INDIANA CRIMINAL JURY INSTRUCTIONS

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Disclaimer

The organization of the IPDC jury instruction chapters online does not parallel the organization of the Indiana Pattern Criminal Jury Instructions. Additionally, there have been significant changes to the Indiana Pattern Criminal Jury Instructions and you should make sure to use instructions based on the date the crime was committed (*i.e.*, instructions for offenses before July 1, 2014 and after July 1, 2014).

Although every attempt has been made to be accurate both in the wording of instructions and the authority for them, any sample you decide to use should be independently evaluated and researched. The suitability of any instruction for any given case can also only be determined on a case-by-case basis. It is additionally possible that some of the instructions furnished from other jurisdictions may not fully comport with Indiana law, and therefore they should be evaluated and modified as necessary.

You will also find the authority for some instructions to be from "National Criminal Jury Instruction Compendium." The author of that compendium has an additional disclaimer that the:

> National Criminal Jury Instruction Compendium does not endorse or recommend the suitability or accuracy of the instructions for a particular case. Use of these instructions requires the application of independent legal research and judgment by the user.

Thanks - Thanks to all defenders who contributed ideas, concerns, instructions and motions to the compilation of this manual.

IN Criminal Jury Instructions

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Note: A number of instructions included in this section may be met with an objection that they single out a specific witness or piece of evidence for special consideration, which is generally considered improper in Indiana. You need to be prepared to argue for those instructions based on the specific and unusual facts of your case, and/or for a change in the law. Some comments from the 7th Circuit in support of such instructions are included in **Appendix G.**

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Note: Whenever the penalty for an offense is increased due to prior convictions, the court is required to hold a bifurcated hearing, and the evidence concerning the prior acts is not admissible in the first stage. I.C. 35-34-1-2.5, *Landis v. State*, 704 N.E.2d 113 (Ind. 1998). If the prior relied on for enhancement is an infraction, *e.g.*, Driving While Suspended with a prior (Class A infraction), elevated to a Class A misdemeanor, it is unclear whether bifurcation is required. It is possible to waive this issue, however, so it must always be requested. *Nasser v. State*, 727 N.E.2d 1105 (Ind.Ct.App. 2000).

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Indiana Criminal Jury Instructions

INTRODUCTION

Instructions are often treated by trial courts as "mere formalities," and counsel are seldom given much time to deal with them. This settling of instructions necessarily includes arguing for and against the court's instructions, presenting and arguing for the defense instructions, and objecting to the State's instructions where there are grounds and need to do so. It is not unusual for courts to allow only a lunch hour or similarly short period of time to tender any instructions, and allowing less than ten to fifteen minutes to review all instructions and frame objections is not unheard of.

Instructions, however, are one of the most significant parts of a trial. Just ask someone in a murder trial who has battled extensively, and ultimately successfully, for a lesser-included offense of reckless homicide or involuntary manslaughter, and had the jury return the lesser conviction. Eight years versus sixty-five years makes a significant difference in any client's life. Just ask someone who has successfully argued for a self-defense instruction and then watched their client walk out the jail door as a free person. Other types of instructions are often no less significant in determining the client's ultimate fate.

How do we find the time?

There are two ways to try to handle the settling of instructions issue. One is to try to get courts to give more time to the issue. To highlight the importance of adequate time, you might want to consider filing a pretrial motion for significant time such as the one included as a sample in this manual as **Appendix A**. If you do not wish to file such a motion, the same arguments can be made at the appropriate time. In either case, if you are being given inadequate time, you might want to make a record of the time you were given for each aspect of the procedure to preserve the issue for appeal. Otherwise the record doesn't reflect the timing involved.

The other, and generally preferable, way to deal with the problem is to prepare instructions as much as possible in advance, rather than trying to gather/write them in the heat of battle, when you are also refining your closing argument and are usually exhausted. It is easy to overlook crucial details at the last minute. This is obviously the best practice where possible. If your facts allow you to formulate and commit to your defense before trial, it is even possible to tender and obtain a preliminary instruction on it. *See, Everly v. State,* 271 Ind. 687, 395 N.E.2d 254, 257 (1979), where the court recognized that it can "be appropriate to give a preliminary instruction upon a theory of defense, if requested and if the defendant has committed himself to such defense by pleading or pre-trial order."

Although you cannot always know just what the State may submit in the area of instructions, certain offensive instructions can sometimes be anticipated based on the type of case. For example, in many murder and attempted murder prosecutions, the State may well tender the "inferring intent from the use of a deadly weapon" instruction. *See,* McDowell v. State, 885 N.E.2d 1260 (Ind. 2008) (reversible error to instruct jury that "intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused"). This manual attempts to provide arguments against some of these most common state's instructions, and it is recommended that you have the arguments prepared in advance so that you will be ready at the crucial time.

Many authorities have recognized the importance of preparing your instructions in advance of trial. In a speech to the Criminal Defense Attorneys of Michigan, the Honorable Dennis C. Kolenda, noted:

> Because instructions tell juries what has to be proven and what is appropriate evidence to prove it, researching them early can reveal to trial counsel what has to be proven and by whom, what has to be defended and by whom, and what is an appropriate way to do either or both. Drafting instructions also helps counsel develop a theme for trial. The more closely trial presentation parallels what will be in the instructions, the more comprehensible is that presentation and the more likely it is that the jury will find that presentation to satisfy what the judge's instructions say must be proven. At a minimum, early preparation avoids the discovery just a few days before trial, when it usually is too late to do anything about it, that counsel has missed some key element, that there is something which must be proven at which no discovery has been directed, and/or that there is some defense available to the opponent for which no response can be crafted quickly.

"Jury Instructions: A Judicial Perspective," Hon. Dennis C. Kolenda, Circuit Judge, Grand Rapids, Michigan.

In the **Practical Pointers** section of this manual, there are additional notes concerning the advance preparation of instructions and you are encouraged to review the items set forth there.

Make sure instructions are settled on the record

The appellate courts have made it clear that there is seldom fundamental error concerning instructions. Therefore it is essential that all controversy concerning them, and all tendered instructions and arguments concerning them be on the record. Although Criminal Rule 8(C) requires settling of instructions to be on the record, some judges seem to honor this rule in the breach. If your judge has a habit of trying to partially resolve instructions in chambers or otherwise off the record, you may wish to file a pre-trial motion to make sure all issues regarding instructions are on the record. An example of such a motion is included with this manual as **Appendix B.**

The Defendant vs. The Accused

There has been much discussion lately in the criminal defense community about the common practice of the courts and the state to call the person on trial, "the defendant." You will notice that all of the instructions contained in this manual use the term "accused" rather than "defendant." Of course, using the person's proper name would also be acceptable, and is often less cumbersome. It is anticipated that there will be considerable objection to this nomenclature, and therefore a motion concerning this issue is also included in this manual as **Appendix C.**

Jury Instruction Checklist

Included with this manual is a 2- page checklist to use in trial. It addresses some of the most common issues, so that you may quickly go over the instructions with these points in mind.

How to use this manual

This manual attempts to meet the needs of those just beginning practice, as well as experienced practitioners, so please don't be offended if you feel some of it is too basic.

