

## HOUSE BILL No. 1281

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DIGEST OF HB 1281 (Updated January 29, 1998 2:14 pm - DI 69)

**Citations Affected:** IC 5-2; IC 35-38; IC 35-50; noncode.

**Synopsis:** Hate crimes and expungement of arrest records. Requires law enforcement agencies to: (1) collect information concerning crimes that are apparently directed at an individual or group because of the individual's or group's race, color, religion, sexual orientation, or national origin; and (2) submit the information collected to the Indiana central repository for criminal history information. Allows a court to consider the fact that an individual who committed an offense knowingly or intentionally selected another individual who was injured by the offense or damaged property that was damaged by the offense because of the race, color, religion, sexual orientation, or national origin of the injured individual or of the owner or occupant of the damaged property. Allows an individual to petition a court for expungement of the records related to the individual's arrest if: (1) all criminal charges filed against the individual are dropped because of an  
(Continued next page)

**Effective:** July 1, 1998.

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**Keeler**

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January 13, 1998, read first time and referred to Committee on Courts and Criminal Code.  
January 26, 1998, reported — Do Pass.  
January 29, 1998, read second time, amended, ordered engrossed.

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HB 1281—LS 6035/DI 69



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involuntary dismissal or a directed verdict in favor of the individual; or (2) the individual is arrested and charged with committing a criminal offense and is subsequently found not guilty of committing the offense. Allows the fact that a defendant committed a murder by knowingly or intentionally selecting the victim of the murder because of the victim's race, color, religion, sexual orientation, or national origin to be used as an aggravating circumstance when determining if the defendant should be sentenced to death.

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Reprinted  
January 30, 1998

Second Regular Session 110th General Assembly (1998)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1997 General Assembly.

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## HOUSE BILL No. 1281

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A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 5-2-5-14 IS ADDED TO THE INDIANA CODE  
2 AS A **NEW SECTION** TO READ AS FOLLOWS [EFFECTIVE JULY  
3 1, 1998]: **Sec. 14. (a) A law enforcement agency shall collect**  
4 **information concerning crimes that are apparently directed at an**  
5 **individual or a group because of the individual's or group's race,**  
6 **color, religion, sexual orientation, or national origin.**  
7 (b) **At least two (2) times each year, a law enforcement agency**  
8 **shall submit information collected under subsection (a) to the**  
9 **Indiana central repository for criminal history information.**  
10 (c) **At least one (1) time each year, the Indiana central**  
11 **repository for criminal history information shall submit a report**  
12 **that includes a compilation of information obtained under**  
13 **subsection (b) to each law enforcement agency.**  
14 (d) **Information collected, submitted, and reported under this**  
15 **section must be consistent with guidelines established for the**

HB 1281—LS 6035/DI 69



1 **acquisition, preservation, and exchange of identification records**  
 2 **and information by:**

3 (1) **the Attorney General of the United States; or**

4 (2) **the Federal Bureau of Investigation under 28 U.S.C. 534.**

5 SECTION 2. IC 35-38-1-7.1, AS AMENDED BY P.L.210-1997,  
 6 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 7 JULY 1, 1998]: Sec. 7.1. (a) In determining what sentence to impose  
 8 for a crime, the court shall consider:

9 (1) the risk that the person will commit another crime;

10 (2) the nature and circumstances of the crime committed;

11 (3) the person's:

12 (A) prior criminal record;

13 (B) character; and

14 (C) condition;

15 (4) whether the victim of the crime was less than twelve (12)  
 16 years of age or at least sixty-five (65) years of age;

17 (5) whether the person violated a protective order issued against  
 18 the person under IC 31-15 or IC 31-16 (or IC 31-1-11.5 before its  
 19 repeal) or IC 34-4-5.1; and

20 (6) any oral or written statement made by a victim of the crime.

