was "less than average".).

b. Physical maturity

Whipple v. State, 523 N.E.2d 1363, 1371 (Ind. 1988) (Child was six weeks shy of his eighteenth birthday and in good physical health.).

Stone v. State, 268 Ind. 672, 377 N.E.2d 1372, 1373-74 (1978) (When child tells police that he is over 18 years old and police make a good faith, diligent effort to confirm age and mistakenly believe juvenile to be an adult, confession is admissible without waiver. Child stated he was 19 years old and had similarly lied and given the same erroneous date of birth on four prior arrests. When police checked their records, the birth date was confirmed, albeit erroneously.).

Note: Stone was expressly limited to situations where police make good faith diligent effort in making the age determination and are frustrated in such effort by the misstatement of the suspect as to age.

Mayfield v. State, 402 N.E.2d 1301, 1306 (Ind. Ct. App. 1980), *reh'g denied* (Juvenile's statement to a police officer conducting investigatory traffic stop was admissible even though requirements of Lewis were not complied with where police were not aware child was under 18 years old and juvenile had been advised of Miranda rights.).

c. Mental maturity

Graham v. State, 464 N.E.2d 1, 4-5 (Ind. 1984) (Waiver was knowing and voluntary where expert testified the child could engage in intelligent conversation, the father could read and attended some school, and both child and father indicated that they understood rights and waiver.).

Yarbrough v. State, 463 N.E.2d 1098, 1099 (Ind. 1984) (Fact that child could not read well did not invalidate waiver of rights in view of presence of mother and reading of Miranda rights by police officer to child and mother.).

Gregory v. State, 540 N.E.2d 585, 592 (Ind. 1989) (When defendant claims he was under influence of drugs at the time he made a statement, degree of mental impairment is of critical importance.).

Thomas v. North Carolina, 447 F.2d 1320, 1321 (4th Cir. 1971) (Child's confession was inadmissible based primarily on limited education and low mental ability where 15-year-old could read or write very little and had a composite IQ of 72.).

d. Emotional maturity

Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302 (1948) (Events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." Admissibility of confession reversed based on young age of defendant, duration and time of the interrogation, and the exclusion of parents and counsel.).

Fare v. Michael C., 442 U.S. 707, 721, 99 S.Ct. 2560, 2570 (1979) (Where juvenile was on probation and experienced in juvenile justice system, confession was admissible

despite request to see his probation officer, in part because his experience with judicial system indicating his statement was voluntary and knowing.).

Smith v. State, 580 N.E.2d 298, 301 (Ind. Ct. App. 1991), *trans. denied* (Statement of 16-year-old entering senior year of high school was admissible based in part on fact that he was relatively mature for a juvenile.).

Sparks v. State, 248 Ind. 429, 434, 229 N.E.2d 642, 646 (1967) (Even though child was 17 years old, fact that he had no previous police record and was without benefit of counsel or opportunity to consult with parents or anyone else outside presence of police while being detained required finding that waiver of rights was involuntary, and that confession must be suppressed.).

PRACTICE POINTERS: Federal courts have granted habeas corpus relief or reversed delinquency adjudications under federal statutes where the youth questioned by police had no prior delinquency experience and had never been interrogated previously. See, e.g., United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973).

2. Did the Child and Parent Understand the Consequences?

Tingle v. State, 632 N.E.2d 345, 352-53 (Ind. 1994) (Failure of police officer taking incriminating statement from child to inform child and guardian of potential charges or penalties that may be brought against child may be insufficient, standing alone, to render child's confession involuntary.).

In re Gault, 387 U.S. 1, 55, 87 S.Ct. 1428, 1458 (1967) (Greatest care must be taken to assure that admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.).

Smith v. State, 580 N.E.2d 298, 301 (Ind. Ct. App. 1991), *trans. denied* (Fact that mother failed to appreciate that son was in jeopardy of prosecution and that confession would harm him did not, under the totality of the circumstances, render the confession involuntary.).

Jackson v. State, 269 Ind. 256, 260, 379 N.E.2d 975, 977 (1978) (Statement admissible even though neither child nor parents were advised that the offense of first-degree murder was outside the jurisdiction of the juvenile court, as there was no implication that child would be tried in juvenile court.).

Sparks v. State, 248 Ind. 429, 438, 229 N.E.2d 642, 648 (1967) (Conviction reversed where child was not aware of the consequences of his statement to police. Child believed that even the third confession he signed would not incriminate him.).

Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979) (Capacity of child to understand consequences of waiving rights and nature of Fifth Amendment and Miranda rights are factors to be considered.).

C.J. v. State, 141 N.E.3d 830, 836 (Ind. Ct. App. 2020), *trans. denied* (juvenile's behavior was not that expected of someone who understood he was being questioned about a serious

crime, where juvenile "hummed, moved chairs, danced, clapped, and laughed" while in the interrogation room alone after waiving his rights).

3. Were the Child and Parent Informed of Delinquent Act?

Trowbridge v. State, 717 N.E.2d 138, 146 (Ind. 1999), *reh'g denied* (Although Ind. Code 31-32-5-4(3) states that assessment of voluntariness of waiver must include consideration of whether child and child's parent, guardian, or custodian were informed of delinquent act with which child is charged or suspected, the Supreme Court has held that waiver can be made knowingly even where parent is not specifically apprised of charges against child or act of which child is suspected. In this case, mother was concerned child had information about murder and "should have appreciated that her son was in jeopardy of prosecution".).

Carter v. State, 686 N.E.2d 1254, 1258 (Ind. 1997) (Confession and waiver upheld where mother and child had not been told that child was a suspect, but mother was aware of victim's murder, rights were read, and waivers were signed.).

Tingle v. State, 632 N.E.2d 345, 352-53 (Ind. 1994) (Admissibility of confession upheld where officers read rights and grandmother signed waiver despite fact that grandmother had not been informed of potential charges or possibility of child being tried as an adult.).

Smith v. State, 580 N.E.2d 298, 301 (Ind. Ct. App. 1991) (Waiver upheld where mother failed to appreciate fact that her son was in jeopardy of prosecution.).

C.J. v. State, 141 N.E.3d 830, 837 (Ind. Ct. App. 2020), *trans. denied* (where juvenile was not informed of the delinquent act of which he was suspected, the juvenile's "mere recognition that he would likely get into trouble [did] not automatically equate to an appreciation for the illegal nature of his conduct.").

PRACTICE POINTER: In all of the above cases, the parent who waived the child's rights had some knowledge of the alleged crime or circumstances of child's arrest. If parent waives child's rights without any knowledge of why child was arrested or what type of questioning is intended, or if police question child about crimes beyond the scope of which the parent was aware, these cases can be distinguished. Argue that to permit waiver without any knowledge by the parent or child of the crime or charges would cause the "knowingly" requirement to not be met.

4. Length of Time Child Held in Custody Before Consultation

Harden v. State, 576 N.E.2d 590, 593 (Ind. 1991) (Even though child claimed he was in room alone for over three hours without food or drink and was cold before father arrived to consult with him, evidence did not indicate undue deprivation, abnormal room temperature or anything else sufficient to render statement involuntary.).

Poling v. State, 515 N.E.2d 1074, 1078-79 (Ind. 1987), *cert. denied* (Environment in which child confessed was not unduly coercive even though San Francisco police officers admitted that they did not provide him with food or drink and that he was handcuffed to a bench in the waiting room while they attempted to determine his status in Indiana. He was released to go to bathroom and there was no evidence that he was refused food or drink or desired any, and he was not threatened or mistreated by police.).

5. Was There Coercion, Force, or Inducement?

Critical inquiry is whether child's statements were induced by violence, threats, promises or other improper influence. A.A. v. State, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999) (*citing* Page v. State, 689 N.E.2d 707, 710 (Ind. 1997)).

a. Coercion

Fare v. Michael C., 442 U.S. 707 (1979) (Abhorrence of coercive confessions is rooted in both Fourteenth and Fifth Amendments. To preserve blessings of liberty, U.S. Constitution requires that forfeiture of lives, liberties or property of people accused of crime can only follow if: (1) procedural safeguards of due process have been obeyed; and (2) element of compulsion condemned by Fifth Amendment is not present.).

Gallegos v. Colorado, 370 U.S. 49, 50-51 (1962) (Holding a child incommunicado may constitute physical and psychological pressure vitiating the voluntariness of a confession.).

Sparks v. State, 248 Ind. 429, 436-38, 229 N.E.2d 642, 647 (1967) (17-year-old's confession was coerced when it was given after child had taken lie detector test that he did not know he had the right to refuse, and child had been subjected to extended questioning over three-day period during which child gave two earlier statements to police, neither of which suggested guilt.).

Hall v. State, 264 Ind. 448, 453, 346 N.E.2d 584, 587-88 (1976), *reh'g denied* (Overzealous police activities occurred before guardian arrived, after which there could be no meaningful consultation and the subsequent confession was suppressed.).

Foster v. State, 633 N.E.2d 337, 349-50 (Ind. Ct. App. 1994), *trans. denied* (Where investigating detective erroneously believed child was old enough to be subject to death penalty, fact that he made reference to death penalty while seeking cooperation from child's mother did not constitute coercion. Statement was made to impress upon child's mother the seriousness of the offenses being investigated.).

b. Inducement

Definite promises not permitted but vague statements are permitted.

Clark v. State, 808 N.E.2d 1183, 1191 (Ind. 2004) (statement by officer that "there's a way you can work around this" was not a promise of leniency).

Ashby v. State, 265 Ind. 316, 321-22, 354 N.E.2d 192, 196 (1976) (Direct representation that defendant would receive "ten flat" sentence instead of life sentence rendered confession involuntary.).

