

IC 35-34

ARTICLE 34. BRINGING CRIMINAL CHARGES

IC 35-34-1

Chapter 1. Indictment and Information

IC 35-34-1-1

Commencement of prosecution; filing; sealing; violation

35-34-1-1 Sec. 1. (a) All prosecutions of crimes shall be brought in the name of the state of Indiana. Any crime may be charged by indictment or information.

(b) Except as provided in IC 12-15-23-6(d), all prosecutions of crimes shall be instituted by the filing of an information or indictment by the prosecuting attorney, in a court with jurisdiction over the crime charged.

(c) Whenever an indictment or information is filed, the clerk of the court shall:

- (1) mark the date of filing on the instrument;
- (2) record it in a record book; and
- (3) upon request, make a copy of it available to the defendant or his attorney.

(d) The court, upon motion of the prosecuting attorney, may order that the indictment or information be sealed. If a court has sealed an indictment or information, no person may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. However, any person may make any disclosure necessarily incident to the arrest of the defendant. A violation of this subsection is punishable as a contempt.

As added by Acts 1981, P.L.298, SEC.3. Amended by Acts 1982, P.L.204, SEC.18; P.L.10-1994, SEC.7.

IC 35-34-1-2

Contents; requisites; form

35-34-1-2 Sec. 2. (a) The indictment or information shall be in writing and allege the commission of an offense by:

(1) stating the title of the action and the name of the court in which the indictment or information is filed;

(2) stating the name of the offense in the words of the statute or any other words conveying the same meaning;

(3) citing the statutory provision alleged to have been violated, except that any failure to include such a citation or any error in such a citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against the defendant;

(4) setting forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition;

(5) stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense;

(6) stating the time of the offense as definitely as can be done if time is of the essence of the offense;

(7) stating the place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed;

(8) stating the place of the offense as definitely as can be done if the place is of the essence of the offense; and

(9) stating the name of every defendant, if known, and if not known, by designating the defendant by any name or description by which he can be identified with reasonable certainty.

(b) An indictment shall be signed by:

- (1) the foreman or five (5) members of the grand jury; and
- (2) the prosecuting attorney or his deputy.

An information shall be signed by the prosecuting attorney or his deputy and sworn to or affirmed

by him or any other person.

(c) An indictment or information shall have stated upon it the names of all the material witnesses. Other witnesses may afterwards be subpoenaed by the state, but unless the name of a witness is stated on the indictment or information, no continuance shall be granted to the state due to the absence of the witness.

(d) The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. Presumptions of law and matters of which judicial notice is taken need not be stated.

(e) The indictment may be substantially in the following form:

IN THE _____ COURT OF INDIANA, 20 ____
STATE OF INDIANA
vs. CAUSE NUMBER _____
A _____ B _____

The grand jury of the county of _____ upon their oath or affirmation do present that AB, on the _____ day of _____ 20____ at the county of _____ in the state of Indiana (HERE SET FORTH THE OFFENSE CHARGED).

(f) The information may be substantially in the same form as the indictment, substituting for the words, "the grand jury of the county of _____, upon their oath or affirmation so present" the following: "CD, being duly sworn on his oath or having affirmed, says." It is not necessary in an information to state the reason why the proceeding is by information rather than indictment.

(g) This section applies to a traffic offense (as defined in IC 9-30-3-5) if the traffic offense is:

- (1) a felony; or
- (2) a misdemeanor.

As added by Acts 1981, P.L.298, SEC.3. Amended by Acts 1982, P.L.204, SEC.19; P.L.320-1983, SEC.11; P.L.158-1994, SEC.1; P.L.2-2005, SEC.119.

IC 35-34-1-2.4

Verified or sworn documents; form of oath; administration; false affirmation or verification

35-34-1-2.4 Sec. 2.4. (a) If an indictment, information, pleading, motion, petition, probable cause affidavit, or other document is required to be verified or sworn under oath before it is submitted to the court in a criminal action, the document meets the requirements of the law as a sworn document if the following form or a substantially similar form is used:

I swear (affirm), under penalty of perjury as specified by IC 35-44-2-1, that the foregoing (the following) representations are true.

Signed _____

(b) If a document complies with subsection (a), the swearing or affirming need not be done before a notary or other officer empowered to administer oaths.

(c) A person who makes a false affirmation or verification under this section may be prosecuted under IC 35-44-2-1.

As added by P.L.181-1988, SEC.1.

IC 35-34-1-2.5

Prior convictions

35-34-1-2.5 Sec. 2.5. If the penalty for an offense is, by the terms of the statute, increased because the person was previously convicted of the offense, the state may seek to have the person sentenced to receive the increased penalty by alleging, on a page separate from the rest of the charging instrument, that the person was previously convicted of the offense.

As added by P.L.50-1984, SEC.7.

IC 35-34-1-3

Illegible or lost indictment or information

35-34-1-3 Sec. 3. When an indictment or information which has been returned or presented to a court as authorized by law has become illegible or cannot be produced, the defendant may be

tried using a copy certified by the clerk of the court.
As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-4

Motion to dismiss by defendant; grounds; requisites; disposition; effect of order

35-34-1-4 Sec. 4. (a) The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:

(1) The indictment or information, or any count thereof, is defective under section 6 of this chapter.

(2) Misjoinder of offenses or parties defendant, or duplicity of allegation in counts.

(3) The grand jury proceeding was defective.

(4) The indictment or information does not state the offense with sufficient certainty.

(5) The facts stated do not constitute an offense.

(6) The defendant has immunity with respect to the offense charged.

(7) The prosecution is barred by reason of a previous prosecution.

(8) The prosecution is untimely brought.

(9) The defendant has been denied the right to a speedy trial.

(10) There exists some jurisdictional impediment to conviction of the defendant for the offense charged.

(11) Any other ground that is a basis for dismissal as a matter of law.

(b) Except as otherwise provided, a motion under this section shall be made no later than:

(1) twenty (20) days if the defendant is charged with a felony; or

(2) ten (10) days if the defendant is charged only with one (1) or more misdemeanors; prior to the omnibus date. A motion made thereafter may be summarily denied if based upon a ground specified in subdivision (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5) of this section. A motion to dismiss based upon a ground specified in subdivision (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), or (a)(11) of this section may be made or renewed at any time before or during trial. A motion to dismiss based upon lack of jurisdiction over the subject matter may be made at any time.

(c) Upon the motion to dismiss, a defendant who is in a position adequately to raise more than one (1) ground in support thereof shall raise every ground upon which he intends to challenge the indictment or information. A subsequent motion based upon a ground not properly raised may be summarily denied. However, the court, in the interest of justice and for good cause shown, may entertain and dispose of such a motion on the merits.