21 (b) The court may consider the following factors as aggravating  
 22 circumstances or as favoring imposing consecutive terms of  
 23 imprisonment:

24 (1) The person has recently violated the conditions of any  
 25 probation, parole, or pardon granted to the person.

26 (2) The person has a history of criminal or delinquent activity.

27 (3) The person is in need of correctional or rehabilitative  
 28 treatment that can best be provided by commitment of the person  
 29 to a penal facility.

30 (4) Imposition of a reduced sentence or suspension of the  
 31 sentence and imposition of probation would depreciate the  
 32 seriousness of the crime.

33 (5) The victim of the crime was less than twelve (12) years of age  
 34 or at least sixty-five (65) years of age.

35 (6) The victim of the crime was mentally or physically infirm.

36 (7) The person committed a forcible felony while wearing a  
 37 garment designed to resist the penetration of a bullet.

38 (8) The person committed a sex crime listed in subsection (e) and:

39 (A) the crime created an epidemiologically demonstrated risk  
 40 of transmission of the human immunodeficiency virus (HIV)

41 and involved the sex organ of one (1) person and the mouth,  
 42 anus, or sex organ of another person;



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- 1 (B) the person had knowledge that the person was a carrier of
- 2 HIV; and
- 3 (C) the person had received risk counseling as described in
- 4 subsection (g).
- 5 (9) The person committed an offense related to controlled
- 6 substances listed in subsection (f) if:
- 7 (A) the offense involved:
- 8 (i) the delivery by any person to another person; or
- 9 (ii) the use by any person on another person;
- 10 of a contaminated sharp (as defined in IC 16-41-16-2) or other
- 11 paraphernalia that creates an epidemiologically demonstrated
- 12 risk of transmission of HIV by involving percutaneous contact;
- 13 (B) the person had knowledge that the person was a carrier of
- 14 the human immunodeficiency virus (HIV); and
- 15 (C) the person had received risk counseling as described in
- 16 subsection (g).
- 17 (10) The person committed the offense in an area of a
- 18 consolidated or second class city that is designated as a public
- 19 safety improvement area by the Indiana criminal justice institute
- 20 under IC 36-8-19.5.
- 21 **(11) The person who committed the offense knowingly or**
- 22 **intentionally:**
- 23 **(A) selected another individual who was injured; or**
- 24 **(B) damaged or otherwise affected property that was**
- 25 **damaged or affected;**
- 26 **by the offense because of the race, color, religion, sexual**
- 27 **orientation, or national origin of the injured individual or of**
- 28 **the owner or occupant of the affected property.**
- 29 (c) The court may consider the following factors as mitigating
- 30 circumstances or as favoring suspending the sentence and imposing
- 31 probation:
- 32 (1) The crime neither caused nor threatened serious harm to
- 33 persons or property, or the person did not contemplate that it
- 34 would do so.
- 35 (2) The crime was the result of circumstances unlikely to recur.
- 36 (3) The victim of the crime induced or facilitated the offense.
- 37 (4) There are substantial grounds tending to excuse or justify the
- 38 crime, though failing to establish a defense.
- 39 (5) The person acted under strong provocation.
- 40 (6) The person has no history of delinquency or criminal activity,
- 41 or the person has led a law-abiding life for a substantial period
- 42 before commission of the crime.