A.A. v. State, 706 N.E.2d 259, 263 (Ind. Ct. App. 1999) (Where police officer suggested to child that State "wanted to make a deal," and that child could receive counseling and would probably be placed on house arrest, this alone did not render child's confession inadmissible because comments did not amount to promises of immunity or mitigation of punishment.).

Ward v. State, 408 N.E.2d 140, 143 (Ind. Ct. App. 1980) (Officer's promise to "help. . .in every way he could" was too vague and indefinite to undermine voluntariness of the confession.).

Fowler v. State, 483 N.E.2d 739, 744 (Ind. 1985), *reh'g denied* (Suppression of confession unwarranted where child had already voluntarily admitted his guilt by nodding head before alleged inducements were offered, and inducements were just statements that cooperation might affect whether child was charged as an adult and judge would be more likely to try to help a sincere rather than an abusive defendant.).

Douglas v. State, 481 N.E.2d 107, 111-12 (Ind. 1985) (Child claimed that police made representations to child and father regarding leniency and place of incarceration prior to taking child's written statement, but the evidence did not support claim.).

Johnson v. Trigg, 28 F.3d 639, 642 (7th Cir. 1994), *reh'g denied* (Confession was admissible where police told child that mother, who was also jailed for failing to bring her son in for questioning, would be released if he confessed, as child was hardened criminal, police has legitimate basis for arresting child's mother, child was not close to or living with mother, and child was not subjected to prolonged interrogation and not fed lies or promises.).

PRACTICE POINTER: Johnson noted that a defendant cannot complain about having been induced to confess by the bona fide arrest of another person, as that would force the police to forego a perfectly proper arrest in order to protect the possibility of interrogating a suspect in a different crime.

A.A. v. State, 706 N.E.2d 259, 263 (Ind. Ct. App. 1999) (*citing* Ashby v. State, 265 Ind. 316, 320, 354 N.E.2d 192, 195 (1976)) (Confession obtained by promise of immunity or mitigation of punishment is inadmissible.).

Neal v. State, 522 N.E.2d 912, 913 (Ind. 1988) (Vague and indefinite statements by police that do not involve direct or implied promises but merely indicate it is in child's best interest to cooperate or to tell the real story are not sufficient inducements to render a subsequent confession inadmissible.).

c. State has burden of proving that no coercion existed, including atmosphere evidence

Williams v. State, 433 N.E.2d 769, 772-73 (Ind. 1982) (State failed to meet its burden of proof where sole evidence relating to purported waiver of rights is: (1) a form containing an advisement of rights, and (2) juvenile's signature under a waiver of rights paragraph. Court cannot enter a factual finding that no coercion existed because there is no evidence concerning atmosphere surrounding advice and waiver of rights.).

Bluitt v. State, 269 Ind. 438, 443-47, 381 N.E.2d 458, 462-64 (1978) (Good description of appropriate atmosphere evidence.).

H. WHEN STATEMENT IS SUPRESSED

1. Inadmissibility of First Statement May Taint Lather Statements

Garrett v. State, 265 Ind. 63, 68-69, 351 N.E.2d 30, 34 (1976), *reh'g denied* (Where child had previously given police two confessions, both of which were inadmissible because of failure of the police to properly advise child of his rights and afford him an opportunity for meaningful consultation with parents, third confession after consultation with mother and an execution of a waiver of rights form by both child and mother was inadmissible as being tainted by first two confessions.).

Graham v. State, 464 N.E.2d 1, 5-6 (Ind. 1984), *reh'g denied* (Inadmissibility of first statement does not necessarily taint second statement, if second statement is independent and voluntarily given. Child made "partial confession" to police officers without first being afforded an opportunity for meaningful consultation with his father, and during interrogation police officer realized that he had "inadvertently" failed to permit child and father to confer privately. Police officers explained situation to child and father, gave them their Miranda rights again and received from them a written waiver of rights, then permitted private consultation. Subsequent confession was voluntary and independent of first and therefore was admissible.).

Hall v. State, 264 Ind. 448, 346 N.E.2d 584, 587-88 (1976) (Where advisement of rights and opportunity for meaningful consultation have not occurred before first confession, a subsequent confession may be suppressed. Confession suppressed where juvenile confessed during custodial interrogation before being advised of Miranda rights and before having an opportunity for meaningful consultation.).

Oregon v. Elstad, 470 U.S. 298, 314, 105 S.Ct. 1285, 1296 (1985) (Suspect who has once responded to unwarned, yet non-coercive questioning is not thereby disabled from waiving rights and confessing after he has been given the requisite Miranda warnings.).

Seay v. State, 173 Ind.App. 348, 351, 363 N.E.2d 1063, 1066 (1977), *reh'g denied* (Second confession by juvenile was not admissible in State's case- in-chief because it was fruit of first, illegal confession.).

Missouri v. Seibert, 542 U.S. 600, 606-07 (2004) (Where police withheld Miranda warnings in attempt to get defendant to make illegal confession, then gave Miranda warning mid-interrogation and took second confession, second confession was inadmissible as improper fruit of illegal interrogation. Police cannot deprive defendant of knowledge essential to his ability to understand rights, and it would be unrealistic to treat two spates of integrated interrogation to independent evaluation merely because of a Miranda warning in between them.).

State v. Keller, 845 N.E.2d 154, 166-67 (Ind. Ct. App. 2006) (Distinguishing Seibert – Law enforcement provided child with advice of rights form prior to interrogation, which shows intent to comply with requirements of Miranda. The failure to ensure the adequacy of the good-faith attempt does not render it closed to correction by subsequent compliance through full advisement of constitutional rights prior to second statement.).

Maxwell v. State, 839 N.E.2d 1285, 1288 (Ind. Ct. App. 2005), *trans. denied* (Not extending Seibert to situations where police do not initially Mirandize a defendant where defendant makes no incriminating statements prior to his being Mirandized.).

Johnson v. State, 829 N.E.2d 44, 51 (Ind. Ct. App. 2005), *trans. denied* (Distinguishing Seibert – Court applied the totality of circumstances test analyzing whether the case involved a "'police strategy adapted to undermine the Miranda warnings,'" or "a 'good-faith Miranda mistake . . . open to correction by careful warnings . . . and posing no threat to warn-first practice generally." A good faith Miranda mistake by investigators with no coercion present did not lead to invalidating second Mirandized statement.).

2. If Confession is Suppressed, "Fruit of the Poisonous Tree" Must be Suppressed

a. Same law that applies in adult cases applies to confession suppression

Hall v. State, 264 Ind. 448, 452-53, 346 N.E.2d 584, 587-88 (1976), *reh'g denied* (When confession is suppressed, same law that applies in adult cases is equally applicable to juvenile cases and, unless it is shown that evidence was discovered by some means independent of illegal confession, evidence which is inextricably bound to confession must also be suppressed.).

b. Physical evidence

United States v. Patane, 542 U.S. 630, 632-33, 124 S.Ct. 2620, 2623 (2004) (Plurality holding reliable physical evidence derived from unwarned but voluntary statements could be used despite gained from inadmissible statement from Miranda violation.).

PRACTICE POINTER: In relation to Patane, it can be argued that Indiana has not adopted "inevitable discovery" as a matter of Indiana Constitutional law. Anderson v. State, 64 N.E.3d 903, 908 (Ind. Ct. App. 2016) (*citing* Ind. Ct. App.Ammons v. State, 770 N.E.2d 927 (Ind. Ct. App. 2002), *trans. denied*). Some states have rejected the analysis of Patane under their state constitutions. See State v. Farris, 849 N.E.2d 985 (Ohio 2006); Commonwealth v. Martin, 827 N.E.2d 198 (Mass. 2005); State v. Vondehn, 236 P.3d 691 (Ore. 2010); State v. Peterson, 923 A.2d 585 (Vt.2007); and State v. Knapp, 700 N.W.2d 899 (Wis. 2005).

3. Inadmissible Confessions May Still Be Used in Some Circumstances

a. Confession inadmissible in Indiana courts may be admissible in federal court

United States v. Wilderness, 160 F.3d 1173, 1175 (7th Cir. 1998) (Federal rather than state law determines admissibility of evidence in federal prosecutions, and therefore juvenile's confession that violates waiver statute and would not be admissible in Indiana court may still be admissible in federal court.).

b. Excluded statement may be used for impeachment purposes

Pursuant to Ind. Code 31-32-5-3, if:

1. A statement made knowingly and voluntarily cannot be admitted as evidence against the child because of failure to meet the requirements of Ind. Code 31-32-5-1 [waiver of rights]; and
2. The child testifies in the child's own defense;

The statement may be admitted to impeach the child as a witness in the same manner as evidence of any other prior inconsistent statement can be admitted for impeachment.

Harris v. New York, 401 U.S. 222, 225, 91 S.Ct. 643, 645-46 (1971) (Every defendant is privileged to testify in own defense, but that does not include right to commit perjury. Having voluntarily taken stand, defendant is obligated to speak truthfully and accurately. Any knowing and voluntary statement by accused that is inadmissible due to lack of Miranda warning may still be admitted for impeachment purposes.).

Barker v. State, 440 N.E.2d 664, 668 (Ind. 1982), *reh'g denied* (Although confession was inadmissible as substantive evidence, the confession was admissible for impeachment purposes.).

(1) Due process requires that statement used for impeachment was voluntary and knowing

Purcell v. State, 406 N.E.2d 1255, 1259 (Ind. Ct. App. 1980) (Any use of involuntary statement is a denial of due process of law. To be admissible for impeachment purposes, the tainted statement must be voluntary in the sense of being product of rational intellect and free will. Therefore, the statement did not involve coercion, duress, or other indicators of involuntary submission to police questioning.).