(d) Upon the motion to dismiss, the court shall:

(1) overrule the motion to dismiss;

(2) grant the motion to dismiss and discharge the defendant; or

(3) grant the motion to dismiss and deny discharge of the defendant if the court determines that the indictment or information may be cured by amendment under section 5 of this chapter and the prosecuting attorney has moved for leave to amend.

If the court grants the motion under subdivision (3) and grants the prosecuting attorney leave to amend, any prior order imposing conditions of release pending trial shall stand unless otherwise modified or removed by order of the court.

(e) If the court grants a motion under subsection (a)(3) and the prosecuting attorney informs the court on the record that the charges will be refiled within seventy-two (72) hours by information:

(1) the court may not discharge the defendant; and

(2) any prior order concerning release pending trial remains in force unless it is modified or removed by the court.

(f) An order of dismissal does not, of itself, constitute a bar to a subsequent prosecution of the same crime or crimes except as otherwise provided by law.

As added by Acts 1981, P.L.298, SEC.3. Amended by Acts 1982, P.L.204, SEC.20; P.L.320-1983, SEC.12.

IC 35-34-1-5

Amendment of charge; procedures; limitations

Sec. 5. (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:

- (1) any miswriting, misspelling, or grammatical error;
- (2) any misjoinder of parties defendant or offenses charged;
- (3) the presence of any unnecessary repugnant allegation;
- (4) the failure to negate any exception, excuse, or provision contained in the statute defining the offense;
- (5) the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;
- (6) any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
- (7) the failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;
- (8) the failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or
- (9) any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:

- (1) up to:
 - (A) thirty (30) days if the defendant is charged with a felony; or
 - (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors; before the omnibus date; or
- (2) before the commencement of trial;

if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.

(c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than

amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

(e) An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8, IC 35-50-2-8.5, or IC 35-50-2-10 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

As added by Acts 1981, P.L.298, SEC.3. Amended by Acts 1982, P.L.204, SEC.21; P.L.320-1983, SEC.13; P.L.164-1993, SEC.7; P.L.178-2007, SEC.1.

IC 35-34-1-6

Defective indictment or information; dismissal; exceptions

35-34-1-6 Sec. 6. (a) An indictment or information is defective when:

- (1) it does not substantially conform to the requirements of section 2(a) of this chapter;
- (2) the allegations demonstrate that the court does not have jurisdiction of the offense

charged; or

(3) the statute defining the offense charged is unconstitutional or otherwise invalid.

(b) An information is defective if:

(1) the defendant was a grand jury target identified under IC 35-34-2-12(a)(1);

(2) the offense alleged was identified on the record under IC 35-34-2-12(a)(2) as an offense that the defendant allegedly committed; and

(3) the grand jury proceeded to deliberate on whether to issue an indictment, and voted not to indict the defendant for the offense identified on the record under IC 35-34-2-12(a)(2).

However, if the prosecuting attorney shows that there is newly discovered material evidence that was not presented to the grand jury before the grand jury's failure to indict, then the information is not defective.

(c) Except as provided in section 5 of this chapter, an indictment or information or a count thereof shall be dismissed upon motion when it is defective.

As added by Acts 1981, P.L.298, SEC.3. Amended by P.L.312-1985, SEC.1; P.L.3-1990, SEC.121.

IC 35-34-1-7

Grand jury proceedings; violation of IC 35-34-2; dismissal

35-34-1-7 Sec. 7. An indictment shall be dismissed upon motion when the grand jury proceeding which resulted in the indictment was conducted in violation of IC 35-34-2.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-8

Motion to dismiss by defendant; requisites; affidavits; documentary evidence; hearing; disposition; procedures

35-34-1-8 Sec. 8. (a) A motion to dismiss an indictment or information under section 4 of this chapter shall be in writing. The

prosecutor must be given reasonable notice of a motion to dismiss. If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts. The sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant discloses the sources of the information and the grounds for the belief. If the motion is expressly or impliedly based upon the existence of any question of law, the motion shall be accompanied by a memorandum stating specifically the legal question in issue. The defendant may also submit documentary evidence tending to support the allegations of the motion.

(b) The prosecutor may:

(1) file with the court an answer denying or admitting any or all of the allegations of the motion; and

(2) submit documentary evidence tending to refute the allegations.

(c) After all papers of both parties have been filed, and after all documentary evidence has been submitted, the court shall determine whether, under subsections (d) and (e) of this section, a hearing is necessary to resolve questions of fact.

(d) The court shall grant the motion without conducting a hearing only if:

(1) the motion alleges a ground constituting a legal basis for the motion under section 4 of this chapter;

(2) the ground, if expressly or impliedly based upon the existence or occurrence of facts, is supported by sworn allegations of all facts essential to support the motion; and

(3) the sworn allegations of fact essential to support the motion are admitted as true by the prosecutor or are conclusively established by documentary evidence.

(e) The court may deny the motion without conducting a hearing only if:

(1) the motion does not allege a ground constituting a legal basis for the motion under section 4 of this chapter;

(2) the motion is expressly or impliedly based upon the existence or occurrence of facts, and the motion does not contain sworn allegations supporting all the essential facts; or

(3) an allegation of fact essential to support the motion is conclusively refuted by

documentary evidence.

(f) If a hearing is necessary to resolve questions of fact, the court shall conduct a hearing and make findings of fact essential to the determination of the motion. The defendant has a right to be present and represented by counsel at the hearing but may waive this right. The defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-9

Joinder of offenses or defendants

35-34-1-9 Sec. 9. (a) Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

(b) Two (2) or more defendants can be joined in the same indictment or information when:

(1) each defendant is charged with each offense included;

(2) each of the defendants is charged as a conspirator or party to the commission of the offense and some of the defendants are also charged with one (1) or more offenses alleged to be in furtherance of the conspiracy or common scheme or plan; however, a party to the commission of an offense or conspirator need not be designated as such in the indictment or information; or

(3) conspiracy is not charged and not all of the defendants are charged in each count, if it is alleged in the indictment or information that the offenses charged:

(A) were part of a common scheme or plan; or

(B) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one (1) charge from proof of the others.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-10

Motions; joinder of offenses; dismissal of offense joinable for trial or of related offenses; requisites; orders

35-34-1-10 Sec. 10. (a) When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations and the offenses could be joined in the same indictment or information under section 9(a)(1) of this chapter, the court, upon motion of the defendant, may order that the indictments or informations be joined for trial. Such motion shall be made before commencement of trial on either of the offenses charged.