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- 1 (7) The person is likely to respond affirmatively to probation or  
 2 short term imprisonment.
- 3 (8) The character and attitudes of the person indicate that the  
 4 person is unlikely to commit another crime.
- 5 (9) The person has made or will make restitution to the victim of  
 6 the crime for the injury, damage, or loss sustained.
- 7 (10) Imprisonment of the person will result in undue hardship to  
 8 the person or the dependents of the person.
- 9 (11) The person was convicted of a crime involving the use of  
 10 force against a person who had repeatedly inflicted physical or  
 11 sexual abuse upon the convicted person and evidence shows that  
 12 the convicted person suffered from the effects of battery as a  
 13 result of the past course of conduct of the individual who is the  
 14 victim of the crime for which the person was convicted.
- 15 (d) The criteria listed in subsections (b) and (c) do not limit the  
 16 matters that the court may consider in determining the sentence.
- 17 (e) For the purposes of this article, the following crimes are  
 18 considered sex crimes:
- 19 (1) Rape (IC 35-42-4-1).  
 20 (2) Criminal deviate conduct (IC 35-42-4-2).  
 21 (3) Child molesting (IC 35-42-4-3).  
 22 (4) Child seduction (IC 35-42-4-7).  
 23 (5) Prostitution (IC 35-45-4-2).  
 24 (6) Patronizing a prostitute (IC 35-45-4-3).  
 25 (7) Incest (IC 35-46-1-3).
- 26 (f) For the purposes of this article, the following crimes are  
 27 considered offenses related to controlled substances:
- 28 (1) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).  
 29 (2) Dealing in a schedule I, II, or III controlled substance  
 30 (IC 35-48-4-2).  
 31 (3) Dealing in a schedule IV controlled substance (IC 35-48-4-3).  
 32 (4) Dealing in a schedule V controlled substance (IC 35-48-4-4).  
 33 (5) Possession of cocaine or a narcotic drug (IC 35-48-4-6).  
 34 (6) Possession of a controlled substance (IC 35-48-4-7).  
 35 (7) Dealing in paraphernalia (IC 35-48-4-8.5).  
 36 (8) Possession of paraphernalia (IC 35-48-4-8.3).  
 37 (9) Offenses relating to registration (IC 35-48-4-14).
- 38 (g) For the purposes of this section, a person received risk  
 39 counseling if the person had been:
- 40 (1) notified in person or in writing that tests have confirmed the  
 41 presence of antibodies to the human immunodeficiency virus  
 42 (HIV) in the person's blood; and



1 (2) warned of the behavior that can transmit HIV.

2 SECTION 3. IC 35-38-5-1, AS AMENDED BY P.L.159-1994,  
3 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
4 JULY 1, 1998]: Sec. 1. (a) Whenever:

5 (1) an individual is arrested but no criminal charges are filed  
6 against the individual; ~~or~~

7 (2) all criminal charges filed against an individual are dropped  
8 because:

9 (A) of a mistaken identity;

10 (B) no offense was in fact committed; or

11 (C) there was an absence of probable cause;

12 **(3) all criminal charges filed against an individual are**  
13 **dropped because of:**

14 **(A) an involuntary dismissal; or**

15 **(B) a directed verdict;**

16 **in favor of the individual; or**

17 **(4) an individual is:**

18 **(A) arrested and charged with committing an offense; and**

19 **(B) subsequently found not guilty of committing the**  
20 **offense;**

21 the individual may petition the court for expungement of the records  
22 related to the arrest.

23 (b) A petition for expungement of records must be verified and filed  
24 in the court in which the charges were filed, or if no criminal charges  
25 were filed, in a court with criminal jurisdiction in the county where the  
26 arrest occurred. The petition must set forth:

27 (1) the date of the arrest;

28 (2) the charge;

29 (3) the law enforcement agency employing the arresting officer;

30 (4) any other known identifying information, such as the name of  
31 the arresting officer, case number, or court cause number;

32 (5) the date of the petitioner's birth; and

33 (6) the petitioner's Social Security number.

34 (c) A copy of the petition shall be served on the law enforcement  
35 agency and the state central repository for records.