In addition to authority for the instructions provided, many instructions have notes concerning their use, and if they merit more extensive discussion, it will be referred to as being contained in an Appendix on that issue.

It is impossible to compile here all instructions from all jurisdictions, or all instructions for any conceivable issue. It is also important to make sure that you are comfortable with the wording of an instruction and its authority. Therefore, it is intended that you use the samples provided here as a starting point, but that you tailor them to your particular case and that you can independently vouch for their accuracy.

It is recommended that as soon as you spot the likely issues to be involved in your trial, you review the sample instructions contained in this manual, and use them to create your own. We have attempted to provide as much information and authority as possible, but it is you, your case, and your client that determines how best to instruct the jury.

Remember that it is legitimate to argue for a change in the law, even if the court finds your tendered instruction does not accurately reflect the current law in the jurisdiction.

Also remember that if you have an issue which might involve federal constitutional principles, it is necessary to raise those principles and constitutional provisions for potential eventual federal review. An example of this principle would be where the court refuses an instruction on a theory of defense. To "federalize" your objection to the refusal, you would need to base it on the Sixth Amendment right to present a defense, as well as State constitutional grounds.

GOOD LUCK!

JURY INSTRUCTION CHECKLIST
(For use in the heat of battle)

***** HAVE YOU HAD SUFFICIENT TIME TO SETTLE INSTRUCTIONS, PREPARE YOUR OWN, AND ARE THE INSTRUCTIONS BEING SETTLED ON THE RECORD AS REQUIRED? BE SURE TO MAKE AN ADEQUATE RECORD IF EITHER OF THESE ISSUES ARISE.**

OFFENSE ELEMENTS INSTRUCTIONS:

√ Does the instruction contain all elements of the offense, including "the accused" as an element to be proven? [**It should**]

√ Does the instruction include any alternative ways of committing the offense which are not charged by the State? **[It shouldn't**]

√ If the State has specified a particular way the offense is alleged to have been committed, is that included in the instruction? [**It should be**]

√ Does the instruction require the jury to acquit, *i.e.*, "*must* find not guilty" if the State has not proven all elements beyond a reasonable doubt? [**It should**]

√ Does the instruction allow, and not require, the jury to convict if the State has proven all elements beyond a reasonable doubt, *i.e.*, "may" find the accused guilty? [**It should**]

√ Are the elements of the offense broken down to their smallest elements? [**They should be**]

√ Are there any lesser-included offenses involved, and if so, is there an adequate explanation of the difference between the greater and lesser offenses? [**There should be**]

√ Does the instruction have any language about the jury determining guilt or innocence? [**It should not**, because the jury never determines "innocence", only whether the State has proven guilt]

GENERAL ISSUES:

√ Have you made a sufficient objection on the record to any instruction you disagree with to preserve the issue on appeal? [**You must**]

√ Have you tendered an instruction on all issues you want the jury to consider? [**You must**]

√ Have any required limiting instructions been counted against your allotment of 10 instructions? [**They should not be]**

√ Does the instruction contain any language which could allow the jury to think it's required to accept any presumption? [**It shouldn't**]

√ Does the instruction contain any language which could allow the jury to think it's required to accept as proven anything the court takes judicial notice of? [**It shouldn't**]

√ Does the instruction contain any terms which need additional definition? [**If so, be prepared to argue for the same**]

√ Does the instruction contain any definitions which are open to attack on the grounds they are overbroad or vague? [**It shouldn't**]

√ Does the instruction contain any wording which might be confusing to the jury? [**It shouldn't**]

√ Unless specifically allowed by law, *i.e.*, insanity, does the instruction make sure the jury is informed that the State has the burden of disproving any defenses like self-defense, alibi, etc.? [**It should**]

√ Has the court refused to allow an instruction on your theory of defense, even if the evidence is slight and controverted? [**It should allow such instructions**]

√ Has the jury been adequately instructed on the presumption of innocence, *i.e.*, that it prevails throughout the trial and the jury has a duty to fit the evidence to the presumption that the accused is innocent if it can do so? [**It must**. *See*, *Robey v. State*, 454 N.E.2d 1221 (Ind. 1983); *Lee v. State*, 964 N.E.2d 859 (Ind.Ct.App. 2012); *Matheny v. State*, 983 N.E.2d 672 (Ind.Ct.App. 2013), aff'd on reh'g, 987 N.E.2d 1169 (Ind.Ct.App. 2013).]

√ Does the instruction reflect case law which is inappropriate for an instruction, *i.e.*, sufficiency of evidence case law, unduly emphasizing one particular evidentiary fact, witness, or phase of case? [**It shouldn't**]

√ Watch out for "ands" and "ors" to make sure that the instruction accurately reflects the law and does not allow the jury to make a mistake based on inaccurate grammar? [**It shouldn't**]

√ Is there a better way to phrase the instruction in common language less likely to confuse the jury with legalese or complex sentences? [**If so, object and propose alternatives**]

√ If the jurors have asked questions during the trial showing areas of particular concern to them, are they addressed in the instructions? [**If not, propose instructions in these areas and point to the jurors' questions as reasons to address them**]

√ If the State's evidence is largely circumstantial, is there an instruction on resolving it to exclude all hypotheses of innocence? [**There should be.** *See*, Hampton v. State, 961 N.E.2d 480 (Ind. 2012) (discussing importance of instructing jurors to use caution when evidence is circumstantial)]

√ Have any instructions concerning inferences given the jury discretion to accept or reject them? [**They should**]

√ If there has been expert testimony, has the jury been instructed that they do not have to accept this testimony as true? [**They should be**]

√ In child sex offense cases, if the State decides not to designate a specific act (or acts) on which it relies to prove a particular charge, has the jury been instructed that in order to convict the accused they must either unanimously agree that the accused committed the same act or acts or that the accused committed all the acts described by the complaining witness and included within the period charged? [**It should**. *See, Baker v. State*, 948 N.E.2d 1169 (Ind. 2011).]

CRIMINAL AND JURY RULES IMPACTING ON INSTRUCTIONS

Criminal Rule 8. Instructions; limitations thereon; objections

(A) In addition to instructions given by the Court on its own motion, a party in any cause tried by a jury, before argument, shall be entitled to tender in writing not to exceed ten (10) proposed instructions to be given to the jury. However, the trial court, in its discretion, may fix a greater number in a particular case, which number shall be stated of record by an order book entry made by the court. The number of tendered instructions permitted shall not be reduced by any necessary limiting or cautionary instructions, tendered as final instructions, where a limiting or cautionary instruction has been requested during the course of the presentation of evidence. No party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by the court order, whichever is greater. Each tendered instruction shall be confined to one (1) relevant legal principle.

(B) The court shall indicate on all instructions, in advance of the argument, those that are to be given and those refused. After the court has indicated the instructions to be given, each party shall have a reasonable opportunity to examine such instructions and to state his specific objection to each, out of the presence of the jury and before argument, or specific written objections to each instruction may be submitted to the court before argument. No error with respect to the giving of instructions shall be available as a cause for new trial or on appeal, except upon the specific objections made as above required.