(2) Child is entitled to limiting instruction when statement is used to impeach

Barker v. State, 440 N.E.2d 664, 668 (Ind. 1982), *reh'g denied* (If juvenile has been waived to adult court and at the trial the State offers juvenile's prior inconsistent and otherwise inadmissible statement for impeachment purposes, the defendant is entitled to limiting instruction that statement may only be considered by jury to weigh defendant's credibility and may not be considered as evidence of guilt.).

c. When child does not testify, but opens the door, formerly inadmissible statement is admissible

Brown v. State, 464 N.E.2d 361, 363 (Ind. Ct. App. 1984) (defendant did not testify, but State was permitted to use his previously suppressed second statement for impeachment after opening the door by cross-examining police officer regarding defendant's first statement.).

d. Inadmissible statement is admissible at waiver hearing

Clemons v. State, 162 Ind. App. 50, 60-61, 317 N.E.2d 859, 867 (1974), *reh'g denied, cert. denied* (Incriminating statement by juvenile which would not be admissible at trial

because of failure of police to comply with waiver requirements is nevertheless admissible at a hearing on waiver to adult court where it can only be considered as it relates to the child's welfare and best interests of the state. The fifth amendment privilege against self-incrimination is inapplicable in the waiver hearing setting where the confession cannot be viewed as inculpatory and where it may not be used in a later criminal or delinquency hearing).

Taylor v. State, 438 N.E.2d 275, 282 (Ind. 1982) (Confession admissible at waiver hearing because Juvenile Code's waiver section requires court to find probable cause to believe that child committed offense. However, court also found confession was also admissible at trial, and therefore no decision was made on whether confession inadmissible at trial could be used at waiver hearing.).

e. Indiana law controls when statement given by child in another state

Stidham v. State, 608 N.E.2d 699, 701 (Ind. 1993) (Admissibility of statement in Indiana is controlled by Indiana law, regardless of whether statement was lawfully taken in another state. The Court explicitly rejected contrary holding of several other states and held that Indiana's juvenile waiver statute controls admission of statements in Indiana, not just taking of statements, and cannot be circumvented if interrogation occurred in another jurisdiction.).

But see, Poling v. State, 515 N.E.2d 1074, 1078 (Ind. 1987), *cert. denied* (Child's statements to police in San Francisco were admissible in Indiana courts; however, statements were volunteered rather than result of custodial interrogation and court did not consider statutory protections of juvenile.).

I. FIFTH AMENDMENT RIGHTS DO NOT EXTEND TO ADMISSION OF NON-TESTIMONIAL EVIDENCE

1. Field Sobriety Tests or Breathalyzer Tests

In re J.S.F., 535 N.E.2d 150, 152 (Ind. Ct. App. 1989) (Miranda warnings, and therefore waiver requirements, are not required prior to administering field sobriety tests or breathalyzer tests. Neither type of test is testimonial or communicative in nature but rather provide only real or physical forms of evidence. Thus, Fifth Amendment is not involved and admission of test results into evidence does not violate privilege against self-incrimination. Because privilege against self-incrimination is not violated by such testing, it is not necessary to determine whether juvenile has waived privilege.).

2. Blood, Saliva, and Fingerprint Samples with Valid Search Warrant

Turner v. State, 508 N.E.2d 541, 545 (Ind. 1987), *reh'g denied* (Consent to search and waiver of rights are not necessary to obtain blood, saliva, and fingerprint samples pursuant to a valid search warrant.).

IV. SEARCH AND SEIZURE

See also *the Indiana Public Defender Council Search and Seizure Handbook*

A. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Indiana Constitution Article I, Section 11

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

These constitutional protections may only be waived in accordance with statute. Ind. Code 31-32-5-1 sets forth "specific requirements that must be met before juveniles may waive their constitutional rights, *including the protections against unreasonable search and seizure*, as follows:

> Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only:
>
> (1) by counsel retained or appointed to represent the child if the child knowingly and voluntarily joins with the waiver;
>
> (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 the child;
>
> (c) meaningful consultation has occurred between that person and the child; and
>
> (d) the child knowingly and voluntarily joins with the waiver; or
>
> (3) by the child, without the presence of a custodial parent, guardian, or guardian ad litem, if:
>
> (a) the child knowingly and voluntarily consents to the waiver; and
>
> (b) the child has been emancipated under IC 31-34-20-6 or IC 31-37-19-27, by virtue of having married, or in accordance with the laws of another state or jurisdiction."

L.W. v. State, 199 N.E.3d 1225, 1230 (Ind. Ct. App. 2022) (emphasis added) (A child may only validly waive the right to meaningful consultation with a parent, guardian, or custodian, Ind. Code 31-32-5-1(C), 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.") (citing Ind. Code § 31-32-5-2).

A valid waiver of the juvenile's constitutional protections, including the right to be free from unreasonable search and seizure, must be proven by the State beyond a reasonable doubt. L.W., 199 N.E.3d at 1230.

See L.W., 199 N.E.3d 1225, 1230-31 (holding that consent given by juvenile and her mother to a warrantless blood draw was invalid, despite an implied consent advisement and an advisement by a phlebotomist, because the juvenile and her mother were not advised of their right to talk privately in advice of deciding whether to consent to the draw; thus, the Fourth Amendment was violated).

B. SCHOOL SEARCHES

Elkins v. U.S. 364 U.S. 206, 213, 80 S.Ct. 1437, 1442 (1960); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961) (The U.S. Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.).

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185 (1943) (The Fourteenth Amendment as "applied to the States protects the citizen against the State itself and all of its creatures, Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind of its source and teach youth to discount important principles of our government are mere platitudes.").

New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S.Ct. 733 (1985) (In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.).

1. Test to Determine Reasonableness of the Search

New Jersey v. T.L.O. 469 U.S. 325, 341, 105 S.Ct. 733 (1985) Ind. Ct. App. (The Court developed a two-prong test for determining the reasonableness of a school search: (1) whether the action was justified at its inception; and (2) whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.).

T.S. v. State, 863 N.E.2d 362, 368 (Ind. Ct. App. 2007), *trans. denied* (Where a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable.).

2. Exclusionary Rule Applies

T.S. v. State, 863 N.E.2d 362, 367 (Ind. Ct. App. 2007), *trans. denied*; D.I.R. v. State, 683 N.E.2d 251, 253 (Ind. Ct. App. 1997) (The exclusionary rule is the remedy for Fourth Amendment violations occurring in schools.).

3. Body and Strip Searches

Cornfield v. Consolidated High School Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (Strip search of special education student believed to be "crotching" drugs was reasonable because of the student's past history with drugs and the school officials used the least invasive methods under the circumstances.).

Safford Unified School District #1 v. Redding, 557 U.S. 364, 129 S.Ct. 2633, 2642 (2009) (Search of outer clothing is permissible when school has reason to believe that the child has been involved with contraband. Strip search of 13-year-old girl was too intrusive given the age and sex of the child and the nature of the infraction. The contraband was prescription Ibuprofen and over-the-counter Naproxen. Balance school's interest in a drug-free environment versus the child's right to be free from unreasonable search.).

4. Searches of Property on School Grounds

New Jersey v. T.L.O., 469 U.S. 325, 342, 105 S.Ct. 733 (1985) (Search of property must be based on a reasonable belief that it would turn up evidence of a violation of school policy. In this case, the school officials were looking for cigarettes in a purse. Neither a search warrant nor probable cause was necessary for school searches in these cases. School officials should limit the intrusiveness of the search in light of the age and sex of the student and the nature of the infraction.).

R.M. v. State, 20 N.E.3d 873 (Ind. Ct. App. 2014) (Search of juvenile's backpack by police officer was reasonable when child left his backpack unattended in a classroom, the teacher told the officer she thought there were drugs or a weapon in the backpack, and the scope of the search was reasonably limited as the officer found the weapon after merely unzipping the backpack and peering inside.).

5. Searches on a Bus

Florida v. Bostick, 501 U.S. 429, 436, 111 S.Ct. 2382 (1991) (Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to search, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter.

U.S. v. Drayton, 536 U.S. 194, 195 (2002) (Where there was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat, and no command, not even an authoritative tone of voice, the encounter was cooperative and not coercive or confrontational.).

PRACTICE POINTER: Bostick and Drayton involved publicly operated buses, not school buses, thus arguments can be made to distinguish these voluntary settings from those in which children are required to be during school transportation.

6. School Required Drug Testing

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 837-38, (2002) (Policy requiring all students who participate in extracurricular

activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing and deterring drug use and therefore did not violate the Fourth Amendment.).

Vernonia School District 47J v. Acton, 515 U.S. 646, 664-65 (1995) (School's random drug screening policy for all athletes did not violate the Fourth Amendment given the decreased expectation of privacy for students and student athletes, the relative unobtrusiveness of the search, and the severity of the need to deter drug use by schoolchildren. A dirty screen would result in suspension from sports activities and not school.).

Northwestern School Corporation v. Linke, 763 N.E.2d 972, 985 (Ind. 2002) (Random drug testing of students participating in athletics and extracurricular activities did not violate the searches and seizures clause, nor the privileges and immunities clause, of the state constitution after weighing the school's interest in maintaining a safe environment conducive to learning against the student's expectation of privacy and the intrusiveness of the search.).