36 (d) Upon receipt of a petition for expungement, the law enforcement  
37 agency shall notify the court of the name and address of each agency  
38 to which any records related to the arrest were forwarded. The clerk  
39 shall immediately send a copy of the petition to each of those agencies.  
40 Any agency desiring to oppose the expungement shall file a notice of  
41 opposition with the court setting forth reasons for resisting the  
42 expungement along with any sworn statements from individuals who



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1 represent the agency that explain the reasons for resisting the  
 2 expungement within thirty (30) days after the petition is filed. A copy  
 3 of the notice of opposition and copies of any sworn statements shall be  
 4 served on the petitioner in accordance with the Rules of Trial  
 5 Procedure. The court shall:

- 6 (1) summarily grant the petition;  
 7 (2) set the matter for hearing; or  
 8 (3) summarily deny the petition, if the court determines that:  
 9 (A) the petition is insufficient; or  
 10 (B) based on information contained in sworn statements  
 11 submitted by individuals who represent an agency, the  
 12 petitioner is not entitled to an expungement of records.

13 (e) If a notice of opposition is filed and the court does not  
 14 summarily grant or summarily deny the petition, the court shall set the  
 15 matter for a hearing.

16 (f) After a hearing is held under this section, the petition shall be  
 17 granted unless the court finds:

- 18 (1) the conditions in subsection (a) have not been met;  
 19 (2) the individual has a record of arrests other than minor traffic  
 20 offenses; or  
 21 (3) additional criminal charges are pending against the individual.

22 SECTION 4. IC 35-50-2-9, AS AMENDED BY P.L.216-1996,  
 23 SECTION 25, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 24 JULY 1, 1998]: Sec. 9. (a) The state may seek either a death sentence  
 25 or a sentence of life imprisonment without parole for murder by  
 26 alleging, on a page separate from the rest of the charging instrument,  
 27 the existence of at least one (1) of the aggravating circumstances listed  
 28 in subsection (b). In the sentencing hearing after a person is convicted  
 29 of murder, the state must prove beyond a reasonable doubt the  
 30 existence of at least one (1) of the aggravating circumstances alleged.  
 31 However, the state may not proceed against a defendant under this  
 32 section if a court determines at a pretrial hearing under IC 35-36-9 that  
 33 the defendant is a mentally retarded individual.

34 (b) The aggravating circumstances are as follows:

- 35 (1) The defendant committed the murder by intentionally killing  
 36 the victim while committing or attempting to commit any of the  
 37 following:  
 38 (A) Arson ( IC 35-43-1-1).  
 39 (B) Burglary ( IC 35-43-2-1).  
 40 (C) Child molesting ( IC 35-42-4-3).  
 41 (D) Criminal deviate conduct ( IC 35-42-4-2).  
 42 (E) Kidnapping ( IC 35-42-3-2).



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- 1 (F) Rape ( IC 35-42-4-1).  
 2 (G) Robbery ( IC 35-42-5-1).  
 3 (H) Carjacking ( IC 35-42-5-2).  
 4 (I) Criminal gang activity ( IC 35-45-9-3).  
 5 (J) Dealing in cocaine or a narcotic drug ( IC 35-48-4-1).  
 6 (2) The defendant committed the murder by the unlawful  
 7 detonation of an explosive with intent to injure person or damage  
 8 property.  
 9 (3) The defendant committed the murder by lying in wait.  
 10 (4) The defendant who committed the murder was hired to kill.  
 11 (5) The defendant committed the murder by hiring another person  
 12 to kill.  
 13 (6) The victim of the murder was a corrections employee,  
 14 probation officer, parole officer, community corrections worker,  
 15 home detention officer, fireman, judge, or law enforcement  
 16 officer, and either:  
 17 (A) the victim was acting in the course of duty; or  
 18 (B) the murder was motivated by an act the victim performed  
 19 while acting in the course of duty.  
 20 (7) The defendant has been convicted of another murder.  
 21 (8) The defendant has committed another murder, at any time,  
 22 regardless of whether the defendant has been convicted of that  
 23 other murder.  
 24 (9) The defendant was:  
 25 (A) under the custody of the department of correction;  
 26 (B) under the custody of a county sheriff;  
 27 (C) on probation after receiving a sentence for the commission  
 28 of a felony; or  
 29 (D) on parole;  
 30 at the time the murder was committed.  
 31 (10) The defendant dismembered the victim.  
 32 (11) The defendant burned, mutilated, or tortured the victim while  
 33 the victim was alive.  
 34 (12) The victim of the murder was less than twelve (12) years of  
 35 age.  
 36 (13) The victim was a victim of any of the following offenses for  
 37 which the defendant was convicted:  
 38 (A) Battery as a Class D felony or as a Class C felony under  
 39 IC 35-42-2-1.  
 40 (B) Kidnapping ( IC 35-42-3-2).  
 41 (C) Criminal confinement ( IC 35-42-3-3).  
 42 (D) A sex crime under IC 35-42-4.