(C) All instructions given or refused, and all written objections submitted thereto, shall be filed in open court and become a part of the record in the cause without a bill of exceptions. Objections made orally shall be taken by the reporter and may be made a part of the record by a general or a special bill of exceptions.

(D) Requested instructions must be reduced to writing (identified as to the party making submission), separately numbered, and accompanied by a cover sheet signed by the party, or his attorney, who requests such instructions and will be deemed sufficiently identified as having been tendered by the parties or submitted by the court if it appears in the record from an order book entry, bill of exceptions, or otherwise, by whom the same were tendered or submitted. Where final instructions are submitted to the jury in written form after having been read by the court, no indication of the party or parties by whom instructions were tendered should appear on any instruction.

(E) The court's action in directing or refusing to direct a verdict shall be shown by order book entry. Error may be predicated upon such ruling or upon the giving or refusing to give a written instruction directing the verdict.

(F) When the jury has been sworn the court shall instruct in writing as to the issues for trial, the burden of proof, the credibility of witnesses, and the manner of weighing the testimony to be received. Each party shall have reasonable opportunity to examine such instructions and state his specific objections thereto out of the presence of the jury and before any party has stated his case.

(G) The court may of its own motion and shall, if requested by either party, reread to the jury the instructions given pursuant to subdivision (F) of this rule along with the other instructions given to the jury at the close of the case.

(H) The manner of objecting to such instructions, of saving questions thereon, and making the same a part of the record shall be the same as in Rule 51(C) of the Rules of Trial Procedure.
Amended Nov. 4, 1985, effective Jan. 1, 1986; amended Oct. 29, 1993, effective Jan 1, 1994.

JURY RULE 20. PRELIMINARY INSTRUCTIONS

(a) The court shall instruct the jury before opening statements by reading the appropriate instructions which shall include at least the following:

(1) the issues for trial;

(2) the applicable burdens of proof;

(3) the credibility of witnesses and the manner of weighing the testimony to be received;

(4) that each juror may take notes during the trial and paper shall be provided, but note taking shall not interfere with the attention to the testimony;

(5) the personal knowledge procedure under Rule 24;

(6) the order in which the case will proceed;

(7) that jurors, including alternates, may seek to ask questions of the witnesses by submission of questions in writing.

(8) that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.

(b) The court shall instruct the jurors before opening statements that until their jury service is complete, they shall not use computers, laptops, cellular telephones, or other electronic communication devices while in attendance at trial, during discussions, or during deliberations, unless specifically authorized by the court. In addition, jurors shall be instructed that when they are not in court they shall not use computers, laptops, cellular telephones, other electronic communication devices, or any other method to:

(1) conduct research on their own or as a group regarding the case;

(2) gather information about the issues in the case;

(3) investigate the case, conduct experiments, or attempt to gain any specialized knowledge about the case;

(4) receive assistance in deciding the case from any outside source;

(5) read, watch, or listen to anything about the case from any source;

(6) listen to discussions among, or received information from, other people about the case; or

(7) talk to any of the parties, their lawyers, any of the witnesses, or members of the media, or anyone else about the case, including posting information, text messaging, email, Internet chat rooms, blogs, or social websites.

(c) It is assumed that the court will cover other matters in the preliminary instructions.

(d) The court shall provide each juror with the written instructions while the court reads them.

Adopted Dec. 21, 2001, effective Jan. 1, 2003; amended Sept. 30, 2004, effective Jan. 1, 2005; amended Sept. 10, 2007, effective Jan. 1, 2008; amended March 1, 2010, effective July 1, 2010.

JURY RULE 26. FINAL INSTRUCTIONS

(a) The court shall read appropriate final instructions, which shall include at least the following:
(1) the applicable burdens of proof;
(2) the credibility of witnesses; and,
(3) the manner of weighing the testimony received.
The court shall provide each juror with written instructions before the court reads them. Jurors shall retain the written instructions during deliberations. The court may, in its discretion, give some or all final instructions before final arguments, and some or all final instructions after final arguments.

(b) The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations.

Adopted Dec. 21, 2001, effective Jan. 1, 2003; amended July 1, 2003, effective Aug. 1, 2003; amended March 1, 2010, effective July 1, 2010; Sept. 21, 2010, effective Jan. 1, 2011.

PRACTICE POINTERS

1. At the beginning of your case preparations, obtain the instructions on the elements of the crimes charged against your client and any potential defenses. You can these use these instructions as a guide for discovery and to determine what evidence you need to prepare for trial. It can also help you frame objections to potential State evidence.

2. When preparing for trial, consider the State's theories of your client's guilt, like accomplice liability, felony murder, etc., and list the required elements. Then you can consider where the State may fall short or where you have defenses, element by element. This should help you in doing initial instruction drafting which is uniquely tailored to winning your case.

3. If you deal with anticipated instructions prior to trial, you can also draft pre-trial motions which can head things off at the pass. For example, if it becomes clear that there are jury instruction problems in a multiple defendant or multiple counts case, you may have additional grounds for severance.

4. Analyzing potential instructions prior to trial may reveal that some are so problematic you may want to seek a pre-trial ruling on them, especially if they deal with the type of evidence which is going to be admissible.

5. Early preparation of proposed instructions may also help you with your argument to the jury. If the judge refuses to give your instruction, especially on the grounds that it is covered by other instructions or that the court prefers the pattern instruction, you may still be able to get whatever point you wanted to make through your argument, assuming that it is a correct statement of the law. Article I, § 19 of the Indiana Constitution should even give you even more leeway to do this. *See, e.g., Dixey v. State,* 956 N.E.2d 776 (Ind.Ct.App. 2011) (in theft prosecution, although D's tendered lesser-included offense instructions on utility fraud and criminal deception were properly refused, trial court erred when it refused to allow D to discuss these lesser offenses during closing argument. The jury would have been aided had D been able to explain that the legislature had enacted other offenses directly related to the use of utility bypass schemes or devices that do not require proof of the same requisite mens rea as theft); *Taylor v. State,* 457 N.E.2d 594 (Ind.Ct.App. 1983) (trial court erred in prohibiting defense counsel from arguing difference between negligence and recklessness to jury in D's trial for DWI and reckless homicide; D was denied a fair trial because D's counsel was precluded from arguing law relevant to theory of proximate cause).

6. During your opening statement and closing argument weave in as much of the language from the instructions as possible, but don't tell the jury "the judge will instruct you that ...." This way, when the jury is instructed by the judge in the very same words you used, they will see that you were on the ball in your comments to them, and your credibility and trustworthiness will be enhanced. This may also lead the jury to believe you were accurate in everything else you said, too.

7. Because the rules limit the number of proposed instructions to 10 in noncapital cases, without leave of the court, it may be necessary to prioritize your requests to make sure that the most crucial defense instructions are considered. If your case is very complex and you anticipate the need for additional instructions, you may wish to file a pre-trial motion asking for an increased limit. Of course, you will need to include specific facts supporting your request for these increase, the more specific, the greater the likelihood the request will be granted. If the court grants the pre-trial motion, you will know in advance, and if the motion is denied, you know you may have a struggle for additional instructions at trial and can prepare for that eventuality.