C. SCHOOL RESOURCE OFFICERS

1. Defined

Pursuant to Ind. Code 20-26-16-6(a), a school corporation police officer appointed under this chapter:

(1) Is a law enforcement officer (as defined in Ind. Code 5-2-1-2(1);
(2) Must take an appropriate oath of office in a form and manner prescribed by the governing body or the equivalent for a charter school;
(3) Serves at the governing body's (or the equivalent for a charter school) pleasure; and
(4) Performs the duties that the governing body or the equivalent for a charter school assigns.

a. Police Powers

School corporation or charter school police officers appointed under this chapter have general police powers, including the power to arrest, without process, all persons who within their view commit any offense. They have the same common law and statutory powers, privileges, and immunities as sheriffs and constables, except that they are empowered to serve civil process only to the extent authorized by the employing governing body or the equivalent for a charter school; however, any powers may be expressly forbidden them by the governing body (or the equivalent for a charter school) employing them. In addition to any other powers or duties, such police officers shall enforce and assist the educators and administrators of their school corporation or charter school in the enforcement of the rules and regulations of the school corporation or charter school and assist and cooperate with other law enforcement agencies and officers. Ind. Code 20-26-16-6(b).

b. Jurisdiction

Such police officers may exercise the powers granted under this section only upon any property owned, leased, or occupied by the school corporation or charter school, including the streets passing through and adjacent to the property. Additional jurisdiction may be established by agreement with the chief of police of the municipality or sheriff of

the county or the appropriate law enforcement agency where the property is located, dependent upon the jurisdiction involved. Ind. Code 20-26-16-6(c).

c. Minimum Training Requirements

Pursuant to Ind. Code 20-26-16-4, an individual appointed as a school corporation or charter school police officer must successfully complete at least:

i. The pre-basic training course established under Ind. Code 5-2-1-9(f); and
ii. The minimum basic training and educational requirements adopted by the law enforcement training board under Ind. Code 5-2-1-9 as necessary for employment as a law enforcement officer.

Minimum training includes at least six hours in interacting with persons with autism, mental illness, addictive disorders, intellectual disabilities, and developmental disabilities. Ind. Code 5-2-1-9(a)(12(A).

PRACTICE POINTER: If your client has an Individual Education Plan (is special education qualified), investigate whether the delinquent behaviors are related to the IEP and whether the school resource officer was informed of the child's special needs and conformed his behavior to meet the needs of the child.

2. Reasonable Suspicion Standard May Apply

T.S. v. State, 863 N.E.2d 362, 368, 371 (Ind. Ct. App. 2007), *trans. denied* (The New Jersey v. T.L.O. reasonableness standard applies when the school resource officer is acting on his own initiative and acting "to further educationally related goals." The ordinary warrant requirement applies where "outside" police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes).

S.A. v. State, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995), *trans. denied* (*disapproved of on other grounds by* Alvey v. State, 911 N.E.2d 1248 (Ind. 2009) (Employees of the Indianapolis Public Schools Police Department who act in their capacity as security officers are considered school officials and that their conduct is governed by New Jersey v. T.L.O. and the reasonableness standard).

3. Seizure by School Resource Officer

T.S. v. State, 863 N.E.2d 362, 372-73 (Ind. Ct. App. 2007), *trans. denied* (Child was ordered by school resource officer to leave his gym class. A reasonable student would not feel free to disregard an armed officer's demand to leave class. The child enjoyed greater freedom of movement while in his regularly scheduled class than while in the company of the school resource officer. Therefore, the child was seized, and the Fourth Amendment was implicated. The proper test is whether the intrusion was reasonable. An officer does not need the reasonable, articulable suspicion necessary to justify a Terry stop of a citizen in public.).

V. DOUBLE JEOPARDY

A. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Fifth Amentment

…nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb…

Breed v. Jones, 421 U.S. 519, 531, 95 S.Ct. 1779 (1975) (Double jeopardy attaches to juvenile proceedings.).

2. Indiana Constitution Article I, Section 14

No person shall be put in jeopardy twice for the same offense.

D.B. v. State, 842 N.E.2d 399, 403 (Ind. Ct. App. 2006) (citing Breed v. Jones) (Double jeopardy attaches to juvenile proceedings.).

B. CHILD CHARGED WITH TWO OR MORE OFFENSES

1. Two or More Offenses Violate Prohibition Against Double Jeopardy: The Tests

Wadle v. State, 151 N.E.3d 227, 235 (Ind. 2020) (Pertaining to when a single criminal act violates multiple statutes with common elements) ("[W]hen a defendant's single act or transaction implicates multiple criminal statutes (rather than a single statute), … a two-part inquiry [applies]: First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts—as alleged in the information and as adduced at trial—to determine whether the charged offenses are the "same." If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, "included" in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute- -either in express terms or by unmistakable implication—clearly permits multiple punishment.").

Powell v. State, 151 N.E.3d 256, 264-65 (Ind. 2020) (cleaned up) (Pertaining to when a single criminal act violates a single criminal statute and results in multiple injuries) (In order to evaluate whether such a situation amounts to double jeopardy, "First, we review the text of the statute itself. If the statute, whether expressly or by judicial construction, indicates a unit of prosecution, then we follow the legislature's guidance, and our analysis is complete. But if the statute is ambiguous, then we proceed to the second step of our analysis. Under this second step, a court must determine whether the facts—as presented in the charging instrument and as adduced at trial—indicate a single offense or whether they indicate distinguishable offenses. To answer this question, we ask whether the defendant's actions are so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction. If the defendant's criminal acts are sufficiently distinct, then multiple convictions may stand; but if those acts are continuous and indistinguishable, a court

may impose only a single conviction. Any doubt counsels against turning a single transaction into multiple offenses.").

A.W. v. State, 192 N.E.3d 227 (Ind. Ct. App. 2022) (applying Wadle to juvenile court's true findings and reversing one true finding).

a. Result if Double Jeopardy Found

A.W. v. State, 192 N.E.3d 227 (Ind. Ct. App. 2022) (reversing one true finding after concluding that juvenile's two true findings amounted to double jeopardy under Wadle).

C. ONE DISPOSITION IMPOSED FOR MULTIPLE ADJUDICATIONS CONTAINED IN ONE PETITION ALLEGING DELINQUENCY

H.M. v. State, 892 N.E.2d 679, 682 (Ind. Ct. App. 2008), *trans. denied* (There is no analogy – in terms of double jeopardy – between a juvenile delinquency proceeding in which the court issues only one dispositional order regarding delinquency no matter how many true findings it issues versus the merger of adult criminal convictions. Because a history of juvenile adjudications is properly used by a trial court to enhance a defendant's sentence and there may be a penal consequence for an offender later in life relating to multiple true findings, double jeopardy principles attach.).

D. JEOPARDY DOES NOT ATTACH AFTER WAIVER HEARING

Bey v. State, 179 Ind. App. 87, 385 N.E.2d 1153, 1156 (1979) (The investigation required under the waiver statute was not a delinquency adjudication but was merely determinative of the forum. There is no finding that certain acts have or have not been committed in fact.).

VI. RIGHT TO DUE PROCESS OF LAW

A. LEGAL PROVISIONS

1. U.S. Constitution Fifth Amend

No person shall…be deprived of life, liberty, or property, without due process of law

2. U.S. Constitution Fourteenth Amendment

…nor shall any state deprive any person of life, liberty, or property, without due process of law…

3. Indiana Constitution Article I, Section 12

…every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

B. RIGHT TO DUE PROCESS DURING WAIVER PROCEEDINGS

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 1053-54 (1966) (Society's special concern for children does not permit waiver without due process. There is no place in the system of law for reaching a result of such tremendous consequences without ceremony: "without hearing, without effective assistance of counsel, without a statement of reasons.").

C. RIGHT TO DUE PROCESS IN ALL OTHER PROCEEDINGS

In re Gault, 387 U.S. 1, 30, 87 S.Ct. 1428, 1445 (1967) (There is no reason why the application of due process requirements should interfere with "the unique, protective provisions of the juvenile justice system." Due process of law requires notice which would be deemed constitutionally adequate in a civil or criminal proceeding.).

Davies v. State, 171 Ind. App. 487, 489, 357 N.E.2d 914, 916 (1976) (Since the special status of the juvenile court is nurtured for the purpose of making the process understandable, paternal, and compassionate, the court cannot, under the guise of flexibility, ignore extending to the accused fundamental fairness.).

1. Standard for Due Process

M.H. v. State, 199 N.E.3d 1240 (cleaned up) (Ind. Ct. App. 2022) ("Children in the juvenile justice system have many of the same due process rights guaranteed to adults accused of crimes, plus a few extra protections. While the due process clause applies in juvenile proceedings, a juvenile court must respect the informality and flexibility that characterize juvenile proceedings while ensuring that such proceedings comport with the fundamental fairness demanded by the due process clause.").

S.L.B. v. State, 434 N.E.2d 155, 156 (Ind. Ct. App. 1982) (The standards for determining what due process requires in a particular juvenile proceeding is "fundamental fairness.").

M.T. v. State, 928 N.E.2d 266, 270-71 (Ind. Ct. App. 2010), *trans. denied* (During modification hearing, fundamental fairness requires some evidence of wrongdoing on which the modification is premised.).

VII. RIGHT TO COUNSEL

Also see *section on Waiver of Any Rights Guaranteed to the Child*.

A. LEGAL PROVISIONS

1. U.S. Constitution Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for his defense.

2. Indiana Constitution Article I, Section 13(a)

In all criminal prosecutions, the accused shall have the right…to be heard by himself and counsel…

The right to counsel attaches earlier under the Indiana Constitution than the U.S. Constitution. Under the Indiana Constitution, protection attaches upon a person's arrest, rather than only when "formal proceedings have been initiated" as with the federal right. State v. Taylor, 49 N.E. 3d 1019, 1024-25 (Ind. 2016) (*citing* Taylor v. State, 689 N.E. 2d 699, 703-04 (Ind. 1997)).