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1 (14) The victim of the murder was listed by the state or known by  
 2 the defendant to be a witness against the defendant and the  
 3 defendant committed the murder with the intent to prevent the  
 4 person from testifying.

5 (15) The defendant committed the murder by intentionally  
 6 discharging a firearm (as defined in IC 35-47-1-5):

7 (A) into an inhabited dwelling; or

8 (B) from a vehicle.

9 **(16) The defendant committed the murder by knowingly or**  
 10 **intentionally selecting the victim of the murder because of the**  
 11 **race, color, religion, sexual orientation, or national origin of**  
 12 **the victim.**

13 (c) The mitigating circumstances that may be considered under this  
 14 section are as follows:

15 (1) The defendant has no significant history of prior criminal  
 16 conduct.

17 (2) The defendant was under the influence of extreme mental or  
 18 emotional disturbance when the murder was committed.

19 (3) The victim was a participant in or consented to the defendant's  
 20 conduct.

21 (4) The defendant was an accomplice in a murder committed by  
 22 another person, and the defendant's participation was relatively  
 23 minor.

24 (5) The defendant acted under the substantial domination of  
 25 another person.

26 (6) The defendant's capacity to appreciate the criminality of the  
 27 defendant's conduct or to conform that conduct to the  
 28 requirements of law was substantially impaired as a result of  
 29 mental disease or defect or of intoxication.

30 (7) The defendant was less than eighteen (18) years of age at the  
 31 time the murder was committed.

32 (8) Any other circumstances appropriate for consideration.

33 (d) If the defendant was convicted of murder in a jury trial, the jury  
 34 shall reconvene for the sentencing hearing. If the trial was to the court,  
 35 or the judgment was entered on a guilty plea, the court alone shall  
 36 conduct the sentencing hearing. The jury or the court may consider all  
 37 the evidence introduced at the trial stage of the proceedings, together  
 38 with new evidence presented at the sentencing hearing. The court shall  
 39 instruct the jury concerning the statutory penalties for murder and any  
 40 other offenses for which the defendant was convicted, the potential for  
 41 consecutive or concurrent sentencing, and the availability of good time  
 42 credit and clemency. The defendant may present any additional



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1 evidence relevant to:

2 (1) the aggravating circumstances alleged; or

3 (2) any of the mitigating circumstances listed in subsection (c).

4 (e) Except as provided by IC 35-36-9, if the hearing is by jury, the  
5 jury shall recommend to the court whether the death penalty or life  
6 imprisonment without parole, or neither, should be imposed. The jury  
7 may recommend:

8 (1) the death penalty; or

9 (2) life imprisonment without parole;

10 only if it makes the findings described in subsection (k). The court shall  
11 make the final determination of the sentence, after considering the  
12 jury's recommendation, and the sentence shall be based on the same  
13 standards that the jury was required to consider. The court is not bound  
14 by the jury's recommendation. In making the final determination of the  
15 sentence after receiving the jury's recommendation, the court may  
16 receive evidence of the crime's impact on members of the victim's  
17 family.

18 (f) If a jury is unable to agree on a sentence recommendation after  
19 reasonable deliberations, the court shall discharge the jury and proceed  
20 as if the hearing had been to the court alone.

21 (g) If the hearing is to the court alone, except as provided by  
22 IC 35-36-9, the court shall:

23 (1) sentence the defendant to death; or

24 (2) impose a term of life imprisonment without parole;

25 only if it makes the findings described in subsection (k).