8. Keep each instruction limited to a single legal issue. There are three reasons for this: 1) they are easier to understand; 2) if one part is legally correct and another part is either incorrect or duplicates another instruction, the court may deny the instruction in its entirety; and 3) the court may reject multiple issue instructions because Crim. Rule 8(A) says each instruction is to be limited to one legal principle.

9. Settling of instructions should always be done on the record to preserve any issues for appeal. If your judge insists on settling instructions in chambers or elsewhere (and your only alternative is contempt), make sure that you can at least make a record on them after they are settled. Failure to tender or object to instructions acts as a waiver of the issue, so if your judge regularly tries to settle instructions off the record, you may need to file a pre-trial motion requesting settlement on the record. A sample motion to this effect is included in **Appendix B**.

10. Try not to make your instructions argumentative, and if there are certain points related to your instruction that favor your opponent, including these points will give your instruction more credibility. Totally one-sided instructions may well be presumed by the judge to be inaccurate.

11. Where possible, use every day language in your instructions. You want the jury to actually use them, and if they don't understand them because of "legalese," they won't help you.

12. Where possible, relate the applicable law to the facts of your case. You are entitled to have the jury instructed on any theory of the defense which is supported by the evidence. *Bragg v. State*, 695 N.E.2d 179 (Ind.Ct.App. 1998); *Dayhuff v. State*, 545 N.E.2d 1100, 1102 (Ind.Ct.App. 1989), *trans. denied; and Howard v. State*, 755 N.E.2d 242, (Ind.Ct.App. 2001), where the court acknowledged that only a scintilla of evidence was necessary to support the giving of a theory of defense instruction. *See also Burton v. State*, 978 N.E.2d 520 (Ind.Ct.App. 2012) (although officers testified to different versions of what occurred, DVD provided a strong evidentiary foundation to warrant the giving of tendered instruction on right to defend against perceived excessive force; error in refusing instructions was not harmless).

13. If there are going to be lesser included offenses involved in your instructions, make sure that the instructions explain what the difference between the greater and lesser offense is. *See, e.g., Scott v. State*, 924 N.E.2d 169 (Ind.Ct.App. 2010) (trial court abused its discretion in refusing to instruct jury it could find D guilty of misdemeanor pointing a firearm instead of class D felony version of offense if it found Derringer he pointed at officer was unloaded; the misdemeanor is at issue unless the evidence is totally lacking with regard to whether the weapon is loaded or unloaded).

14. Whenever you can, make your instructions short and sweet. Like legalese, complex or lengthy instructions may cause the jurors to "tune out" and not consider the instruction. This admonition has to be balanced, however, with the need to make sure the instructions convey legal concepts we take for granted, but with which the jurors may be totally unfamiliar. Sometimes this compromise can be reached by using simple rather than complex words, and simple rather than complex sentences. Although the instruction may be long, if it is broken into comprehensible concepts, it is more likely to be considered.

15. Remember that Criminal Rule 8 provides that tendered final instructions regarding any necessary or limiting instructions do not count against your maximum of 10 where a limiting or cautionary instruction was requested during the course of the evidence at trial.

16. Depending on your particular case, you might want to put what you anticipate to be the most controversial, and therefore most likely to be denied, instructions first so the court might throw you a bone after denying them, and agree to give the later ones you really need.

17. When you have a controversial instruction that you are afraid won't fly, prepare a fallback instruction on the issue, and have it ready to present, rather than trying to think it up on the fly.

18. If you have a reasonable prosecutor, you might want to get together right before settling of instructions (so you don't tip your hand too soon) and see if there are any compromises or trade-offs you can reach. Courts are usually more likely to give an instruction if there is no objection from the other side.

19. If at all possible, give the court an electronic version of your tendered instructions. Experience shows us that judges are more likely to grant what you want if it is handy and easy for their staffs to prepare. If this is absolutely impossible, have versions of your tendered instructions available which are unidentified

and without the authority, and make sure the court knows that if it grants your instruction there will be a clean copy ready to go.

20. You will note that the instructions provided in this manual use the term "accused" rather than "defendant." The client's name is also an alternative for "defendant." A motion concerning this issue is included in **Appendix C**, and you should probably file this motion pre-trial and get a ruling on it, so you will know how to tender your instructions.

21. Check patterns/statutes for definitions which might be helpful to you, e.g., proximate cause. Challenge definitions which seem contrary to common sense, etc.

22. If your case involves terms which are not defined, use dictionaries to propose definitions. This concept is supported by case law. See, e.g., *Hook v. State*, 775 N.E.2d 1125 (Ind.Ct.App. 2002) "Statutes that are criminal or penal in nature must be strictly construed. *Burrus v. State*, 763 N.E.2d 469, 471 (Ind. Ct. App. 2002). Although an act may fall within the spirit of the statute, it will not constitute a crime unless it is also within the words of the statute. *Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000). Also, criminal statutes may not be enlarged by construction, implication, or intendment beyond the fair meaning of the words used. *Id*. at 1010. Words and phrases are thought to have their plain, ordinary, and usual meaning unless a different meaning is shown by the statute. *Becker v. State*, 703 N.E.2d 696, 698 (Ind. Ct. App. 1998)." In construing a statute, courts must assign words their plain, ordinary, and usual meanings in everyday speech, unless the statute itself provides definitions to the contrary. *Smith v. State*, 867 N.E.2d 1286, 1288 (Ind. 2007).

23. Discussion of client's right not to testify during voir dire or initial instructions may unduly highlight the issue. You should be entitled not to have this mentioned if you want to. Giving instruction that highlights your client's failure to testify violates his State constitutional right against self-incrimination, if instruction is given over your client's objection. Ind.Const. art. I, § 14; *Hill v. State*, 371 N.E.2d 1303 (Ind. 1978); *Bush v. State*, 755 N.E.2d 309 (Ind. 2002).

24. It has been recognized that in some instances limiting or cautionary instructions are inadequate to cure the prejudice of the admission of improper evidence. *See, e.g., White v. State*, 257 Ind. 64; 272 N.E.2d 312, 315 (1971), Citing *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723, 93 L. Ed. 790 (1949) ('The naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction.')*; See, also, Scifres-Martin v. State*, 635 N.E.2d 218 (Ind.Ct.App. 1994); *Edwards v. State*, 479 N.E.2d 541 (Ind. 1985) Be sure to include this argument both at any mistrial motion and again when the court gives a final instruction regarding the limitation/caution. (Although whether to argue against the instruction as a final instruction will depend on the situation of your case.) *See also Bonner v. State*, 650 N.E.2d 1139 (Ind. 1995) (Simple fact that admonition is given does not necessarily mean that particularly prejudicial, erroneously admitted evidence will be erased from minds of reasonable jurors or omitted from their deliberations).