3. Indiana Code

a child charged with a delinquent act is also entitled to be represented by counsel under Ind. Code 31-32-4. Ind. Code 31-32-2-2(1).

(1) Timing of appointment of counsel to represent child

a. At detention hearing or initial hearing

Pursuant to Ind. Code 31-32-4-2(a), if:

(1) A child alleged to be a delinquent child does not have an attorney who may represent the child without a conflict of interest; and

(2) The child has not lawfully waived the child right to counsel under Ind. Code 31-32-5 (or Ind. Code 31-6-7-3 before its appeal);

the juvenile court shall appoint counsel for the child at the detention hearing or at the initial hearing, whichever comes first, or at any earlier time.

b. **At any other proceeding**

The court may appoint counsel to represent any child in any other proceeding. Ind. Code 31-32-4-2(b).

Bridges v. State, 260 Ind. 651, 299 N.E.2d 616, 618 (1973) (Court has duty to advise juvenile at hearing stage of right to counsel. When faced with a juvenile who desires to waive the right to counsel, the court must inquire of both juvenile and parents, if available, to ensure that waiver is voluntarily, knowingly, and intelligently given.).

J.W. v. State, 113 N.E.3d 1202, 1208 (Ind. 2019) (a juvenile's statutory right to counsel extends through a post-judgment motion).

4. Indiana Rule of Criminal Procedure 25, Right to Counsel in Juvenile Delinquency Proceedings

a. Right to Counsel
A child charged with a delinquent act is entitled to be represented by counsel in accordance with Ind. Code 31-32-4-1.

b. Mandatory Appointment of Counsel in Certain Juvenile Delinquency Proceedings

Under Ind. Rule of Criminal Procedure 25(B), counsel for a child must be appointed:

i. When there is a request to waive the child to a court having criminal jurisdiction; or

ii. When a parent, guardian, or custodian of the child has an interest adverse to the child; or

iii. Before a convening any hearing in which the court may find facts (or the child may admit to facts) on the basis of which the court may impose the following:

(a) Wardship of the child to the Department of Correction;
(b) Placement of the child in a community based correctional facility for children;

(c) Confinement or continued confinement of the child in a juvenile detention center following the earlier of an initial or detention hearing;
(d) Placement or continued placement of the child in a secure private facility following the earlier of an initial or detention hearing;
(e) Placement or continued placement of the child in a shelter care facility following the earlier of an initial hearing; or
(f) Placement or continued placement of the child in any other non-relative out of home placement following the earlier of an initial or detention hearing; or

Unless or until waiver has been or is made under subsection (C) (quoted in subsection (c) below).

J.G. v. State, 83 N.E.3d 1263, 1264 (Ind. Ct. App. 2017) (Criminal Rule 25(B)(3)(a) expressly states that "counsel for the child *must* be appointed ... before convening *any hearing* in which the court may find facts (or the child may admit to facts) on the basis of which the court may impose ... wardship of the child to the Department of Correction[.]" And Criminal Rule 25(C) provides that, following the appointment of counsel under subsection (B), any waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney.)

c. Waiver

Under Ind. Rule of Criminal Procedure 25(C), "[f]ollowing the appointment of counsel under subsection (B) [quoted above], any waiver of the right to counsel shall be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney."

d. Withdrawing Waiver

"Waiver of the right to counsel may be withdrawn at any stage of a proceeding, in which event the court shall appoint counsel for the child." Ind. Crim. R. 25(D).

B. COUNSEL MUST BE EFFECTIVE

Juveniles are entitled not only to counsel, but to effective counsel. The right to counsel in juvenile proceedings flows from the Fourteenth Amendment Due Process guarantee. In Re Gault, 387 U.S. 1, 36, 41 (1967), *abrogated on other grounds by* Allen v. Illinois, 478 U.S. 364 (1986).

The Indiana Supreme Court has applied both the Strickland v. Washington Sixth Amendment-based test for ineffective assistance of counsel claims and a less stringent fundamental fairness test in juvenile cases.

In S.T. v. State, 764 N.E.2d 632 (Ind. 2002), the Court applied Strickland in examining counsel's performance during an adjudication hearing.

In a disposition modification case, the Court adopted the following due process-based test: "when a juvenile raises an ineffective-assistance-of-counsel claim following a modified disposition, we focus our inquiry on whether it appears that the juvenile received a fundamentally fair hearing where the facts demonstrate the court imposed an appropriate disposition considering the child's

best interests. In assessing fundamental fairness, a court should not focus on what the child's lawyer might or might not have done to better represent the child. Rather, the court should consider whether the lawyer's overall performance was so defective that the court cannot say with confidence that the juvenile court imposed a disposition modification consistent with the best interests of the child." A.M. v. State, 134 N.E.3d 361, 368 (Ind. 2019), *reh'g denied, cert. denied* (cleaned up). The A.M. Court expressly declined to address whether Strickland or its newly announced due process-based standard applies in juvenile adjudication and original dispositional hearings. Id. at 370 n.2.

PRACTICE POINTER: **PRACTICE POINTER**: In light of footnote 2 of A.M., it is still an open question whether the more protective Strickland v. Washington standard for evaluating ineffective assistance of counsel claims applies when reviewing the performance of counsel during adjudicative and original dispositional hearings, and S.T. provides a basis for arguing that it does.

C. FACTORS FOR KNOWING AND VOLUNTARY WAIVER OF RIGH TO COUNSEL

Four factors are to be considered when determining whether a knowing and voluntary waiver of counsel occurred:

(1) The extent of the court's inquiry into the defendant's decision;
(2) Other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation;
(3) The background and experience of the defendant; and
(4) The context of the defendant's decision to proceed pro se.

Poynter v. State, 749 N.E.2d 1122, 1127-28 (Ind. 2001) (*quoting* U.S. v. Hoskins, 243 F.3d 407, 410 (7th Cir. 2001)).

1. Advisements by Court

See also *Section I – Advisement of Rights*

A.S. v. State, 923 N.E.2d 486, 491 (Ind. Ct. App. 2010), *reh'g denied* (Evidence was insufficient to establish that juvenile and her mother knowingly and voluntarily waived the right to counsel where the court made no inquiry into the decision to waive counsel, there was no evidence that the child and mother were advised of the dangers and disadvantages of self-representation, and there was no evidence of juvenile or mother's background.).

a. Advisements of right to public defender

N.M. v. State, 791 N.E.2d 802, 807 (Ind. Ct. App. 2003) (Evidence did not establish adequate advisement that counsel would be appointed if child and parent could not afford one. Therefore, waiver was not knowing, intelligent, and voluntary.).

In re Jennings, 176 Ind.App. 277, 279, 375 N.E.2d 258, 260 (1978) (To be a knowing and voluntary waiver, the court must inform the juvenile that if she or her parents cannot afford an attorney, one will be appointed at public expense.).

A.S. v. State, 929 N.E.2d 881, 887 (Ind. Ct. App. 2010), *reh'g denied* (Failure to advise a juvenile in a delinquency proceeding of his right to counsel is fundamental error.).

b. Child must be warned of dangers of self-representation

J.W. v. State, 763 N.E.2d 464, 467 (Ind. Ct. App. 2002) (Before waiving right to counsel, juvenile should be warned by juvenile court of dangers and pitfalls of self-representation. Juvenile court erroneously conducted fact-finding hearing by allowing defense counsel to withdraw immediately prior to the hearing, where juvenile requested counsel and was not adequately advised of nature, extent, and importance of right to counsel and dangers of self-representation.).

A.A.Q. v. State, 958 N.E.2d 808, 812-13 (Ind. Ct. App. 2011) (The juvenile court should warn a defendant who proceeds pro se of the dangers and pitfalls of self-representation. In this case, the child consulted with an intern at the public defender's office and the public defender secured a plea deal for the juvenile. Therefore, it appears counsel assisted the family in the decision to proceed pro se.).

2. Meaningful Consultation Prior to Waiver of Right to Counsel

A.S. v. State, 923 N.E.2d 486, 492-93 (Ind. Ct. App. 2010), *reh'g denied* (Adjudications were void where there was no evidence that the juvenile and mother were advised of right to counsel, the dangers of proceeding pro se, and had a subsequent opportunity for a meaningful consultation on the issue.).

R.W. v. State, 901 N.E.2d 539, 544 (Ind. Ct. App. 2009) (*quoting* Borton v. State, 759 N.E.2d 641, 646 (Ind. Ct. App. 2001)) (The 'preferred practice is to provide consultation after advising the juvenile and his or her parents of the rights to be waived.').

D. PAYMENT FOR COUNSEL

Payment for counsel shall be made under Ind. Code 31-40. Ind. Code 31-32-4-4.

Adams v. State, 411 N.E.2d 160, 162 (Ind. Ct. App. 1980) (Appointment of counsel is not dependent upon determination of indigence of child or child's parent, guardian, or custodian. Determination of who shall immediately or ultimately pay cost is secondary to and completely independent of determination regarding appointment.).

E. RIGHT TO COUNSEL ATTCHES AT EVERY STATE OF PROCEEDINGS

The right to counsel attaches earlier under the Indiana Constitution than the U.S. Constitution. Under the Indiana Constitution, protection attaches upon a person's arrest, rather than only when "formal proceedings have been initiated" as with the federal right. State v. Taylor, 49 N.E. 3d 1019, 1024-25 (Ind. 2016) (*citing* Taylor v. State, 689 N.E. 2d 699, 703-04 (Ind. 1997)).

In re Gault, 387 U.S. 1, 36, 87 S.Ct. 1428, 1448 (1967) (Juvenile has right to counsel at every step of proceedings under Sixth Amendment of United States Constitution.).