26 (h) If a court sentences a defendant to death, the court shall order  
27 the defendant's execution to be carried out not later than one (1) year  
28 and one (1) day after the date the defendant was convicted. The  
29 supreme court has exclusive jurisdiction to stay the execution of a  
30 death sentence. If the supreme court stays the execution of a death  
31 sentence, the supreme court shall order a new date for the defendant's  
32 execution.

33 (i) If a person sentenced to death by a court files a petition for  
34 post-conviction relief, the court, not later than ninety (90) days after the  
35 date the petition is filed, shall set a date to hold a hearing to consider  
36 the petition. If a court does not, within the ninety (90) day period, set  
37 the date to hold the hearing to consider the petition, the court's failure  
38 to set the hearing date is not a basis for additional post-conviction  
39 relief. The attorney general shall answer the petition for post-conviction  
40 relief on behalf of the state. At the request of the attorney general, a  
41 prosecuting attorney shall assist the attorney general. The court shall  
42 enter written findings of fact and conclusions of law concerning the

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1 petition not later than ninety (90) days after the date the hearing  
 2 concludes. However, if the court determines that the petition is without  
 3 merit, the court may dismiss the petition within ninety (90) days  
 4 without conducting a hearing under this subsection.

5 (j) A death sentence is subject to automatic review by the supreme  
 6 court. The review, which shall be heard under rules adopted by the  
 7 supreme court, shall be given priority over all other cases. The supreme  
 8 court's review must take into consideration all claims that the:

9 (1) conviction or sentence was in violation of the:

10 (A) Constitution of the State of Indiana; or

11 (B) Constitution of the United States;

12 (2) sentencing court was without jurisdiction to impose a  
 13 sentence; and

14 (3) sentence:

15 (A) exceeds the maximum sentence authorized by law; or

16 (B) is otherwise erroneous.

17 If the supreme court cannot complete its review by the date set by the  
 18 sentencing court for the defendant's execution under subsection (h), the  
 19 supreme court shall stay the execution of the death sentence and set a  
 20 new date to carry out the defendant's execution.

21 (k) Before a sentence may be imposed under this section, the jury,  
 22 in a proceeding under subsection (e), or the court, in a proceeding  
 23 under subsection (g), must find that:

24 (1) the state has proved beyond a reasonable doubt that at least  
 25 one (1) of the aggravating circumstances listed in subsection (b)  
 26 exists; and

27 (2) any mitigating circumstances that exist are outweighed by the  
 28 aggravating circumstance or circumstances.

29 **SECTION 5. [EFFECTIVE JULY 1, 1998] IC 35-38-1-7.1 and**  
 30 **IC 35-50-2-9, both as amended by this act, apply only to crimes**  
 31 **committed after June 30, 1998.**

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Courts and Criminal Code, to which was referred House Bill 1281, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

DVORAK, Chair

Committee Vote: yeas 10, nays 3.

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## HOUSE MOTION

Mr. Speaker: I move that House Bill 1281 be amended to read as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 5-2-5-14 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1998]: **Sec. 14. (a) A law enforcement agency shall collect information concerning crimes that are apparently directed at an individual or a group because of the individual's or group's race, color, religion, sexual orientation, or national origin.**

**(b) At least two (2) times each year, a law enforcement agency shall submit information collected under subsection (a) to the Indiana central repository for criminal history information.**

**(c) At least one (1) time each year, the Indiana central repository for criminal history information shall submit a report that includes a compilation of information obtained under subsection (b) to each law enforcement agency.**

**(d) Information collected, submitted, and reported under this section must be consistent with guidelines established for the acquisition, preservation, and exchange of identification records and information by:**

- (1) the Attorney General of the United States; or**
- (2) the Federal Bureau of Investigation under 28 U.S.C. 534.**