(b) When a defendant has been charged with two (2) or more offenses in two (2) or more indictments or informations and the offenses could have been joined in the same indictment or information under section (9)(a)(2) of this chapter, the court, upon motion of the defendant or the prosecuting attorney, or on its own motion, shall join for trial all of such indictments or informations unless the court, in the interests of justice, orders that one (1) or more of such offenses shall be tried separately. Such motion shall be made before commencement of trial on either of the offenses charged.

(c) A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses

under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.

(d) A defendant who has been sentenced on a plea of guilty to one (1) offense may move to dismiss an indictment or information for a related offense. The motion shall be granted if the plea of guilty was entered on the basis of a plea agreement in which the prosecutor agreed to seek or not to oppose dismissal of other related offenses or not to prosecute other potential related offenses.

(e) Subject to the provisions of section 11(a) of this chapter, two (2) or more offenses which are within the jurisdiction of the same court and which could have been joined in one (1) prosecution

constitute related offenses.
As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-11

Severance of offenses or separate trial of defendants joined

35-34-1-11 Sec. 11. (a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law

intelligently as to each offense.

(b) Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect:

- (1) a joint trial at which the statement is not admitted into evidence;
- (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
- (3) a separate trial for the moving defendant.

In all other cases, upon motion of the defendant or the prosecutor, the court shall order a separate trial of defendants whenever the court determines that a separate trial is necessary to protect a defendant's right to a speedy trial or is appropriate to promote a fair determination of the guilt or innocence of a defendant.

(c) The court may order the prosecutor to disclose in camera any information concerning statements made by the defendants which the prosecutor intends to introduce in evidence at the trial if this information would assist the court in ruling on a motion for a separate trial.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-12

Motion for severance or separate trial; time; waiver or bar

35-34-1-12 Sec. 12. (a) A defendant's motion for severance of crimes or motion for a separate trial must be made before commencement of trial, except that the motion may be made before or at the close of all the evidence during trial if based upon a ground not previously known. The right to severance of offenses or separate trial is waived by failure to make the motion at the appropriate time.

(b) If a defendant's pretrial motion for severance of offenses or motion for a separate trial is overruled, the motion may be renewed on the same grounds before or at the close of all the evidence during trial. The right to severance of offenses or separate trial is waived by failure to renew the motion.

(c) If a defendant's motion for severance of offenses or separate trial is granted during the trial, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses charged.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-13

Motion to dismiss by prosecuting attorney

35-34-1-13 Sec. 13. (a) Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information. The motion may be made at any time before sentencing and may be made on the record or in writing. The motion shall state the reason for dismissal.

(b) In any case where an order sustaining a motion to dismiss would otherwise constitute a bar

to further prosecution of the crime charged, unless the defendant objects to dismissal, the granting of the motion does not bar a subsequent trial of the defendant on the offense charged. As added by Acts 1981, P.L.298, SEC.3. Amended by Acts 1982, P.L.204, SEC.22.

IC 35-34-1-14

Pleading special matters; sufficiency

35-34-1-14 Sec. 14. In any indictment or information, an averment substantially in compliance with the provisions of this section shall be sufficient.

(a) The age of the defendant or the victim need not be alleged, except where the age of the defendant or the victim is an essential element of the offense charged.

(b) Averments as to any money or bills or notes or postal orders issued by any lawful authority and intended to pass and circulate as money are sufficient to be alleged simply as money without further identification.

(c) It is sufficient to describe a written instrument by any name or designation by which it is usually known or to aver generally the contents of such instrument.

(d) Averments of dates and numbers may be by words or figures or both.
As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-15

Incorrect name of defendant immaterial

35-34-1-15 Sec. 15. (a) If the stated name of the defendant in the indictment or information is incorrect:

(1) this defect shall not be a ground for dismissal of the indictment or information; and

(2) any variance between the allegations and the proof of the defendant's name shall not be considered material.

(b) If at any time during the proceedings the true name of the defendant becomes known, the court shall order the indictment or information amended to show both the name by which the defendant was first charged and the name later alleged to be true.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-16

Perjury; requisites

35-34-1-16 Sec. 16. (a) In an indictment or information for perjury, it is necessary to set forth only:

(1) the substance of the controversy or the matter in respect to which the alleged offense was committed; and

(2) in what court or before whom the false statement was made.

It is not necessary to set forth any part of any record or proceeding, or the commission or authority of the court or person before whom the perjury was allegedly committed.

(b) In an indictment or information for perjury, in swearing to any written instrument, it is necessary to set forth only that part of the instrument alleged to have been falsely sworn to, and to negative the same, with the name of the officer or court before whom the instrument was sworn.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-17

Forgery; misdescription of instrument destroyed or withheld by defendant immaterial

35-34-1-17 Sec. 17. When an instrument which is the subject of an indictment or information for forgery has been destroyed, or is withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment or information, and established at trial, the misdescription of the instrument is immaterial.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-18

Names of owners of property

35-34-1-18 Sec. 18. The indictment or information for an offense which was committed upon or in relation to any property belonging to partners, or to several joint owners, or property which, when the offense was committed, was in possession of a bailee or tenant, is sufficient if it alleges the ownership of the property to be in the name of:

- (1) the partnership or any partner;
- (2) an owner;
- (3) a bailor;
- (4) a bailee; or
- (5) a tenant.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-34-1-19

Rules of construction

35-34-1-19 Sec. 19. The words used in an indictment or information shall be construed using their ordinary and common meaning, except words and phrases defined by law, which are to be construed according to their legal meaning.

As added by Acts 1981, P.L.298, SEC.3.

IC 35-36

ARTICLE 36. PRETRIAL NOTICES, MOTIONS, AND PROCEDURES

IC 35-36-1

Chapter 1. Definitions

IC 35-36-1-1

Definitions

35-36-1-1 Sec. 1. As used in this article:

"Insanity" refers to the defense set out in IC 35-41-3-6.

"Mentally ill" means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function; "mentally ill" also includes having any mental retardation.

"Omnibus date" refers to the omnibus date established under IC 35-36-8-1.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-2

Chapter 2. Affirmative Defense of Insanity or Mental Illness; Pleadings, Orders, and Findings

IC 35-36-2-1

Time of filing

35-36-2-1 Sec. 1. When the defendant in a criminal case intends to interpose the defense of insanity, he must file a notice of that intent with the trial court no later than:

- (1) twenty (20) days if the defendant is charged with a felony; or
- (2) ten (10) days if the defendant is charged only with one (1) or more misdemeanors;

before the omnibus date. However, in the interest of justice and upon a showing of good cause, the court may permit the filing to be made at any time before commencement of the trial.

As added by Acts 1981, P.L.298, SEC.5. Amended by Acts 1982, P.L.204, SEC.29.