D.H. v. State, 688 N.E.2d 221, 223-24 (Ind. Ct. App. 1997) (Juvenile is entitled to assistance of counsel at every stage of juvenile delinquency proceedings, including dispositional hearing. If

record does not show that child was represented by counsel or freely and voluntarily waived representation, results of hearing must be reversed.).

J.W. v. State, 113 N.E.3d 1202, 1208 (Ind. 2019) (a juvenile's statutory right to counsel extends to post-judgment proceedings under Trial Rule 60(B), where the juvenile claims a consent judgment was obtained unlawfully).

F. RIGHT TO COUNSEL WITHOUT CONFLICT OF INTEREST

1. Ind. Code 31-32-4-2 indicates that juveniles alleged to be delinquent are entitled to conflict-free counsel:

a. if:

i. a child alleged to be a delinquent child does not have an attorney who may represent the child without a conflict of interest; and
ii. the child has not lawfully waived the child's right to counsel under IC 31-32-5 (or IC 31-6-7-3 before its repeal);

iii. the juvenile court shall appoint counsel for the child at the detention hearing or at the initial hearing, whichever occurs first, or at any earlier time.

G.P. v. State, 4 N.E.3d 1158, 1166 (Ind. 2014) (When a trial court fails to appoint counsel for a person in accordance with the Indiana Code, "the deprivation would constitute a failure to afford that [person] the process to which the General Assembly says he or she is due." The result of being deprived of a statutory right to counsel is a denial of due process.).

2. If Child Does Not Want Counsel Retained by Parents, Child Must Object

Lindley v. State, 426 N.E.2d 398, 400-401 (Ind. 1981) (If child fails to object during juvenile court proceedings to representation by an attorney selected by parent or custodian, child waives issue.).

3. Probation Officer May Not Act as Counsel for Child

VIII. NO RIGHT TO JURY TRIAL

A. U.S. CONSTITUTION SIXTH AND SEVENTH AMENDMENTS RIGHT TO JURY TRIAL DOES NOT APPLY TO JUVENILES

Jury trials are not essential for accurate fact finding and are not constitutionally required in juvenile court. A juvenile's right to fundamental fairness does not include the right to a jury trial.

McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S.Ct. 1976, 1986 (1971) (Court premised its conclusion on lack of a necessity for juries as a component of accurate fact-finding in workmen's compensation, probate, deportation, and military trials. The Court then emphasized that requiring jury trials in juvenile court would destroy the juvenile justice system. The measure of due process extended to juveniles depends on what is necessary for fundamental fairness. Although requirements of notice, counsel, confrontation, cross-

examination, and standard of proof naturally flow to juveniles, a jury is not a necessary component of accurate fact finding.).

B. INDIANA CONSTITUTION ARTICLE I, SECTIONS 13, AND 20 [RIGHT TO A JURY TRIAL] DO NOT APPLY

Except as provided by Ind. Code 31-32-6-7(b) [trial of an adult charged with a crime], all matters in juvenile court shall be tried to the court. Ind. Code 31-32-6-7(a).

A.S. v. State, 929 N.E.2d 881, 891-92 (Ind. Ct. App. 2010) (Court disagreed with juvenile's argument that the right to jury trial should apply in juvenile proceedings because they are quasi-criminal.).

C. RATIONALE FOR DENIAL OF RIGHT TO JURY TRIAL

Issues of law and issues of fact in causes that prior to the eighteenth day of June 1852 were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other cases shall be triable as the same are now triable. Ind. T.R. 38(A).

Bible v. State, 253 Ind. 373, 379-80, 254 N.E.2d 319, 321-22 (1970) (citing State ex rel. Gannon v. Lake Circuit Court, 223 Ind. 375, 61 N. E. 2d 168 (1945) and State ex rel. Johnson v. White Circuit Court, 225 Ind. 602, 77 N. E. 2d 298 (1948)) (Before 1945, the Juvenile Code granted juveniles a trial by jury at request of the juvenile. Indiana's original Juvenile Code of 1903 and Acts 1941, ch. 233, Sec.13. The Indiana General Assembly enacted certain amendments in 1945, one of which contained a provision that expressly denied right to jury trial at juvenile hearings. When the opinion in Bible v. State was delivered, juvenile statutes provided that "[n]o adjudication upon the status of any child in the jurisdiction of the court shall operate to impose any of the civil disabilities ordinarily imposed by conviction." The Indiana Supreme Court has rationalized denial of a juvenile right to jury trial in Indiana by finding that because juvenile proceedings in Indiana are considered civil in nature and not criminal, the statutory denial of the right to trial by jury has never been thought to violate the Indiana Constitution. The Indiana Supreme Court held that Article 1, Section 20 of the Indiana Constitution applies only to civil actions triable by jury under the common law and consequently, creation of the juvenile courts is not unconstitutional on the ground that it does not provide for jury trial. The Indiana Supreme Court noted that an act of juvenile delinquency is not a crime. Proceedings therefore do not have formalities that a criminal proceeding has, including right to a jury trial.).

Bible v. State, 253 Ind. 373, 387-88, 254 N.E.2d 319, 326 (1970) (No case law expressly or impliedly says that all guarantees of the Bill of Rights need necessarily be applicable in juvenile proceedings.).

In re E.P., 653 N.E.2d 1026, 1030 (Ind. Ct. App. 1995) (citing Gray v. Monroe County Department of Public Welfare, 529 N.E.2d 860 (Ind. Ct. App. 1988)) (Because no special judicial system for juveniles existed at common law when Art. I, Sec. 20 of the Indiana Constitution was adopted, juvenile matters were not triable by jury. Art. I, Sec. 20 does not give a party a right to a jury in juvenile court proceedings.).

C. EXAMPLES OF RATIONALE FOR OTHER STATES ALLOWING JURY TRIAL

1. Jury Trial Required Due to Threat of Incarceration

R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (right to jury trial in juvenile delinquency cases under Alaska Constitution; critiques the characterization of juvenile delinquency matters as rehabilitative and, for that reason, subject to dispensing with constitutional protections).

Matter of Felder, 93 Misc.2d 369, 402 N.Y.S.2d 528 (N.Y.Fam.Ct. 1978).

2. Jury Trial Required When Alleged Act Would be a Felony if Committed by an Adult and for Which an Adult Would Receive a Jury Trial

State v. Doe, 614 P.2d 1086 (N.M.Ct.App. 1980).

3. Juvenile Court Distinction from Criminal Court has Eroded

In the Matter of L.M., 186 P.3d 164 (2008) (concluding that a right to jury trial in juvenile delinquency proceedings is found in the Sixth and Fourteenth Amendments to the United States Constitution and in the Kansas Constitution; discusses McKeiver at length).

IX. NO GRAND JURY

State ex rel. Atkins v. Juvenile Court of Marion County, 252 Ind. 237, 242, 247 N.E.2d 53, 56 (1969) (Where the prosecutor and grand jury members knew that the relators were under eighteen years of age, they were precluded by law from returning a valid indictment charging relators with a criminal offense, unless the case is within the statutory exceptions [direct file cases where juvenile court lacks jurisdiction]. The criminal court lacked jurisdiction even to transfer the case to the juvenile court.).

X. RIGHT TO SPEEDY TRIAL

A. U.S. CONSTITUTION SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…

B. INDIANA CONSTITUTION ARTICLE I, SECTION 12

Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

C. INDIANA CODE

1. If Child is Detained

Pursuant to Ind. Code 31-37-11-2(a), if: (1) a child is in detention; and (2) a petition has been filed; a fact-finding hearing or a waiver hearing must be commenced not later than twenty (20) days, excluding Saturdays, Sundays, and legal holidays, after the petition is filed.

Brown v. State, 448 N.E.2d 10 (Ind. 1983) (Failure to hold waiver hearing within twenty days of filing petition alleging delinquency entitles juvenile to no more than release on his own recognizance or to his parents, guardian, or custodian.).

a. Home detention and conditions of release is not considered detained

A child who is ordered detained in the home of the child's parent, guardian, or custodian or who is subject to other conditions of release under Ind. Code 31-37-6-6 may not be considered as being detained for purposes of this section. Ind. Code 31-37-11-2(c).

2. If Child is Not Detained

Pursuant to Ind. Code 31-37-11-2(b), if:

(1) A child is not in detention; and

(2) A petition has been filed;

the hearing must be commenced not later than sixty (60) days, excluding Saturdays, Sundays, and legal holidays, after the petition is filed.

A.S. v. State, 929 N.E.2d 881, 889 (Ind. Ct. App. 2010) (If the child is not detained, every Saturday, Sunday, and legal holiday during the period should be excluded from the sixty-day calculation).

A.K. v. State, 915 N.E.2d 554, 556 (Ind. Ct. App. 2009), *reh'g denied*, *trans. denied* (court's setting of hearing outside of 60-day window does not entitle juvenile to dismissal of charges; further, when juvenile fails to timely object to the setting of an untimely hearing, a later challenge to the delay is waived).

K.G. v, State, 67 N.E.3d 1147,1149-50 (Ind. Ct. App. 2017), *trans. denied* (neither discharge nor dismissal are required where court fails to comply with 60-day timeline for holding hearing for out-of-custody juvenile defendant).

3. If Waiver of Jurisdiction Motion is Denied

If waiver is denied, the fact-finding hearing must be commenced not later than ten (10) days, excluding Saturdays, Sundays, and legal holidays, after the denial. Ind. Code 31-37-11-3.