SECTION 2. IC 35-38-1-7.1, AS AMENDED BY P.L.210-1997, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1998]: **Sec. 7.1. (a) In determining what sentence to impose for a crime, the court shall consider:**

- (1) the risk that the person will commit another crime;**
- (2) the nature and circumstances of the crime committed;**
- (3) the person's:**
  - (A) prior criminal record;**
  - (B) character; and**
  - (C) condition;**
- (4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;**
- (5) whether the person violated a protective order issued against the person under IC 31-15 or IC 31-16 (or IC 31-1-11.5 before its repeal) or IC 34-4-5.1; and**
- (6) any oral or written statement made by a victim of the crime.**

**(b) The court may consider the following factors as aggravating circumstances or as favoring imposing consecutive terms of**

**HB 1281—LS 6035/DI 69**



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imprisonment:

- (1) The person has recently violated the conditions of any probation, parole, or pardon granted to the person.
- (2) The person has a history of criminal or delinquent activity.
- (3) The person is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility.
- (4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.
- (5) The victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age.
- (6) The victim of the crime was mentally or physically infirm.
- (7) The person committed a forcible felony while wearing a garment designed to resist the penetration of a bullet.
- (8) The person committed a sex crime listed in subsection (e) and:
  - (A) the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) and involved the sex organ of one (1) person and the mouth, anus, or sex organ of another person;
  - (B) the person had knowledge that the person was a carrier of HIV; and
  - (C) the person had received risk counseling as described in subsection (g).
- (9) The person committed an offense related to controlled substances listed in subsection (f) if:
  - (A) the offense involved:
    - (i) the delivery by any person to another person; or
    - (ii) the use by any person on another person;
 of a contaminated sharp (as defined in IC 16-41-16-2) or other paraphernalia that creates an epidemiologically demonstrated risk of transmission of HIV by involving percutaneous contact;
  - (B) the person had knowledge that the person was a carrier of the human immunodeficiency virus (HIV); and
  - (C) the person had received risk counseling as described in subsection (g).
- (10) The person committed the offense in an area of a consolidated or second class city that is designated as a public safety improvement area by the Indiana criminal justice institute under IC 36-8-19.5.
- (11) The person who committed the offense knowingly or intentionally:**



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**(A) selected another individual who was injured; or  
(B) damaged or otherwise affected property that was  
damaged or affected;  
by the offense because of the race, color, religion, sexual  
orientation, or national origin of the injured individual or of  
the owner or occupant of the affected property.**

(c) The court may consider the following factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

- (1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.
- (2) The crime was the result of circumstances unlikely to recur.
- (3) The victim of the crime induced or facilitated the offense.
- (4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.
- (5) The person acted under strong provocation.
- (6) The person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime.
- (7) The person is likely to respond affirmatively to probation or short term imprisonment.
- (8) The character and attitudes of the person indicate that the person is unlikely to commit another crime.
- (9) The person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.
- (10) Imprisonment of the person will result in undue hardship to the person or the dependents of the person.
- (11) The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.

(d) The criteria listed in subsections (b) and (c) do not limit the matters that the court may consider in determining the sentence.

(e) For the purposes of this article, the following crimes are considered sex crimes:

- (1) Rape (IC 35-42-4-1).
- (2) Criminal deviate conduct (IC 35-42-4-2).
- (3) Child molesting (IC 35-42-4-3).
- (4) Child seduction (IC 35-42-4-7).



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- (5) Prostitution (IC 35-45-4-2).
- (6) Patronizing a prostitute (IC 35-45-4-3).
- (7) Incest (IC 35-46-1-3).

(f) For the purposes of this article, the following crimes are considered offenses related to controlled substances:

- (1) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
- (2) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2).
- (3) Dealing in a schedule IV controlled substance (IC 35-48-4-3).
- (4) Dealing in a schedule V controlled substance (IC 35-48-4-4).
- (5) Possession of cocaine or a narcotic drug (IC 35-48-4-6).
- (6) Possession of a controlled substance (IC 35-48-4-7).
- (7) Dealing in paraphernalia (IC 35-48-4-8.5).
- (8) Possession of paraphernalia (IC 35-48-4-8.3).
- (9) Offenses relating to registration (IC 35-48-4-14).