IC 35-36-2-2

Admissibility of evidence; psychiatrists, psychologists, or physicians; defendant's failure to communicate, participate, and cooperate with court appointed medical witnesses

35-36-2-2 Sec. 2. (a) At the trial of a criminal case in which the defendant intends to interpose the defense of insanity, evidence may be introduced to prove the defendant's sanity or insanity at the time at which the defendant is alleged to have committed the offense charged in the indictment or information.

(b) When notice of an insanity defense is filed, the court shall appoint two (2) or three (3) competent disinterested psychiatrists, psychologists endorsed by the state psychology board as health service providers in psychology, or physicians, at least one (1) of whom must be a psychiatrist, to examine the defendant and to testify at the trial. This testimony shall follow the presentation of the evidence for the prosecution and for the defense, including testimony of any medical experts employed by the state or by the defense.

(c) If a defendant does not adequately communicate, participate, and cooperate with the medical witnesses appointed by the court, after being ordered to do so by the court, the defendant may not present as evidence the testimony of any other medical witness:

- (1) with whom the defendant adequately communicated, participated, and cooperated; and
- (2) whose opinion is based upon examinations of the defendant;

unless the defendant shows by a preponderance of the evidence that the defendant's failure to communicate, participate, or cooperate with the medical witnesses appointed by the court was caused by the defendant's mental illness.

(d) The medical witnesses appointed by the court may be cross-examined by both the prosecution and the defense, and each side may introduce evidence in rebuttal to the testimony of such a medical witness.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.321-1983, SEC.2; P.L.19-1986, SEC.59; P.L.149-1987, SEC.119; P.L.77-2004, SEC.3.

IC 35-36-2-3

Finding of jury

35-36-2-3 Sec. 3. In all cases in which the defense of insanity is interposed, the jury (or the court if tried by it) shall find whether the defendant is:

- (1) guilty;
- (2) not guilty;
- (3) not responsible by reason of insanity at the time of the crime; or
- (4) guilty but mentally ill at the time of the crime.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-2-4

Finding of nonresponsibility by reason of insanity; commitment procedures; requirements of the superintendent and attending physician

35-36-2-4 Sec. 4. (a) Whenever a defendant is found not responsible by reason of insanity at the time of the crime, the prosecuting attorney shall file a written petition with the court under IC 12-26-6-2(a)(3) or under IC 12-26-7. If a petition is filed under IC 12-26-6-2(a)(3), the court shall hold a commitment hearing under IC 12-26-6. If a petition is filed under IC 12-26-7, the court shall hold a commitment hearing under IC 12-26-7.

(b) The hearing shall be conducted at the earliest opportunity after the finding of not responsible by reason of insanity at the time of the crime, and the defendant shall be detained in custody until the completion of the hearing. The court may take judicial notice of evidence introduced during the trial of the defendant and may call the physicians appointed by the court to testify concerning whether the defendant is currently mentally ill and dangerous or currently mentally ill and gravely disabled, as those terms are defined by IC 12-7-2-96 and IC 12-7-2-130(1). The court may subpoena any other persons with knowledge concerning the issues presented at the hearing.

(c) The defendant has all the rights provided by the provisions of IC 12-26 under which the petition against the defendant was filed. The prosecuting attorney may cross-examine the witnesses and present relevant evidence concerning the issues presented at the hearing.

(d) If a court orders an individual to be committed under IC 12-26-6 or IC 12-26-7 following a verdict of not responsible by reason of insanity at the time of the crime, the superintendent of the facility to which the individual is committed and the attending physician are subject to the requirements of IC 12-26-15-1.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.200-1983, SEC.4; P.L.2-1992, SEC.869; P.L.77-2004, SEC.4.

IC 35-36-2-5

Finding or plea of guilty but mentally ill; evaluation; sentence; treatment

Sec. 5. (a) Except as provided by subsection (e), whenever a defendant is found guilty but mentally ill at the time of the crime or enters a plea to that effect that is accepted by the court, the court shall sentence the defendant in the same manner as a defendant found guilty of the offense.

(b) Before sentencing the defendant under subsection (a), the court shall require the defendant to be evaluated by a physician licensed under IC 25-22.5 who practices psychiatric medicine, a licensed psychologist, or a community mental health center (as defined in IC 12-7-2-38). However, the court may waive this requirement if the defendant was evaluated by a physician licensed under IC 25-22.5 who practices psychiatric medicine, a licensed psychologist, or a community mental health center and the evaluation is contained in the record of the defendant's trial or plea agreement hearing.

(c) If a defendant who is found guilty but mentally ill at the time of the crime is committed to the department of correction, the defendant shall be further evaluated and then treated in such a manner as is psychiatrically indicated for the defendant's mental illness. Treatment may be provided by:

(1) the department of correction; or

(2) the division of mental health and addiction after transfer under IC 11-10-4.

(d) If a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may, in accordance with IC 35-38-2-2.3, require that the defendant undergo treatment.

(e) As used in this subsection, "individual with mental retardation" has the meaning set forth in IC 35-36-9-2. If a court determines under IC 35-36-9 that a defendant who is charged with a murder for which the state seeks a death sentence is an individual with mental retardation, the court shall sentence the defendant under IC 35-50-2-3(a).

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.320-1983, SEC.21; P.L.1-1991, SEC.191; P.L.2-1992, SEC.870; P.L.1-1993, SEC.239; P.L.158-1994, SEC.2; P.L.121-1996, SEC.3; P.L.215-2001, SEC.108; P.L.99-2007, SEC.200.

IC 35-36-3

Chapter 3. Comprehension to Stand Trial

IC 35-36-3-1

Hearing; psychiatric examination; delay or continuance of trial; confinement in psychiatric institution; competency restoration services

35-36-3-1 Sec. 1. (a) If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability. The court shall appoint two (2) or three (3) competent, disinterested:

(1) psychiatrists; or

(2) psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology.

At least one (1) of the individuals appointed under this subsection must be a psychiatrist. However, none may be an employee or a contractor of a state institution (as defined in IC 12-7-2-184). The individuals who are appointed shall examine the defendant and testify at the hearing as to whether the defendant can understand the proceedings and assist in the preparation of the defendant's defense.

(b) At the hearing, other evidence relevant to whether the defendant has the ability to understand the proceedings and assist in the preparation of the defendant's defense may be introduced. If the court finds that the defendant has the ability to understand the proceedings and assist in the preparation of the defendant's defense, the trial shall proceed. If the court finds that the defendant lacks this ability, it shall delay or continue the trial and order the defendant committed to the division of mental health and addiction. The division of mental health and addiction shall provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party in the:

(1) location where the defendant currently resides; or

(2) least restrictive setting appropriate to the needs of the defendant and the safety of the defendant and others.