XI. RIGHT TO NOTICE OF ALLEGATIONS

For discussion about specific notice requirements for each type of hearing, see *the relevant chapters.*

A. U.S. CONSTITUTION SIXTH AMENDMENT.

In all criminal prosecutions, the accused shall enjoy the right…to be informed of the nature and cause of the accusation…

B. INDIANA CONSTITUTIONAL ARTICLE I, SECTION 13(A)

In all criminal prosecutions, the accused shall have the right…to demand the nature and cause of the accusation against him, and to have a copy thereof…

C. INDIANA CODE

The juvenile court shall inform the child and the child's parent, guardian, or custodian, if the person is present, of the…nature of the allegations against the child… Ind. Code 31-37-12-5(1).

XII. RIGHT TO CONFRONT WITNESSES

A. LEGAL PROVISIONS

1. U.S. Constitution Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…

2. Indiana Constitution Article I, Section 13(a)

In all criminal prosecutions, the accused shall have the right…to meet the witnesses face to face…

3. Indiana Code

Except when a child may be excluded from a hearing under Ind. Code 31-32-6 [termination of parental rights and CHINS], a child is entitled to cross-examine witnesses… Ind. Code 31-32-2-1(1).

B. RIGHT TO CONFRONTATION TRUMPS RIGHT TO CONFIDENTIALITY OF JUVENILE RECORD

Davis v. Alaska, 415 U.S. 308, 318-19, 94 S.Ct. 1105, 1111-12 (1974) (State's interest in protecting confidentiality of juvenile offender's record cannot require yielding of so vital a constitutional right as effective cross-examination of an adverse witness.).

But see Martin v. State, 736 N.E.2d 1213, 1219-20 (Ind. 2000) (no error in excluding witness' juvenile record, which defendant wished to use for impeachment; defendant did not argue to the trial court how it would be used for impeachment, and his more developed argument on appeal was therefore deemed waived).

PRACTICE POINTER: If representing a juvenile in a contested adjudication where the allegations involve juvenile witnesses, consider whether discoverable material with regard to those witnesses' juvenile delinquency records relevant to their credibility may exist.

XIII. RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES

A. U.S. CONSTITUTION SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor…

B. INDIANA CONSTITUTION ARTICLE I, SECTION 13(A)

In all criminal prosecutions, the accused shall have the right…to have compulsory process for obtaining witnesses in his favor.

C. INDIANA CODE

Except when a child may be excluded from a hearing under Ind. Code 31-32-6 [termination of parental rights and CHINS], a child is entitled to obtain witnesses or tangible evidence by compulsory process…. Ind. Code 31-32-2-1(2).

XIV. RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

A. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Eight Amendment

…nor cruel and unusual punishments inflicted.

2. Indiana Constitution Article I, Section 16

Cruel and unusual punishment shall not be inflicted. All penalties shall be proportionated to the nature of the offense.

3. Indiana Constitutional Article I, Section 15

No person arrested or confined in jail, shall be treated with unnecessary rigor.

B. CRUEL AND UNUSUAL PUNISHMENT DEFINED

Douglas v. State, 481 N.E.2d 107, 112 (Ind. 1985) (A punishment is excessive and unconstitutional if it: (1) makes no measurable contribution to acceptable goals of punishment but rather constitutes only purposeless and needless imposition of pain and suffering, or (2) is grossly disproportionate to the severity of the crime.).

1. Deliberate Indifference to Serious Medical Needs3

a. Officials must be deliberately indifferent to serious needs

Ratliff v. Cohn, 693 N.E.2d 530, 544 (Ind. 1998) (*citing* Madrid v. Gomez, 889 F.Supp 1146 (N.D.Cal. 1995)) (To establish an Eighth Amendment violation, the defendant "must demonstrate that prison officials are 'deliberately indifferent' to her 'serious' medical needs…" To prove deliberate indifference, the defendant must demonstrate not only that the levels of medical and mental health care are constitutionally inadequate from an objective standpoint…but also that the providers (1) knew the risk to inmate health that this inadequacy posed, and (2) acted with disregard for this risk.).

b. Most desirable care not required

Ratliff v. Cohn, 693 N.E.2d 530, 544 n.24 (Ind. 1998) (*citing* Madrid v. Gomez, 889 F.Supp 1146 (N.D.Cal. 1995)) (The Eighth Amendment does not require that prison officials provide the most desirable medical and mental health care…).

c. Medical Needs include mental health care

Ratliff v. Cohn, 693 N.E.2d 530, 544 (Ind. 1998) (*citing* Madrid v. Gomez, 889 F.Supp 1146 (N.D.Cal. 1995)) (Under the Eighth Amendment, "it is firmly established that

'medical needs' include not only physical health needs, but mental health needs as well.").

2. Prohibitions Against Atrocious or Obsolete Punishments

Wise v. State, 272 Ind. 498, 502, 400 N.E.2d 114, 117 (1980) (Generally, the constitutional prohibitions against cruel and unusual punishment…are proscriptive of atrocious or obsolete punishments and are aimed at the kind and form of the punishment, rather than the duration and amount.).

3 No Measurable Contribution to Acceptable Goals of Punishment

Douglas v. State, 481 N.E.2d 107, 112 (Ind. 1985) (Punishment violates Article 1, Section 16 only if it "makes no measurable contribution to acceptable goals of punishment, but rather constitutes only purposeless and needless imposition of pain and suffering." The court rejected the argument that the imposition of a thirty-year sentence for a sixteen-year-old boy constituted cruel and unusual punishment.).

4. Juvenile Court Dispositional Orders Not "Punishment"

M.C. v. State, 134 N.E.3d 453, 464 (Ind. Ct. App. 2019), *trans. denied*, *cert. denied* ("[J]uvenile proceedings are not criminal in nature and do not amount to a direct action by the State to inflict punishment upon a juvenile. Therefore, neither the cruel and unusual punishment clause under the United States Constitution nor the proportionate penalties clause under the Indiana Constitution is implicated.").

C. PLACEMENT IN INSTITUTION FOR JUVENILE OFFENDERS NOT ALWAYS REQUIRED

The General Assembly shall provide institutions for the correction and reformation of juvenile offenders. Ind. Const. Art. IX, Sec. 2.

Ratliff v. Cohn, 693 N.E.2d 530, 540 (Ind. 1998) (Although the Indiana Constitution requires that the legislature provide institutions for juvenile offenders, it does not require that all juveniles – irrespective of their crimes or backgrounds – be housed only in such institutions.).

D. TREATMENT WITH UNNECESSARY RIGOR

In Ratliff v. Cohn, 693 N.E.2d 530, 541 (Ind. 1998), the Court gave examples of violations of Article 1, Section 15, which involve situations where:

(1) A prisoner was tortured, had a tooth knocked out, was repeatedly beaten, kicked, and struck with a blackjack, and beaten with a rubber hose while he was stretched across a table. Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524 (1938).
(2) A prisoner was beaten with police officer's fists in both eyes, cut on top of his head, and beaten with a rubber hose on the head and ears. Bonahoon v. State, 203 Ind. 51, 178 N.E. 570 (1931).
(3) A prisoner was severely injured after being shot by police during a protest. Roberts v. State, 159 Ind.App. 456, 307 N.E.2d 501 (1974).

E. DEATH PENALTY PROHIBITED FOR MINORS

1. Eighth Amendment Prohibits Death Penalty for Minors

Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (The Eighth Amendment to the United States Constitution forbids the imposition of the death penalty for juvenile offenders under the age of eighteen, in part, because (1) impetuous and ill-considered actions and decisions are more likely with juveniles due to a lack of maturity; (2) juveniles are more vulnerable or susceptible to negative influences and outside pressure and often lack the freedom that adults have to extricate themselves from criminal situations; and (3) the character of the juvenile is not as well formed as an adult and thus his personality traits are more transitory and less fixed.).

2. Indiana Code Prohibits Death Penalty for Minors

A person who was at least eighteen (18) years of age at the time the murder was committed may be sentenced to…death… Ind. Code 35-50-2-3(b)(1)(A).

F. LIFE WITHOUT PAROLE

A person who was at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole under Ind. Code 35-50-2-9 unless a court determines under Ind. Code 35-36-9 that the person is an individual with an intellectual disability. Ind. Code 35-50-2-3(b)(2).

Miller v. Alabama, 567 U.S. 460 (2012) (Prohibited *mandatory* life sentences for juvenile murderers, requiring sentencing court to consider an offender's youth and attendant circumstance.) (given retroactive effect by Montgomery v. Louisiana, 577 U.S. 190 (2016)).

Jones v. Mississippi, 141 S.Ct. 1307 (2021) (Eighth Amendment does not require sentencing court to make factual finding of permanent incorrigibility before imposing a discretionary life without parole sentence for a juvenile).

Conley v. State, 183 N.E.3d 276 (Ind. 2022), *reh'g denied* (affirming denial of post-conviction relief for defendant sentenced to LWOP for murder committed while a juvenile); Conley v. State, 972 N.E.2d 864 (Ind. 2012) (holding that Indiana's discretionary life without parole sentencings scheme for juvenile murderer is constitutional under the United States and Indiana Constitutions).

Newton v. State, 83 N.E.3d 726 (Ind. Ct. App. 2017), *trans. denied*, *cert. denied* (Eighth Amendment not violated and Miller and Montgomery not implicated where juvenile defendant agreed to LWOP sentence as part of a plea agreement).

Taylor v. State, 86 N.E.3d 157 (Ind. 2017) (although juvenile defendant's LWOP sentence was lawful, the Court exercised its constitutional authority to review and revise sentences to revise sentence to 80 years).

1. No Life Without Parole for Non-Murders

Graham v. Florida, 560 U.S. 48 (2010) (Eighth Amendment prohibits imposing life without parole on a juvenile for a crime other than murder.).