POSING OBJECTIONS TO AND PROPOSING INSTRUCTIONS

1. The court shall indicate on all instructions, in advance of the argument, those that are to be given and those refused. After the court has indicated the instructions to be given, each party shall have a reasonable opportunity to examine such instructions and to state his specific objection to each, out of the presence of the jury and before argument, or specific written objections to each instruction may be submitted to the court before argument. No error with respect to the giving of instructions shall be available as a cause for new trial or on appeal, except upon the specific objections made as above required. Ind. C.R. 8(B).

2. The manner of objecting to such instructions, of saving questions thereon, and making the same a part of the record shall be the same as in Rule 51(C) of the Rules of Trial Procedure. Indiana C.R. 8(H).

3. At the close of the evidence and before argument each party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. The court shall note all instructions given, refused or tendered, and all written objections submitted thereto, shall be filed in open court and become a part of the record. Objections made orally shall be taken by the reporter and thereby shall become a part of the record. Indiana T.R. 51(C).

4. Generally, a defendant who fails to object to the trial court's final instructions and fails to tender a competing set of instructions at trial waives a claim of error on appeal, unless the error identified rises to the level of fundamental error. *Sanchez v. State*, 675 N.E.2d 306 (Ind. 1996).

5. Any allegation of error in giving instruction in a criminal prosecution was waived where the defendant's objections were so general as not to specifically point out defects in the instruction. *Russell v. State*, 182 Ind.App. 386, 395 N.E.2d 781 (1979).

6. An oral request for a pattern jury instruction is not enough to tender the instruction. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind.Ct.App. 2003), *trans. denied; Cf. Garrett v. State*, 964 N.E.2d 855 (Ind.Ct.App. 2012) (D's failure to submit a written instruction did not result in waiver of issue where trial court understood the request for the lesser included offense instruction and was able to consider it fully).

7. If a defendant tenders an instruction in writing that designates the number of a pattern jury instruction without copying the instruction verbatim, then it is a sufficient tender. Indiana T.R. 51(E); *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind.Ct.App. 2003), *trans. denied*.

CONSIDERATIONS FOR APPELLATE RECORD

1. The instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of discretion. *Overstreet v. State*, 783 N.E.2d 1140, 1163-64 (Ind. 2003)

2. The Court of Appeals will not reverse for an abuse of discretion in instructing the jury unless the instructions as a whole mislead the jury as to the law of the case. *Higgins v. State*, 783 N.E.2d 1180, 1184 (Ind.Ct.App. 2003)

3. The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Murray v. State*, 798 N.E.2d 895, 899 (Ind.Ct.App. 2003)

4. When reviewing the propriety of the trial court's decision to refuse a tendered instruction, an appellate court must consider: (1) whether the instruction is supported by the evidence in the record, (2) whether the instruction correctly states the law, and (3) whether other instructions adequately cover the substance of the denied instruction. *McBride v. State*, 785 N.E.2d 312, 316 (Ind.Ct.App. 2003)

5. If, in ruling on a request for an included offense instruction, a trial court makes a finding as to the existence or lack of a serious evidentiary dispute, the appellate court reviews the trial court's decision for an abuse of discretion in deference to the trial court's proximity to the evidence. *Henderson v. State*, 795 N.E.2d 473, 481 (Ind.Ct.App. 2003), *trans. denied*

6. Jury instructions are to be considered as a whole and in reference to each other. *McBride v. State*, 785

N.E.2d 312, 316 (Ind.Ct.App. 2003)

7. If an instruction in isolation reasonably could have been understood by a juror as relieving the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of all the jury instructions. *Higgins v. State,* 783 N.E.2d 1180, 1185 (Ind.Ct.App. 2003)

8. Before a defendant is entitled to a reversal, he must affirmatively show that an instruction error prejudiced his substantial rights. *McBride v. State*,785 N.E.2d 312, 316 (Ind.Ct.App. 2003)

9. The question of whether a defendant was so prejudiced that the admonishment could not cure the error in admitting the evidence is one that must be determined by examining the facts of the particular case. *Glenn v. State,* 796 N.E.2d 322, 325 (Ind.Ct.App. 2003), *trans. denied*

10. An instruction error will result in reversal when the reviewing court cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given. *Stoltman v. State*, 793 N.E.2d 275, 281 (Ind.Ct.App. 2003)

11. On appeal, the Court of Appeals presumes that the jury followed the instructions tendered by the trial court. *Williams v. State*, 782 N.E.2d 1039, 1047-48 (Ind.Ct.App. 2003)

12. It is reversible error not to give an instruction, when requested, on an inherently or factually included offense. *Slate v. State*, 798 N.E.2d 510, 514 (Ind.Ct.App. 2003)

13. When determining in context of a claim of fundamental error whether a defendant suffered a due process violation based on an incorrect jury instruction, appellate court does not look at the erroneous instruction in isolation, but in the context of all relevant information given to the jury, including closing arguments and other instructions. There is no resulting due process violation where all such information, considered as a whole, does not mislead the jury to a misunderstanding of the law. *Stoltman v. State*, 793 N.E.2d 275, 281 (Ind.Ct.App. 2003)

14. Appellate counsel performed deficiently, as an element of ineffective assistance of appellate counsel, by failing to raise, on direct appeal from murder conviction, the issue of the trial court's refusal to give an instruction on the lesser offense of reckless homicide. *Fisher v. State*, 810 N.E.2d 674, 678 (Ind. 2004)

15. Counsel's failure to object to lack of robbery instruction where robbery was underlying felony for felony murder denied defendant's right to fundamental due process. *Taylor v. State*, 922 N.E.2d 710 (Ind.Ct.App. 2010).

16. A defendant may not object to an instruction upon one ground at trial and present a different ground upon appeal. *Murray v. State*, 798 N.E.2d 895, 901 (Ind.Ct.App. 2003)

PERMISSIBLE AND IMPERMISSIBLE INSTRUCTIONS AND THE TRIAL COURT'S DISCRETION

Aspects of Permissibility/No Abuse of Discretion

1. Trial court's refusal to give a jury instruction on criminal recklessness as a lesser-included offense of murder was not an abuse of discretion. The court instructed the jury on reckless homicide, which gave the jury the opportunity to determine that the defendant acted recklessly instead of knowingly or intentionally. *Hamilton v. State*, 783 N.E.2d 1266, 1268 (Ind.Ct.App. 2003)

2. An instruction that minimizes the jury's power of discretion in making a determination does not necessarily amount to reversible error, if accompanied by another instruction informing the jury that it is

the judge of the law and the facts. *McBride v. State*, 785 N.E.2d 312, 316 (Ind.Ct.App. 2003)

3. Evidence in a prosecution for criminal recklessness did not support a jury instruction on negligence; the evidence showed that, after the defendant's son was beaten when he crashed a party, the defendant went to the home where the party took place with a loaded gun, cocked and with a bullet in the chamber, demanded to be let in, and that the gun discharged, striking the victim in the chest. *Springer v. State*, 798 N.E.2d 431, 435 (Ind. 2004)

4. Evidence supported an instruction on accomplice liability, in a prosecution for receiving stolen property; the defendant urged accomplice to use stolen checks to obtain merchandise for him in exchange for drugs, the defendant and accomplice went to store together, the defendant tried on shoes, placed them on the counted, and left the store while accomplice completed the transaction, and the defendant knew that accomplice would be using a forged check to acquire the shoes. *Cowan v. State*, 783 N.E.2d 1270, 1276 (Ind.Ct.App. 2003)

5. Where the circumstances of the case raise a reasonable inference that the defendant acted as an accomplice, it is appropriate to instruct the jury on accomplice liability even where the defendant was charged as a principal. *Cowan v. State*, 783 N.E.2d 1270, 1276 (Ind.Ct.App. 2003).