However, if the defendant is serving an unrelated executed sentence in the department of correction at the time the defendant is committed to the division of mental health and addiction under this section, the division of mental health and addiction shall provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party at a department of correction facility agreed upon by the division of mental health and addiction or the third party contractor and the department of correction.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.321-1983, SEC.3; P.L.19-1986, SEC.60; P.L.2-1992, SEC.871; P.L.215-2001, SEC.109; P.L.77-2004, SEC.5.

IC 35-36-3-2

Attainment of ability to stand trial; certification; return to court; order; trial

35-36-3-2 Sec. 2. Whenever the defendant attains the ability to understand the proceedings and assist in the preparation of the defendant's defense:

(1) the superintendent of the state institution (as defined in IC 12-7-2-184); or

(2) if the division of mental health and addiction entered into a contract for the provision of competency restoration services, the director or medical director of the third party contractor; shall certify that fact to the proper court, which shall enter an order directing the sheriff to return the defendant. The court shall enter such an order immediately after being sufficiently advised of the defendant's attainment of the ability to understand the proceedings and assist in the preparation of the defendant's defense. Upon the return to court of any defendant committed under section 1 of this chapter, the court shall hold the trial as if no delay or postponement had occurred.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.2-1992, SEC.872; P.L.215-2001, SEC.110; P.L.77-2004, SEC.6.

IC 35-36-3-3

Substantial probability of attainment of comprehension to stand trial; certification; commitment proceedings; duration of retention

35-36-3-3 Sec. 3. (a) Within ninety (90) days after:

(1) a defendant's admission to a state institution (as defined in IC 12-7-2-184); or

(2) the initiation of competency restoration services to a defendant by a third party contractor;

the superintendent of the state institution (as defined in IC 12-7-2-184) or the director or medical director of the third party contractor, if the division of mental health and addiction has entered into a contract for the provision of competency restoration services by a third party, shall certify to the proper court whether the defendant has a substantial probability of attaining the ability to understand the proceedings and assist in the preparation of the defendant's defense within the

foreseeable future.

(b) If a substantial probability does not exist, the state institution (as defined in IC 12-7-2-184) or the third party contractor shall initiate regular commitment proceedings under IC 12-26. If a substantial probability does exist, the state institution (as defined in IC 12-7-2-184) or third party contractor shall retain the defendant:

(1) until the defendant attains the ability to understand the proceedings and assist in the preparation of the defendant's defense and is returned to the proper court for trial; or

(2) for six (6) months from the date of the:

(A) defendant's admission to a state institution (as defined in IC 12-7-2-184); or

(B) initiation of competency restoration services by a third party contractor;

whichever first occurs.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.2-1992, SEC.873; P.L.215-2001, SEC.111; P.L.77-2004, SEC.7.

IC 35-36-3-4

Inability to attain comprehension to stand trial; commitment proceedings

35-36-3-4 Sec. 4. If a defendant who was found under section 3 of this chapter to have had a substantial probability of attaining the ability to understand the proceedings and assist in the preparation of the defendant's defense has not attained that ability within six (6) months after the date of the:

(1) defendant's admission to a state institution (as defined in IC 12-7-2-184); or

(2) initiation of competency restoration services by a third party contractor;

the state institution (as defined in IC 12-7-2-184) or the third party contractor, if the division of mental health and addiction has entered into a contract for the provision of competency restoration services by a third party, shall institute regular commitment proceedings under IC 12-26.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.2-1992, SEC.874; P.L.215-2001, SEC.112; P.L.77-2004, SEC.8.

IC 35-36-4

Chapter 4. Notice of Alibi Defense

IC 35-36-4-1

Time of filing; requisite information

35-36-4-1 Sec. 1. Whenever a defendant in a criminal case intends to offer in his defense evidence of alibi, the defendant shall, no later than:

(1) twenty (20) days prior to the omnibus date if the defendant is charged with a felony; or

(2) ten (10) days prior to the omnibus date if the defendant is charged only with one (1) or more misdemeanors;

file with the court and serve upon the prosecuting attorney a written statement of his intention to offer such a defense. The notice must include specific information concerning the exact place where the defendant claims to have been on the date stated in the indictment or information.

As added by Acts 1981, P.L.298, SEC.5. Amended by Acts 1982, P.L.204, SEC.30.

IC 35-36-4-2

Reply by prosecutor; second statement by defendant; filing and service

35-36-4-2 Sec. 2. (a) When a defendant files a notice of alibi, the prosecuting attorney shall file with the court and serve upon the defendant, or upon his counsel, a specific statement containing:

(1) the date the defendant was alleged to have committed the crime; and

(2) the exact place where the defendant was alleged to have committed the crime; that he intends to present at trial. However, the prosecuting attorney need not comply with this requirement if he intends to present at trial the date and place listed in the indictment or information as the date and place of the crime.

(b) If a reply by the prosecuting attorney is required by subsection (a) of this section, the prosecuting attorney shall serve such a statement upon the defendant, or his counsel, within

seven (7) days after the filing of the defendant's first notice of alibi.

(c) If the prosecuting attorney's statement to the defendant contains a date or place other than the date or place stated in the defendant's original statement, the defendant shall file a second statement of alibi if the defendant intends to produce at trial evidence of an alibi for the date or place contained in the prosecutor's statement. The defendant shall:

- (1) file the second statement with the court; and
- (2) serve the second statement upon the prosecuting attorney;

within four (4) days after the filing of the prosecuting attorney's statement. The defendant's second statement must contain the same details required in the defendant's original statement. As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-4-3

Failure to file or serve statements; extension of time; exclusion of evidence

35-36-4-3 Sec. 3. (a) If either the defendant or the prosecuting attorney fails to file or serve statements in accordance with section 2 of this chapter, the judge may extend the time for filing.

(b) If at the trial it appears that the defendant has failed to file and serve an original statement of alibi in accordance with section 1 of this chapter, and if the defendant does not show good cause for his failure, then the court shall exclude evidence offered by the defendant to establish an alibi.

(c) If at the trial it appears that the prosecuting attorney has failed to file and serve his statement in accordance with section 2(a) of this chapter, and if the prosecuting attorney does not show good cause for his failure, then the court shall exclude evidence offered by the prosecuting attorney to show:

(1) that the defendant was at a place other than the place stated in the information or indictment; and

(2) that the date was other than the date stated in the information or indictment.