2. De Facto Life Sentences

Brown v. State, 10 N.E.3d 1 (Ind. 2014) (Court exercised its constitutional authority to review and revise sentences to revise juvenile defendant's 150-year sentence to 80 years).

Fuller v. State, 9 N.E.3d 653 (Ind. 2014) (Court exercised its constitutional authority to review and revise sentences to revise juvenile defendant's 150-year sentence to 85 years).

Wilson v. State, 157 N.E.3d 1163 (Ind. 2020) (Concluding Miller v. Alabama was inapplicable to juvenile defendant's 181-year sentence (a term of years sentence rather than *de jure* life sentence), court nonetheless exercised its constitutional authority to review and revise sentences to revise juvenile defendant's sentence to 100 years).

State v. Stidham, 157 N.E.3d 1185 (Ind. 2020), *reh'g denied* (Court exercised its constitutional authority to review and revise sentences to revise juvenile defendant's 138-year sentence to 88 years).

Kedrowitz v. State, 199 N.E.3d 386 (Ind. Ct. App. 2022) (juvenile's 100-year sentence affirmed; court rejected arguments under Ind. App. R. 7(B) and Ind. Const. Art. 1, Sec. 16 and Art. 1, Sec. 18).

XV. NO RIGHT TO BAIL

A. U.S. CONSTITUTION EIGHT AMENDMENT AND INDIANA CONSTITUTION ARTICLE I, SECTION 16 AND 17 DO NOT APPLY IN JUVENILE CASES

A child may not be released on bail except as provided by Ind. Code 31-30-3 [waiver of jurisdiction]. Ind. Code 31-37-6-9.

B. RIGHT TO BAIL ATTACHES IF JURISDICTION OF CHIULD IS WAIVED

If jurisdiction is waived, the juvenile court:… (2) may fix a recognizance bond for the child to answer the charge in the court to which the child is waived. Ind. Code 31-30-3-8(2).

XVI. RIGHT TO HAVE PARENT PRESENT

Child can assert right to have parents present, as rights accorded parents and child are viewed as co-extensive. L.B. v. State, 675 N.E.2d 1104, 1108-09 (Ind. Ct. App. 1996).

Harris v. State, 165 N.E.3d 91, 96 (Ind. 2021) (pursuant to Ind. T.R. 615(c), a child waived into adult court may have parent present throughout trial, even if the parent is a witness and would otherwise be excluded, if the child "can show the parent has a 'unique ability' to assist in the presentation of the defense based on the parent's intimate knowledge of the child or capacity to support the child during the proceedings.").

XVII. EQUAL PROTECTION / PRIVILEGES OR IMMUNITIES

A. CONSTITUTIONAL PROVISIONS

1. U.S. Constitution Fourteenth Amendment

"…nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Indiana Constitution Article 1, 23

"The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

B. CHALLENGE TO INDIANA'S DIRECT FILE AND WAIVER SYSTEM

Layman v. State, 42 N.E.3d 972, 975-76, 981 n.2 (Ind. 2015), *reh'g denied* (challenge to Indiana's direct file statute for murder charges on equal protection/privileges and immunities/due process grounds waived on appeal because the argument were not made in the trial court)

Moten v. State, 269 Ind. 309, 380 N.E.2d 544, 547 (1978) (challenge to Indiana's direct file statute for murder charge on equal protection/due process grounds deemed waived for failure to support the argument with reason and authority).

Imel v. State, 168 Ind. App. 384, 342 N.E.2d 897, 900 (1976) (Indiana's waiver to adult court system not violative of equal protection guarantee).

C. CHALLENGE TO JUVENILE PLACEMENT

State ex rel. Indiana Youth Center v. Howard Juvenile Court, 264 Ind. 371, 344 N.E.2d 842 (1976) (commitment in Boys School rather than Indiana Youth Center because delinquent juvenile had not been waived into adult court and therefore, not been convicted of a felony, did not violate Equal Protection guarantee; dual classification of youthful offenders eligible for but not waived to adult court is rationally related to effective rehabilitation).

M.C. v. State, 134 N.E.3d 453 (Ind. Ct App. 2019)*, trans. denied*, *cert. denied* (juvenile's commitment to DOC did not violate Equal Protection or Privileges and Immunities guarantees; wardship to DOC was rationally related to the goal of rehabilitation).

Person v. State, 661 N.E.2d 587 (Ind. Ct. App. 1996), *trans. denied* (holding that a statute that subjected children to potentially harsher sanction for a firearm possession offense than adults did not violate the Privileges or Immunities Clause of the Indiana Constitution)

PRACTICE POINTER: These cases do not necessarily preclude arguments that a juvenile client's placement under different circumstances violates the Equal Protection and Privileges and Immunities Clauses. In situations in which a client's unique circumstances or characteristics render it unlikely or impossible that DOC wardship could result in rehabilitation, consider whether you have an argument that DOC wardship is not rationally related to the goal of rehabilitation.

D. CHALLENGE TO RESTITUTION ORDERS

S.S. v. State, 68 N.E.3d 594, 596 (Ind. Ct. App. 2017) ("It is well-established 'equal protection and fundamental fairness concerns require that a juvenile court must inquire into a juvenile's ability to pay before the court can order restitution as a condition of probation.'" (*quoting* M.L. v. State, 838 N.E.2d 525, 527 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*).

T.H. v. State, 33 N.E.3d 374, 376 (Ind. Ct. App. 2015) (reversing restitution condition of probation based on equal protection/fundamental fairness violation; "The juvenile is entitled not only to an inquiry into his ability to pay, but also to a modification of an existing restitution order if the court determines he is unable to meet its terms.").

XVIII RIGHTS OF PARENT, GUARDIAN, AND/OR CUSTODIAN

A. RIGHTS OF PARENT AND CHILD ARE CO-EXTENSIVE

L.B. v. State, 675 N.E.2d 1104, 1108-09 (Ind. Ct. App. 1996) (Rights accorded parents and child are viewed as co-extensive. While the statutory scheme recognizes legal counsel as filling the fiduciary rule required for due process concerns, the presence of counsel should not blunt the right of parents to attend proceedings or the child's access to parents during proceedings.).

B. PARENT'S RIGHT TO COUNSEL

1. Court May Appoint Counsel to Represent Parent

The court may appoint counsel to represent any parent in any other proceeding [automatic right to counsel is only for termination of parental rights]. Ind. Code 31-32-4-3(b).

2. Parent May Waive Parent's Right to Counsel

A parent who is entitled to representation by counsel may waive that right if the parent does so knowingly and voluntarily. Ind. Code 31-32-5-5.

3. Payment for Counsel

Payment for counsel shall be made under Ind. Code 31-40. Ind. Code 31-32-4-4.

C. PARENT'S RIGHT TO BE PRESENT AT HEARING

1. Separation of Witness Does Not Waive Right to Be Present

L.B. v. State, 675 N.E.2d 1104, 1107 (Ind. Ct. App. 1996) (Parent's absence during delinquency proceeding on basis of witness separation was not a knowing and voluntary waiver of right to be present as parties to action.).

Harris v. State, 165 N.E.3d 91, 96 (Ind. 2021) (In cases where a child is being tried in adult court, pursuant to Ind. Evidence Rule 615(c), the child may have a parent present throughout trial, even if the parent is a witness and would otherwise be excluded, if the child "can show the parent has a 'unique ability' to assist in the presentation of the defense based on the parent's intimate knowledge of the child or capacity to support the child during the proceedings.").

2. Only One Parent Necessary

C.T.S. v. State, 781 N.E.2d 1193, 1200 (Ind. Ct. App. 2003), *trans. denied* (It was not error to bar child's stepfather from courtroom where it was anticipated that he would later testify, and separation of witnesses was required because child's mother was present at all hearings and that was sufficient to satisfy statute.).

3. Waiver of Right to Be Present by Failure to Appeal

The right of a person, guardian, or custodian to be present at any hearing concerning the person's child is waived by the person's failure to appear after lawful notice. Ind. Code 31-32-5-7.

D. PARENT, GUARDIAN, OR CUSTODIAN MAY WAIVE SERVICE OF SUMMONS

Any person other than the child may waive service of summons if the person does so in writing. Ind. Code 31-32-5-6.

E. PARENT'S, GUARDIAN'S, OR CUSTODIAN'S RIGHT TO CROSS-EXAMINATION

In proceedings to determine whether the parent, guardian, or custodian of a child should participate in a program of care, treatment, or rehabilitation for the child, or to determine whether the parent or guardian of the state of a child should be held financially responsible for any services provided to the parent or guardian or the child of the parent or guardian, a parent, guardian, or custodian is entitled to cross-examine witnesses. Ind. Code 31-32-2-3(a)(2), (a)(3), (b)(1).

F. PARENT'S GUARDIAN'S, OR CUSTODIAN'S RIGHT TO COMPULSORY PROCESS

In proceedings to determine whether the parent, guardian, or custodian of a child should participate in a program of care, treatment, or rehabilitation for the child, or to determine whether the parent or guardian of the state of a child should be held financially responsible for any services provided to the parent or guardian or the child of the parent or guardian, a parent, guardian or custodian is entitled to obtain witnesses or tangible evidence by compulsory process. Ind. Code 31-32-2-3(a)(2), (b)(2).

G. PARENT'S, GUARDIAN'S, OR CUSTODIAN'S RIGHT TO INTRODUCE EVIDENCE

In proceedings to determine whether the parent, guardian, or custodian of a child should participate in a program of care, treatment, or rehabilitation for the child, a parent, guardian or custodian is entitled to introduce evidence on behalf of the parent, guardian, or custodian. Ind. Code 31-32-2-3(a)(2), (b)(3).