6. Trial court's final instruction on accomplice liability that "a defendant is responsible for the acts of his co-defendants as well as his own acts. Any act of one is attributable to them all," erroneously omitted altogether the key phrase "knowingly or intentionally" and said nothing about mens rea at all. *Kane v. State*, 976 N.E.2d 1228 (Ind. 2012).

7. Instructions informing the jury that it was the exclusive judge of the credibility of the witnesses and that with careful consideration it could disregard the testimony of any witness if it had reason to do so sufficiently informed the jury of its obligation to judge the credibility of the witnesses despite not specifically advising the jury that it would reject a witness's perjured testimony. *King v. State*, 799 N.E.2d 42, 50 (Ind.Ct.App. 2003)

8. An accessory liability instruction did not create a mandatory presumption of intent to commit the charged offenses based on participation with another; rather, it allowed the jury to find liability or guilt if it found that the defendant knowingly aided, supported, helped or assisted the other in the commission of the charged offenses. *Pinkins v. State*, 799 N.E.2d 1079, 1088 (Ind.Ct.App. 2003), *trans. denied*

9. Courts should use phrase "specific intent" or "acting with intent to kill a human being," rather than phrase "conscious purpose," when instructing juries on specific intent element of attempted murder. *Elliott v. State*, 786 N.E.2d 799, 802 (Ind.Ct.App. 2003)

10. Trial court's failure to instruct on specific intent element of attempted murder in accomplice liability jury instruction did not constitute fundamental error, where defendant's intent at time of shooting was not at issue, as defense was that defendant had never entered victim's house, but remained outside open window, defense counsel never wavered in defense throughout course of trial, and defense counsel vigorously cross-examined State's witnesses, challenging whether there was any physical evidence placing defendant inside residence. *Hollins v. State*, 790 N.E. 2d 100, 105 (Ind.Ct.App. 2003), *trans. denied*

11. Trial court did not err in giving an additional instruction regarding lesser-included offenses after the jury began deliberating. *Massey v. State*, 803 N.E.2d 1133, 1137 (Ind.Ct.App. 2004)

12. Defendant's proposed self-defense instructions unduly emphasized that the validity of the use of force in self-defense "can only be determined from the standpoint of the accused" without also instructing them to equally consider whether D's belief was objectively reasonable under the circumstances. *Huls v. State*, 971 N.E.2d 739 (Ind.Ct.App. 2012); *see also Washington v. State*, 973 N.E.2d 91 (Ind.Ct.App. 2012), *trans. granted* (no abuse of discretion in using pattern instruction on defense of third person).

13. Trial court did not abuse its discretion by refusing to give D's proposed element instruction which

included the word "voluntary," where jury instructions as a while adequately covered the substance of D's proposed instructions. *O'Connell v. State*, 970 N.E.2d 168 (Ind.Ct.App. 2012).

Aspects of Impermissibility

1. An instruction as to what evidence warrants an inference of guilt clearly invades the jury's province. *McBride v. State*, 793 N.E.2d 275, 280 (Ind.Ct.App. 2003)

2. The phrase "constitutes breaking" in a jury instruction, stating that some physical movement of a structural impediment is necessary to support a finding of breaking, such as opening an unlocked door or pushing open a slightly ajar door, instructed the jury that "breaking" was established if they concluded that the defendant unlocked or pushed open a door. That instruction was impermissible in a trial for residential entry. *State v. Jones*, 805 N.E.2d 469, 473 (Ind.Ct.App. 2004)

3. Generally, it is improper to instruct a jury on the penal ramifications of its verdicts. Stated a different way, the jury must be unaware of the legislature's punishment scheme in performing its guilt-assessing task. To hold otherwise, would be to condone verdicts in which the jury might compromise, to the defendant's benefit or detriment, in order to reach a certain number of years imprisonment. Therefore, the jury should not be privy to information regarding the punishment scheme. *Schmid v. State*, 804 N.E.2d 174, 183 (Ind.Ct.App. 2004), *trans. denied*

4. The Indiana Constitution, in granting to juries in all criminal cases the right to determine the law and the facts, does not allow the jury the latitude to refuse to enforce the law's harshness when justice so requires; a jury has no more right to ignore the law than it has to ignore the facts in a case. *Holden v. State*, 788 N.E.2d 1253, 1254 (Ind. 2003), *reh. granted*

5. Trial court's address to jury, after learning that certain jurors had read newspaper article regarding defendant's propensity to disrupt courtroom, in which court instructed jury what information it could consider, but not what information it could not consider, was not sufficient admonishment to cure court's error in contaminating entire jury by questioning jurors who read article regarding its in presence of those jurors who had not read it. *Stroud v. State*, 787 N.E.2d 430, 435 (Ind.Ct.App. 2003), *trans. denied*

6. Trial court's jury instruction, which failed to inform the jury that it was required to find beyond a reasonable doubt that defendant possessed the specific intent to kill alleged victim to convict on the charge of attempted murder, was improper. *Hopkins v. State*, 782 N.E.2d 988, 991 (Ind. 2003)

7. Language in an appellate opinion stating the rationale for a decision is not necessarily proper for use as a jury instruction. This specifically applies to appellate opinions holding that certain evidence was sufficient to support a conviction. *Higgins v. State*, 783 N.E.2d 1180, 1184-85 (Ind.Ct.App. 2003), *trans. denied*

8. A mandatory instruction that binds the minds and consciences of the jury to return a verdict of guilty upon finding certain facts invades the province of the jury under the provision of Indiana's Constitution that "the jury shall have the right to determine the law and the facts." *Higgins v. State*, 783 N.E.2d 1180, 1186-87 (Ind.Ct.App. 2003), *trans. denied*

9. Defendant was not entitled to jury instruction on "accident" in criminal recklessness prosecution; principles established in instruction were included in instructions given defining elements of crime, and defendant could not have shown that his substantial rights were prejudiced by not giving such instruction.