(d) If at the trial it appears that the defendant has failed to file and serve a second statement in accordance with section 2(c) of this chapter, and if the defendant does not show good cause for his failure, then the court shall exclude evidence offered by the defendant to establish that:

(1) he was at a place other than the place specified in the prosecuting attorney's statement; or

(2) the date was other than the date stated in the prosecuting attorney's statement.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-5

Chapter 5. Change of Judge

IC 35-36-5-1

Preemptory change of venue from judge; procedure

35-36-5-1 Sec. 1. In any criminal action, either the defendant or the state is entitled as a substantive right to a preemptory change of venue from the judge without specifically stating the reason. The defendant or the state may obtain a change of judge under this section by motion filed in a manner and within the time limitations as specified in the Indiana Rules of Criminal Procedure. Each party is entitled to only one (1) change of judge under this section.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.170-1984, SEC.4.

IC 35-36-5-2

Other grounds; motion; affidavit; time limitation

35-36-5-2 Sec. 2. The defendant and the state may obtain a change of judge if the judge:

(1) is biased or prejudiced against the moving party and that the moving party cannot obtain a fair trial before the judge;

(2) is related by blood or marriage to any party to the cause;

(3) is unable to properly perform the functions of his office because of mental or physical disabilities;

(4) is disqualified by reason of any conflict of interest; or

(5) should be disqualified for any other cause.

A motion made under this section must be verified or accompanied by an affidavit specifically stating facts showing that at least one (1) of these causes exists.

The motion must be filed within the time limitations specified in Indiana Rules of Criminal Procedure.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6

Chapter 6. Change of Venue

IC 35-36-6-1

Verified motion by defendant; bias or prejudice; hearing; duties of clerk and sheriff

35-36-6-1 Sec. 1. (a) In any criminal action, the defendant may request a change of venue from the county by filing a verified motion for change of venue alleging that bias or prejudice against the defendant exists in that county.

(b) When a motion for a change of venue is filed, the court shall hold a hearing on the motion and may grant a change of venue to the most convenient county. When a change of venue is granted, the clerk shall immediately:

- (1) make a transcript of the proceedings and orders of the court;
- (2) seal the transcript with the original papers; and
- (3) deliver them to the sheriff.

The sheriff shall immediately deliver them to the clerk's office of the proper county, and make his return accordingly. However, only one (1) change of venue from the county may be granted.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.311-1983, SEC.48; P.L.170-1984, SEC.5.

IC 35-36-6-2

Trial in court to which venued

35-36-6-2 Sec. 2. After a change of venue, the cause shall be docketed and stand for trial. The court to which the case has been venued shall proceed in all respects as if the indictment had been found and returned by a grand jury impaneled in that court, or as if the information had been originally filed in that court.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-3

Transfer of custody of defendant

35-36-6-3 Sec. 3. When ordered to do so by the court allowing a change of venue, the sheriff of the county from which change of venue is granted, when the defendant is in his custody, shall:

- (1) transfer and deliver custody of the defendant; and
- (2) deliver a certified copy of the order for change of venue at the same time the defendant is delivered;

to the sheriff of the county to which change of venue has been granted. The sheriff of the county to which change of venue has been granted shall receive the defendant and detain him in custody until the defendant is discharged from his custody. The sheriff who receives the defendant shall give a certificate that he has received the defendant to the sheriff of the county from which change of venue has been granted.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-4

New prosecution; election of court by defendant; alternative disposition

35-36-6-4 Sec. 4. If it is necessary to institute a new prosecution for the same offense after a change of venue has been taken, the defendant in the case shall elect, when required to do so by the court, the court in which he prefers the new prosecution to be instituted. He may choose either the court from which venue was granted or the court to which venue was granted, and, after his choice, further prosecution shall be instituted in that court. The defendant may then be:

- (1) recognized to appear in the court which he elects;

(2) committed for want of bail;
(3) detained in custody; or
(4) remanded to the county from which the change was taken;
as the case may require and in accordance with the defendant's choice of courts.
As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-5

New prosecution; recognizance

35-36-6-5 Sec. 5. If in a new prosecution for the same offense, the defendant gives recognizance to appear before the court of the county from which the change of venue was taken, the recognizance shall be taken of record, and shall be recorded by the clerk of that court.
As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-6

New prosecution; new indictment or information

35-36-6-6 Sec. 6. If on a new prosecution a defendant is prosecuted for the offense in the court to which the change of venue was taken, a new indictment may be found, or a new information may be filed, and the case may be prosecuted to final execution as if the offense had been committed in the county of that court. However, the indictment or information in such a case must state how the proceeding came into the court where the party elects to be tried, and that he has elected to be tried in that county.
As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-7

Failure of defendant to elect county of trial; remand

35-36-6-7 Sec. 7. If in a new prosecution for the same offense the defendant refuses to elect in which county the new prosecution is to be instituted, he shall be recognized to appear before or be remanded to the proper court of the county from which the change of venue was taken, as if he had elected to be proceeded against in the county from which the change of venue was taken.
As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-8

Costs and expenses; liability; audit, certification, and collection

35-36-6-8 Sec. 8. (a) In all changes of venue from the county, the county from which the change is taken is liable for:

- (1) the expenses and charges of removing, delivering, and keeping the defendant;
- (2) the per diem allowance and expenses of:
 - (A) the jury trying the cause; and
 - (B) any of the regular panel in attendance and not engaged in the trial; and
- (3) all other expenses necessarily incurred by the county to which the change is taken that result from the change of venue.

(b) All costs and charges included under subsection (a) shall be audited and allowed by the court trying the cause, certified to the auditor of the county from which the change of venue was first taken, and collected by the auditor of the county to which the change was taken. However, where specific fees are allowed by law for any duty or service, no additional costs may be allowed for that duty or service than could be legally taxed in the court from which the change was taken.
As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-9

Prosecuting attorney; pauper counsel; appointment; reimbursement for fees and expenses

35-36-6-9 Sec. 9. (a) In a criminal prosecution, if a change of venue has been taken from the county in which the prosecution originated, the prosecuting attorney from the original county shall prosecute the case in the trial court to which the case was venued. The trial court to which the case was venued may appoint a prosecuting attorney to assist on the case.

(b) In a case described in subsection (a), if the defendant is entitled to pauper counsel, the

original trial court shall furnish pauper counsel. The trial court to which the case was venued may remove from the case the pauper counsel furnished by the original trial court, and:

- (1) request the original trial court to furnish another pauper counsel;
- (2) appoint pauper counsel of its choice; or
- (3) request the public defender of the state of Indiana to provide counsel under IC 33-40-2.

(c) The original trial court shall determine the amount of the fee and the expenses incurred by the pauper counsel and shall order the appropriate reimbursement to be paid to him by the county in which the prosecution originated. The fees and expenses of a public defender appointed under IC 33-40-2 shall be paid in accordance with that chapter.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.98-2004, SEC.147.

