

SENATE BILL No. 312

DIGEST OF INTRODUCED BILL

Citations Affected: IC 35-38-1-7.1; IC 35-50-2-9.

Synopsis: Hate crime as aggravating circumstance. Makes commission of a crime because of the race, color, religion, sexual orientation, or national origin of the victim an aggravating circumstance that may be considered by a judge when the judge imposes a sentence for the crime.

Effective: July 1, 1998.

Washington

January 8, 1998, read first time and referred to Committee on Judiciary.

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Introduced

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.

SENATE BILL No. 312

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 35-38-1-7.1, AS AMENDED BY P.L.210-1997,
2 SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 1998]: Sec. 7.1. (a) In determining what sentence to impose
4 for a crime, the court shall consider:
5 (1) the risk that the person will commit another crime;
6 (2) the nature and circumstances of the crime committed;
7 (3) the person's:
8 (A) prior criminal record;
9 (B) character; and
10 (C) condition;
11 (4) whether the victim of the crime was less than twelve (12)
12 years of age or at least sixty-five (65) years of age;
13 (5) whether the person violated a protective order issued against
14 the person under IC 31-15 or IC 31-16 (or IC 31-1-11.5 before its
15 repeal) or IC 34-4-5.1; and
16 (6) any oral or written statement made by a victim of the crime.
17 (b) The court may consider the following factors as aggravating



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1 circumstances or as favoring imposing consecutive terms of
2 imprisonment:

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

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

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

9 (4) Imposition of a reduced sentence or suspension of the
10 sentence and imposition of probation would depreciate the
11 seriousness of the crime.

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

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

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

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

18 (A) the crime created an epidemiologically demonstrated risk
19 of transmission of the human immunodeficiency virus (HIV)
20 and involved the sex organ of one (1) person and the mouth,
21 anus, or sex organ of another person;

22 (B) the person had knowledge that the person was a carrier of
23 HIV; and

24 (C) the person had received risk counseling as described in
25 subsection (g).

26 (9) The person committed an offense related to controlled
27 substances listed in subsection (f) if:

28 (A) the offense involved:

29 (i) the delivery by any person to another person; or

30 (ii) the use by any person on another person;

31 of a contaminated sharp (as defined in IC 16-41-16-2) or other
32 paraphernalia that creates an epidemiologically demonstrated
33 risk of transmission of HIV by involving percutaneous contact;

34 (B) the person had knowledge that the person was a carrier of
35 the human immunodeficiency virus (HIV); and

36 (C) the person had received risk counseling as described in
37 subsection (g).

38 (10) The person committed the offense in an area of a
39 consolidated or second class city that is designated as a public
40 safety improvement area by the Indiana criminal justice institute
41 under IC 36-8-19.5.

42 **(11) The person who committed the offense knowingly or**

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1 **intentionally:**

2 **(A) selected another individual who was injured; or**

3 **(B) damaged or otherwise affected property;**

4 **by the offense because of the race, color, religion, sexual**
 5 **orientation, or national origin of the injured individual or of the**
 6 **owner or occupant of the affected property.**

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

10 (1) The crime neither caused nor threatened serious harm to
 11 persons or property, or the person did not contemplate that it
 12 would do so.

13 (2) The crime was the result of circumstances unlikely to recur.

14 (3) The victim of the crime induced or facilitated the offense.

15 (4) There are substantial grounds tending to excuse or justify the
 16 crime, though failing to establish a defense.

17 (5) The person acted under strong provocation.

18 (6) The person has no history of delinquency or criminal activity,
 19 or the person has led a law-abiding life for a substantial period
 20 before commission of the crime.

21 (7) The person is likely to respond affirmatively to probation or
 22 short term imprisonment.

23 (8) The character and attitudes of the person indicate that the
 24 person is unlikely to commit another crime.

25 (9) The person has made or will make restitution to the victim of
 26 the crime for the injury, damage, or loss sustained.

27 (10) Imprisonment of the person will result in undue hardship to
 28 the person or the dependents of the person.

29 (11) The person was convicted of a crime involving the use of
 30 force against a person who had repeatedly inflicted physical or
 31 sexual abuse upon the convicted person and evidence shows that
 32 the convicted person suffered from the effects of battery as a
 33 result of the past course of conduct of the individual who is the
 34 victim of the crime for which the person was convicted.

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

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

39 (1) Rape (IC 35-42-4-1).

40 (2) Criminal deviate conduct (IC 35-42-4-2).

41 (3) Child molesting (IC 35-42-4-3).

42 (4) Child seduction (IC 35-42-4-7).



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- 1 (5) Prostitution (IC 35-45-4-2).
 2 (6) Patronizing a prostitute (IC 35-45-4-3).
 3 (7) Incest (IC 35-46-1-3).
 4 (f) For the purposes of this article, the following crimes are
 5 considered offenses related to controlled substances:
 6 (1) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).
 7 (2) Dealing in a schedule I, II, or III controlled substance
 8 (IC 35-48-4-2).
 9 (3) Dealing in a schedule IV controlled substance (IC 35-48-4-3).
 10 (4) Dealing in a schedule V controlled substance (IC 35-48-4-4).
 11 (5) Possession of cocaine or a narcotic drug (IC 35-48-4-6).
 12 (6) Possession of a controlled substance (IC 35-48-4-7).
 13 (7) Dealing in paraphernalia (IC 35-48-4-8.5).
 14 (8) Possession of paraphernalia (IC 35-48-4-8.3).
 15 (9) Offenses relating to registration (IC 35-48-4-14).
 16 (g) For the purposes of this section, a person received risk
 17 counseling if the person had been:
 18 (1) notified in person or in writing that tests have confirmed the
 19 presence of antibodies to the human immunodeficiency virus
 20 (HIV) in the person's blood; and
 21 (2) warned of the behavior that can transmit HIV.
 22 SECTION 2. 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 3. [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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