Springer v. State, 798 N.E.2d 431, 436 (Ind. 2004)

10. Jury instruction highlighting distinction between personal and commercial purposes for ephedrine and pseudoephedrine as chemical precursors to methamphetamine was an incorrect statement of law to the extent that it resurrected the personal use exception. *Murray v. State*, 798 N.E.2d 895, 899

(Ind.Ct.App. 2003)

Specific, Impermissible Instructions

1. A conviction may be based solely on the uncorroborated testimony of the alleged victim if such testimony establishes each element of any crime charged beyond a reasonable doubt. *Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003)

2. The sole and uncorroborated testimony of the alleged victim, if believed beyond a reasonable doubt, is sufficient to support a conviction. *Foster v. State*, 795 N.E.2d 1078, 1085 (Ind.Ct.App. 2003), *trans. denied.*

3. A conviction for child molesting may rest solely on the uncorroborated testimony of the child witness. *Manuel v. State*, 793 N.E.2d 1215, 1217 (Ind.Ct.App. 2003)

4. A defendant's refusal to submit to a chemical test may be considered as evidence of the defendant's guilt. *Stoltman v. State*, 793 N.E.2d 275, 280 (Ind.Ct.App. 2003)

5. The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement inconsistent with his testimony in this case. It is inconsistent if the witness denied making the prior statement or if the witness could not remember making the prior statement. Evidence of this kind may be considered by you in deciding the weight to be given to the testimony of that witness *as well as substantial evidence of the guilt of the defendant. Stoltman v. State*, 793 N.E.2d 275, 281 (Ind.Ct.App. 2003) (emphasis added: language that the Court of Appeals found objectionable)

6. It is a fundamental principle of law that where two or more persons engage in the commission of an unlawful act, each person is criminally responsible for the actions of each other person which were a probable and natural consequence of their common plan even though not intended as part of the original plan. It is not essential that participation of any person to each element of the crime be established.

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

1. has not been prosecuted for the offense;

2. has not been convicted of the offense; or

3. has been acquitted of the offense.

In *Kane v. State*, 976 N.E.2d 1228 (Ind. 2012), the Court reversed Defendant's receiving stolen property conviction because the trial court's final instruction on accomplice liability erroneously omitted altogether the key phrase "knowingly or intentionally" and said nothing about mens rea at all. To aid under the law is to knowingly aid, support, help or assist in the commission of a crime. Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to allow an inference of participation. It is being present at the time and place, and knowingly doing some act to render aid to the actual perpetrator of the crime.

The presence of a person at the scene of the commission of a crime and companionship with another person engaged in the commission of the crime and a course of conduct before and after the offense are circumstances which may be considered in determining whether such person aided and abetted the commission of such crime. *McCorker v. State*, 797 N.E.2d 257, 263 (Ind. 2003)* * Opinion notes: "[W]e counsel courts against using [this instruction] in the form given here." 797 N.E.2d at 264.

7. When two or more persons combine to commit a crime, each is criminally responsible for the acts of his or her confederates committed in furtherance of a common design, the act of each being the act of all. *Kane v. State*, 976 N.E.2d 1228 (Ind. 2012) (instruction erroneously omitted altogether the key phrase

"knowingly or intentionally" and said nothing about mens rea at all).

8. The acts of a person of sound mind and discretion are presumed to be the product of the persons' will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. *Higgins v. State*, 783 N.E.2d 1180, 1185 (Ind.Ct.App. 2003), *trans. denied.*

9. Reversible error to instruct jury that "intent to kill may be inferred from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in the hands of the accused." *McDowell v. State*, 885 N.E.2d 1260 (Ind. 2008).

CONSIDERATIONS ON LESSER-INCLUDED OFFENSES

1. There is a three-step analysis for determining whether an instruction on a lesser included offense should be given. The trial court first compares the statute defining the crime charged with the statute defining the allegedly lesser included offense to determine whether the lesser offense is inherently included in the crime charged. If it is not, the trial court then compares the statute defining the allegedly lesser included offense with the charging information to determine whether the lesser offense is factually included in the crime charged. If the trial court determines that an allegedly lesser offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine whether the evidence supports the giving of the requested instruction on the lesser included offense. *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995).

2. Wright makes clear that in determining whether a serious evidentiary dispute exists, trial court must look at evidence in the case presented *by both parties*. *Webb v. State*, 963 N.E.2d 1103 (Ind. 2012) (because State's evidence concerning D's state of mind was "at best ambiguous," it was reversible error to refuse to instruct jury on lesser included offense of reckless homicide even though D testified he wasn't present at the scene); *Young v. State*, 699 N.E.2d 252 (Ind. 1998) (presenting alibi defense does not automatically bar lesser included offense instructions).

3. A defendant is generally entitled to an instruction covering all offenses that are necessarily included in the offense charged and a submission of forms of all possible verdicts under the offense charged. *Hash v. State*, 258 Ind. 692, 696, 284 N.E.2d 770, 772 (1972).

4. The wording of a charging instrument never forecloses or precludes an instruction on an inherently included offense. *Taylor v. State*, 659 N.E.2d 1054, 1059-60 (Ind.Ct.App. 1995),*trans. denied.* However, the State may foreclose an instruction on a factually included offense by omitting from charging information any reference to the factually included offense. *Jones v. State*, 966 N.E.2d 1266 (Ind. 2012); *Norris v. State*, 943 N.E.2d 362 (Ind.Ct.App. 2011).

5. It is reversible error to give a lesser included instruction at the request of the State in the absence of a serious evidentiary dispute distinguishing the lesser offense from the greater. *Watts v. State*, 885 N.E.2d 1228 (Ind. 2008) (in murder and criminal recklessness prosecution, it was reversible error to give voluntary manslaughter instruction over defense counsel's objection because there was no evidence of sudden heat); *True v. State*, 954 N.E.2d 1105 (Ind.Ct.App. 2011) (instructing jury on Class A misdemeanor instead of Class D felony domestic battery was not supported by evidence and improperly invited jury to reach a "compromise" verdict).

6. The test for determining whether it was error for the trial court to refuse instructions on lesser included offenses is not only whether the lesser included offense is necessarily included within the greater offense, as charged, but also whether there was evidence adduced at trial to which the lesser included offense instruction was applicable. *Rowley v. State*, 394 N.E.2d 928, 930 (Ind. 1979).

7. An offense is a "lesser-included offense" if all of the statutory elements of the lesser offense are part of the statutory definition of the greater offense, or if the charging documents reveal that the manner and means used to commit the essential elements of the charged offense include all of the elements of the lesser offense. *Pedrick v. State*, 593 N.E.2d 1213, 1216 (Ind. 1992), *reh. denied.*

8. Instructions on lesser included offenses must explain the role of a lesser included offense and define those offenses for the jury, and must inform the jury that if it determines that the defendant did not commit the element or act that distinguishes the greater offense from the lesser, it can convict the defendant of the lesser. *Corley v. State*, 663 N.E.2d 175, 178 (Ind.Ct.App. 1996).

9. The Court of Appeals reviews a decision whether to instruct the jury on lesser-included offenses for an abuse of discretion if the court makes a finding as to the existence or lack of a serious evidentiary dispute. *Hamilton v. State*, 783 N.E.2d 1266, 1268 (Ind.Ct.App. 2003). In *Garrett v. State*, 964 N.E.2d 855 (Ind.Ct.App. 2012), where refusal to give lesser included offense instruction on possession of methamphetamine was reversible error, the State incorrectly contended that the greater weight of evidence supporting one conclusion precluded determination that there could be an evidentiary dispute. The jury was not required to believe Defendant's version of events, but it was for jury to decide whether the lesser offense was committed and not the greater. *See, also Porter v. State*, 671 N.E.2d 152 (Ind.Ct.App. 1996).