IC 35-36-6-10

Sheriff; expenses of transportation

35-36-6-10 Sec. 10. The sheriff of the county from which venue was taken shall receive actual and necessary expenses for transporting himself and his prisoner, in accordance with this chapter, from the county from which venue was taken to the county receiving the case. The court from which venue was taken shall allow these expenses.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-6-11

Murder or Class A felony proceedings; selection of jury; verdict and judgment

Sec. 11. (a) In any criminal proceeding wherein the defendant is charged with murder or a Class A felony to be tried before a jury in which a motion for a change of venue from the county is filed, the court may recognize but decline to grant the motion, and order that the jury be drawn from the residents of a county other than the county in which the court is located.

(b) Pursuant to an order under this section, the court may convene in any county in the state for purposes of jury selection. The venire may be drawn by the jury administrator of a court in the jurors' home county, or may be drawn by the court itself by random selection.

(c) After a jury is selected, the trial shall be held in the county of the court's location. The verdict of the jury and the judgment based upon it have the same validity and effect as if the jury had been drawn from the county of the court's location.

As added by P.L.1-1998, SEC.61. Amended by P.L.118-2007, SEC.32.

IC 35-36-7

Chapter 7. Continuances

IC 35-36-7-1

Motion by defendant; affidavit; grounds; requisite; contents

35-36-7-1 Sec. 1. (a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on affidavit showing:

- (1) that the evidence is material;
- (2) that due diligence has been used to obtain the evidence; and
- (3) the location of the evidence.

(b) If a defendant's motion to postpone is because of the absence of a witness, the affidavit required under subsection (a) must:

- (1) show the name and address of the witness, if known;
- (2) indicate the probability of procuring the witness's testimony within a reasonable time;
- (3) show that the absence of the witness has not been procured by the act of the defendant;
- (4) state the facts to which the defendant believes the witness will testify, and include a statement that the defendant believes these facts to be true; and
- (5) state that the defendant is unable to prove the facts specified in accordance with subdivision (4) through the use of any other witness whose testimony can be as readily procured.

(c) The trial may not be postponed if:

- (1) after a motion by the defendant to postpone because of the absence of a witness, the prosecuting attorney admits that the absent witness would testify to the facts as alleged by the defendant in his affidavit in accordance with subsection (b)(4); or

(2) after a motion by the defendant to postpone because of the absence of written or documentary evidence, the prosecuting attorney admits that the written or documentary evidence exists.

(d) A defendant must file an affidavit for a continuance not later than five (5) days before the date set for trial. If a defendant fails to file an affidavit by this time, then he must establish, to the satisfaction of the court, that he is not at fault for failing to file the affidavit at an earlier date.

(e) If a motion for a continuance is based on the illness of the defendant or of a witness, it must be accompanied by:

- (1) oral testimony, given in open court; or
- (2) a written statement;

of a physician or hospital official having the care or custody of the defendant or witness, presenting the nature of the illness and the probable duration of the person's incapacity to attend trial. Such a written statement must be sworn to by the person making the statement before an officer authorized to administer an oath. The court may appoint a physician to examine the defendant or witness and report to the court on the nature of the person's illness and of his incapacity to attend trial. The court shall by order provide for compensation for such a physician.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-7-2

Motion by prosecuting attorney; absence of witness or written or documentary evidence; official statement; requisites

35-36-7-2 Sec. 2. (a) A prosecuting attorney may move to postpone the trial of a criminal cause because of the absence of a witness whose name is endorsed on the indictment or information, if he makes an official statement:

- (1) containing the requirements of subsections (b)(1) and (b)(2) of section 1 of this chapter;
- (2) showing that the absence of the witness has not been procured by the act of the prosecuting attorney;
- (3) stating the facts to which he believes the witness will testify, and include a statement that he believes these facts to be true; and
- (4) stating that the prosecuting attorney is unable to prove the facts specified in accordance with subdivision (3) through the use of any other witness whose testimony can be as readily procured.

Upon request of the defendant the court shall order that the prosecuting attorney's motion and official statement be made in writing.

(b) The trial may not be postponed if:

- (1) after a motion by the prosecuting attorney because of the absence of a witness, the defendant admits that the absent witness would testify to the facts as alleged by the prosecuting attorney in his official statement in accordance with subsection (a)(3); or
- (2) after a motion by the prosecuting attorney to postpone because of the absence of written or documentary evidence, the defendant admits that the written or documentary evidence exists.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-7-3

Postponements; adverse impact upon certain children

35-36-7-3 Sec. 3. (a) This section applies to criminal actions for felonies under IC 35-42, for neglect of a dependent (IC 35-46-1-4), and for attempts of those felonies (IC 35-41-5-1).

(b) If a motion is made to postpone a trial or other court proceeding that involves an offense listed in subsection (a), the court shall consider whether a postponement will have an adverse impact upon a child who is less than ten (10) years of age and who:

- (1) is the alleged victim of an offense listed in subsection (a); or
- (2) will be a witness in the trial.

As added by P.L.203-1986, SEC.1. Amended by P.L.11-1987, SEC.33.

IC 35-36-8

Chapter 8. Omnibus Date, Pretrial Hearing, and Pretrial Conference

IC 35-36-8-1

Omnibus date; setting; purpose; notice; time limits

35-36-8-1 Sec. 1. (a) This subsection applies to persons charged with a felony. A date, known as the omnibus date:

(1) must be set by the judicial officer at the initial hearing; and

(2) must be no earlier than forty-five (45) days and no later than seventy-five (75) days after the completion of the initial hearing, unless the prosecuting attorney and the defendant agree to a different date.

(b) The purpose of the omnibus date is to establish a point in time from which various deadlines under this article are established. The court shall direct the clerk to notify the defendant and all counsel of record of the omnibus date.

(c) The omnibus date for persons charged only with one (1) or more misdemeanors:

(1) must be set by the judicial officer at the completion of the initial hearing;

(2) must be no earlier than thirty (30) days (unless the defendant and the prosecuting attorney agree to an earlier date), and no later than sixty-five (65) days, after the initial hearing; and

(3) is the trial date.

(d) Once the omnibus date is set, it remains the omnibus date for the case until final disposition, unless:

(1) the defendant requests a trial within time limits established by the Indiana rules of criminal procedure for early trial motions;

(2) subsequent counsel enters an appearance after the omnibus date and previous counsel withdrew or was removed due to:

(A) a conflict of interest; or

(B) a manifest necessity required that counsel withdraw from the case;

(3) the state has not complied with an order to compel discovery; or

(4) the prosecuting attorney and the defendant agree to continue the omnibus date.

As added by Acts 1981, P.L.298, SEC.5. Amended by Acts 1982, P.L.204, SEC.31; P.L.320-1983, SEC.22; P.L.314-1985, SEC.1.