(g) For the purposes of this section, a person received risk counseling if the person had been:

- (1) notified in person or in writing that tests have confirmed the presence of antibodies to the human immunodeficiency virus (HIV) in the person's blood; and
- (2) warned of the behavior that can transmit HIV."

Page 3, after line 3, begin a new paragraph and insert:

"SECTION 4. IC 35-50-2-9, AS AMENDED BY P.L.216-1996, SECTION 25, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1998]: Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is a mentally retarded individual.

(b) The aggravating circumstances are as follows:

- (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:
  - (A) Arson ( IC 35-43-1-1).
  - (B) Burglary ( IC 35-43-2-1).
  - (C) Child molesting ( IC 35-42-4-3).
  - (D) Criminal deviate conduct ( IC 35-42-4-2).



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- (E) Kidnapping ( IC 35-42-3-2).
  - (F) Rape ( IC 35-42-4-1).
  - (G) Robbery ( IC 35-42-5-1).
  - (H) Carjacking ( IC 35-42-5-2).
  - (I) Criminal gang activity ( IC 35-45-9-3).
  - (J) Dealing in cocaine or a narcotic drug ( IC 35-48-4-1).
- (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
  - (3) The defendant committed the murder by lying in wait.
  - (4) The defendant who committed the murder was hired to kill.
  - (5) The defendant committed the murder by hiring another person to kill.
  - (6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:
    - (A) the victim was acting in the course of duty; or
    - (B) the murder was motivated by an act the victim performed while acting in the course of duty.
  - (7) The defendant has been convicted of another murder.
  - (8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.
  - (9) The defendant was:
    - (A) under the custody of the department of correction;
    - (B) under the custody of a county sheriff;
    - (C) on probation after receiving a sentence for the commission of a felony; or
    - (D) on parole;
 at the time the murder was committed.
  - (10) The defendant dismembered the victim.
  - (11) The defendant burned, mutilated, or tortured the victim while the victim was alive.
  - (12) The victim of the murder was less than twelve (12) years of age.
  - (13) The victim was a victim of any of the following offenses for which the defendant was convicted:
    - (A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.
    - (B) Kidnapping ( IC 35-42-3-2).
    - (C) Criminal confinement ( IC 35-42-3-3).

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(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

**(16) The defendant committed the murder by knowingly or intentionally selecting the victim of the murder because of the race, color, religion, sexual orientation, or national origin of the victim.**

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time

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credit and clemency. The defendant may present any additional evidence relevant to:

- (1) the aggravating circumstances alleged; or
- (2) any of the mitigating circumstances listed in subsection (c).

(e) Except as provided by IC 35-36-9, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

- (1) the death penalty; or
- (2) life imprisonment without parole;

only if it makes the findings described in subsection (k). The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation. In making the final determination of the sentence after receiving the jury's recommendation, the court may receive evidence of the crime's impact on members of the victim's family.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

- (1) sentence the defendant to death; or
- (2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (k).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall

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enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

- (1) conviction or sentence was in violation of the:
  - (A) Constitution of the State of Indiana; or
  - (B) Constitution of the United States;
- (2) sentencing court was without jurisdiction to impose a sentence; and
- (3) sentence:
  - (A) exceeds the maximum sentence authorized by law; or
  - (B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

- (1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and
- (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

**SECTION 5. [EFFECTIVE JULY 1, 1998] IC 35-38-1-7.1 and IC 35-50-2-9, both as amended by this act, apply only to crimes committed after June 30, 1998."**

Re-number all SECTIONS consecutively.

(Reference is to House Bill 1281 as printed January 27, 1998.)

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