10. Failure to tender instructions in writing on lesser included offense constitutes a waiver of the right to challenge a trial court's refusal to instruct the jury on lesser included offenses. *Anderson v. State*, 469 N.E.2d 1166, 1168 (Ind. 1984), *cert. denied*, 469 U.S. 1226, 105 S.Ct. 1220, 84 L.Ed.2d 361.

11. An appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter. *Washington v. State*, 808 N.E.2d 617, 625-26 (Ind. 2004).

12. Once evidence of sudden heat has been introduced in a murder case, the defendant is entitled to a correct instruction on the lesser included offense of voluntary manslaughter, as well as an instruction on murder that places the burden on the State to negate sudden heat; however, where the defendant neither objects to the instruction nor tenders a proper instruction, the matter is waived. *Clark v. State*, 668 N.E.2d 1206, 1209 (Ind. 1996), *cert. denied*.

13. It was reversible error for the trial court to have refused to instruct the jury on the lesser included offense of involuntary manslaughter where the evidence showed a serious dispute as to whether the defendant intended to kill or batter the victim. *Brown v. State*, 659 N.E.2d 652, 657 (Ind.Ct.App. 1995), *trans. denied.*

14. Auto theft is an inherently lesser-included offense of robbery and carjacking. *Waibel v. State*, 808 N.E.2d 750, 758 (Ind.Ct.App. 2004), *trans. denied.*

15. Culpability is the sole distinguishing element between criminal recklessness and murder and as such makes criminal recklessness an inherently lesser-included offense of murder. *Hamilton v. State*, 783 N.E.2d 1266, 1269 (Ind.Ct.App. 2003).

16. To determine whether an alleged lesser-included offense is factually included in the crime charged, the trial court must compare the statute that defines the alleged lesser-included offense with the charging instrument. *Slate v. State*, 798 N.E.2d 510, 516 (Ind.Ct.App. 2003).

17. Involuntary manslaughter is not an inherently included lesser-offense of murder; however, it may be a factually included lesser-offense if the charging information alleges that a battery accomplished the killing. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind.Ct.App. 2003), *trans. denied.*

18. Criminal recklessness was not factually included in attempted murder so as to allow a jury instruction on the alleged lesser-included offense of criminal recklessness. *Means v. State*, 807 N.E.2d 776, 783 (Ind.Ct.App. 2004), *trans. denied.*

19. The defendant was entitled to a jury instruction on battery as a lesser-included offense of attempted murder. The information charged the defendant with stabbing the victim with a deadly weapon. *Edwards v. State*, 773 N.E.2d 360, 364 (Ind.Ct.App. 2000), *trans. denied.*

20. Evidence as to a kidnaping charge did not support an instruction on a lesser-included offense of confinement. *Means v. State*, 807 N.E.2d 776, 784 (Ind.Ct.App. 2004), *trans. denied.*

21. It is reversible error not to give an instruction, when requested, on an inherently or factually included offense. *Slate v. State*, 798 N.E.2d 510, 516 (Ind.Ct.App. 2003).

22. Evidence that defendant did not intend to shoot the victim, but was only "playing around" with the gun, and that after the gun discharged, he started screaming and apologizing and he called 9-1-1 for an ambulance, created serious evidentiary dispute regarding whether the killing was done recklessly instead of knowingly and intentionally, as element for entitlement to instruction on reckless homicide as lesser-included offense of murder. *Fisher v. State*, 810 N.E.2d 674, 680 (Ind. 2004).

23. A defendant charged with child molesting was entitled to a lesser included offense instruction on battery, although battery was not an inherently included offense of child molesting, where the information contained elements of battery in alleging that the defendant touched the children, and there was evidence from which reasonable minds could have concluded that the defendant touched the children in a rude or insolent manner, without the intent to satisfy sexual desires. *Pedrick v. State*, 593 N.E.2d 1213, 1216 (Ind. 1992), *reh. denied.*

24. In theft prosecution, the Rule of Lenity and Proportionality Clause of the Indiana Constitution required lesser included offense instruction on conversion, as ”there may be no practical difference between conversion and theft because it seems nearly impossible for a person to knowingly exert unauthorized control of property of another without intending to deprive the person of the value or use of the property.” *Morris v. State*, 921 N.E.2d 40, 43 (Ind.Ct.App. 2010); *but see Poling v. State*, 938 N.E.2d 1212 (Ind.Ct.App. 2010) (distinguishing and disagreeing with *Morris*).

25. Trial court jury instruction on lesser included offenses, which was provided in response to jury questions, did not prejudice defendant's substantive rights, in prosecution for aggravated battery and battery; jury was instructed that they were the judge of the law and the facts, and the court instructed the jury on the lesser included offenses of Class A and B misdemeanor battery. *Massey v. State*, 803 N.E.2d 1133, 1137 (Ind.Ct.App. 2004).

WATCH OUT FOR:

1. “Should” language. If the state fails to carry its burden, jurors “must” find the accused not guilty. If the state does carry its burden, the jury “may” find the accused guilty. Most patterns contain the “must” language for not guilty.

2. Occasionally an instruction may talk about the jury determining whether the accused is guilty or innocent. The jury has no duty to determine innocence, it is presumed. If the State doesn’t carry its burden, the result is not guilty. Prosecutors may also raise this guilt-innocence issue as something the jury determines. This concept undermines the presumption of innocence. For argument and instruction on this issue, *see*, Justice DeBruler’s dissent in *Daniel v. State*, 582 N.E.2d 364 (Ind. 1991).

3. An instruction regarding Attempted Murder must require that the accused made the attempt with the “intent to kill”. Further, where accomplice liability for Attempted Murder is involved, the accomplice must “intend that a killing occur.”

4. Be aware that it has been held that it is not reversible error to give lesser included instructions merely

because the defense objects. *Garrett v. State*, 756 N.E.2d 523 (Ind.Ct.App. 2001). If this is an issue, you need to be prepared to argue for a change in the law.

5. Be aware that it has been noted that when the evidence indicates that a defendant's decision to abandon the crime was the product of "an extrinsic factor," such as fear of detection or arrest, then an instruction on abandonment is properly refused. *Patterson v. State*, 729 NE 2d 1035 (Ind. Ct. App. 2000).

6. The appellate court has found that "It is a fundamental principle of law" language creates a mandatory presumption, so watch out and object to any language like this. *Walker v. State*, 769 N.E.2d 1162 (Ind.Ct.App. 2002), *overruled on other grounds*, *McCorker v. State*, 797 N.E.2d 257, 265-66 (Ind. 2003).

7. Many of the preliminary instructions in this manual are provided for you to make sure various preliminary points are covered, or to argue for additions, etc. to the courts' instructions. They count against your maximum number of instructions, so you should keep this in mind and try to use them to amend the court's instructions whenever possible.

8. Case law is not necessarily appropriate for instructions in all instances, especially those which relate to sufficiency of the evidence. Further discussion of this issue, and motions in opposition, are contained in **Appendix D.**

9. If the Court refuses your instruction because it lacks authority, and you believe it is a correct statement of the law and is not covered by other instructions, be sure to make those points in your response so that the issue will be preserved for appeal.