IC 35-36-8-2

Withdrawal by counsel; grounds; time limit; restriction

35-36-8-2 Sec. 2. (a) Counsel for a defendant charged with a felony or misdemeanor may withdraw from the case for any reason, including failure of the defendant to fulfill an obligation with respect to counsel's fee, at any time up to thirty (30) days before the omnibus date.

(b) However, the court shall allow counsel for the defendant to withdraw from the case at any time within thirty (30) days of, and at any time after, the omnibus date if there is a showing that:

(1) counsel for the defendant has a conflict of interest in continued representation of the defendant;

(2) other counsel has been retained or assigned to defend the case, substitution of new counsel would not cause any delay in the proceedings, and the defendant consents to or requests substitution of the new counsel;

(3) the attorney-client relationship has deteriorated to a point such that counsel cannot render effective assistance to the defendant;

(4) the defendant insists upon self representation and the defendant understands that the withdrawal of counsel will not be permitted to delay the proceedings; or

(5) there is a manifest necessity requiring that counsel withdraw from the case.

As added by Acts 1981, P.L.298, SEC.5. Amended by P.L.40-1990, SEC.56.

IC 35-36-8-3

Pretrial hearing and conference; time; purposes; memorandum of matters agreed upon; use of admission

35-36-8-3 Sec. 3. (a) A pretrial hearing and pretrial conference, if one is necessary, may be held on the omnibus date or any other date that the court designates prior to the commencement of trial. The purpose of the pretrial hearing is to:

(1) consolidate hearings on pretrial motions and other requests to the maximum extent practicable;

(2) rule on the motions and requests and ascertain whether the case will be disposed of by guilty plea, jury trial, or bench trial; and

(3) make any other orders appropriate under the circumstances to expedite the proceedings.

(b) At the time of the pretrial hearing as provided under this section, or at any other time after the filing of the indictment or information and before the commencement of trial, the court, upon motion of any party or upon its own motion, may order conferences to consider any matters that will promote a fair and expeditious trial. The purpose of such a conference shall be to consider any matters related to the disposition of the proceedings, including the simplification of the issues to be tried and the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

(c) At the conclusion of the conference the court shall prepare and file a memorandum of the matters agreed upon. Any admission made by the defendant or his attorney at the conference may not be used against the defendant unless the admission is reduced to writing and signed by the defendant and his attorney.

As added by Acts 1981, P.L.298, SEC.5.

IC 35-36-8-4 Repealed

(Repealed by P.L.320-1983, SEC.25.)

IC 35-36-9

Chapter 9. Pretrial Determination of Mental Retardation in Death Sentence Cases

IC 35-36-9-1

Applicability

35-36-9-1 Sec. 1. This chapter applies when a defendant is charged with a murder for which the state seeks a death sentence under IC 35-50-2-9.

As added by P.L.158-1994, SEC.3. Amended by P.L.2-1996, SEC.283.

IC 35-36-9-2

"Mentally retarded individual" defined

35-36-9-2 Sec. 2. As used in this chapter, "mentally retarded individual" means an individual who, before becoming twenty-two (22) years of age, manifests:

(1) significantly subaverage intellectual functioning; and

(2) substantial impairment of adaptive behavior;

that is documented in a court ordered evaluative report.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-3

Petition alleging mental retardation; filing

35-36-9-3 Sec. 3. (a) The defendant may file a petition alleging that the defendant is a mentally retarded individual.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) Whenever the defendant files a petition under this section, the court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

(1) Whether the defendant has a significantly subaverage level of intellectual functioning.

(2) Whether the defendant's adaptive behavior is substantially impaired.

(3) Whether the conditions described in subdivisions (1) and (2) existed before the defendant became twenty-two (22) years of age.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-4

Hearing on petition

35-36-9-4 Sec. 4. (a) The court shall conduct a hearing on the petition under this chapter.

(b) At the hearing, the defendant must prove by clear and convincing evidence that the defendant is a mentally retarded individual.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-5

Determination within ten days of trial

35-36-9-5 Sec. 5. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is a mentally retarded individual based on the evidence set forth at the hearing under section 4 of this chapter. The court shall articulate findings supporting the court's determination under this section.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-6

Dismissal of death sentence charges against mentally retarded individual

35-36-9-6 Sec. 6. If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed.

As added by P.L.158-1994, SEC.3.

IC 35-36-9-7

Sentencing of mentally retarded individual convicted of murder

35-36-9-7 Sec. 7. If a defendant who is determined to be a mentally retarded individual under this chapter is convicted of murder, the court shall sentence the defendant under IC 35-50-2-3(a).
As added by P.L.158-1994, SEC.3.

IC 35-36-9

Chapter 9. Pretrial Determination of Mental Retardation in Death Sentence Cases

IC 35-36-9-1

Applicability

Sec. 1. This chapter applies when a defendant is charged with a murder for which the state seeks a death sentence under IC 35-50-2-9.

As added by P.L.158-1994, SEC.3. Amended by P.L.2-1996, SEC.283.

IC 35-36-9-2

Individual with mental retardation

Sec. 2. As used in this chapter, "individual with mental retardation" means an individual who, before becoming twenty-two (22) years of age, manifests:

- (1) significantly subaverage intellectual functioning; and
- (2) substantial impairment of adaptive behavior;

that is documented in a court ordered evaluative report.

As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007, SEC.201.

IC 35-36-9-3

Petition alleging mental retardation; filing

Sec. 3. (a) The defendant may file a petition alleging that the defendant is an individual with mental retardation.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) Whenever the defendant files a petition under this section, the court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

- (1) Whether the defendant has a significantly subaverage level of intellectual functioning.
- (2) Whether the defendant's adaptive behavior is substantially impaired.
- (3) Whether the conditions described in subdivisions (1) and (2) existed before the

defendant became twenty-two (22) years of age.
As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007, SEC.202.

IC 35-36-9-4

Hearing on petition

Sec. 4. (a) The court shall conduct a hearing on the petition under this chapter.

(b) At the hearing, the defendant must prove by clear and convincing evidence that the defendant is an individual with mental retardation.

As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007,

SEC.203.

IC 35-36-9-5

Determination within ten days of trial

Sec. 5. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is an individual with mental retardation based on the evidence set forth at the hearing under section 4 of this chapter. The court shall articulate findings supporting the court's determination under this section.

As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007, SEC.204.

IC 35-36-9-6

Dismissal of death sentence charging instrument

Sec. 6. If the court determines that the defendant is an individual with mental retardation under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed.

As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007, SEC.205.

IC 35-36-9-7

Sentencing

Sec. 7. If a defendant who is determined to be an individual with mental retardation under this chapter is convicted of murder, the court shall sentence the defendant under IC 35-50-2-3(a).

As added by P.L.158-1994, SEC.3. Amended by P.L.99-2007, SEC.206.