

**Frontloading Evidence of Mental Illness:
How to Get Around Indiana's Disdain for Psychiatric Evidence of Insanity,
Our Lack of a Diminished Capacity Defense & IRE 704(b)**

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I. The Indiana Supreme Court's hostility to expert testimony in favor of the insanity defense: what's a criminal defense lawyer to do?

I.C. 35-41-3-6 Mental disease or defect

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to **appreciate** the **wrongfulness** of the conduct at the time of the offense.

(b) As used in this section, 'mental disease or defect' means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

This is a tough standard to meet, but our highest court's anti-psychological-science bias makes it almost impossible. In two Indiana Supreme Court cases, *Gambill* and *Barany*, the expert testimony in support of the insanity defense was unanimous. Nevertheless both juries found the defendant guilty but mentally ill, and the Supreme Court upheld the juries' wholesale rejection of the psychological expert evidence.

Gambill was a paranoid schizophrenic who murdered her child while suffering from a psychotic delusion. *Gambill v. State*, 675 N.E.2d 668, 677-78 (Ind. 1996). *Barany* heard voices directing him to bite off his housemate's finger and eat it and then to kill her. *Barany v. State*, 658 N.E.2d 60, 67 (Ind. 1995).

According to the Indiana Supreme Court, if a lay witness testifies the D "seemed normal" then the jury is free to reject an insanity defense even though highly credentialed psychiatric experts are unanimous in their opinions that D is insane. This anti-intellectual perspective has been criticized at length in *Moler v. State*, 782 N.E. 2d 454, (App. 2003), transfer denied. Moler was a longstanding schizophrenic who out of the blue thought an elderly woman whom he had been caring for, turned into a witch and so he killed her. Both Dr. Don A. Olive and Dr. Rodney Deaton testified Moler was insane at the time of the crime. These are two highly respected psychiatrists. Nevertheless, because lay witnesses testified Moler seemed fine, the appellate court was constrained to uphold the rejection of the insanity defense in light of *Barany*. The *Moler* court was highly critical of this rejection of expert testimony in favor of uninformed lay observation.

The proposition that a jury may infer that a person's actions before and after a crime are "indicative of his actual mental health at the time of the" crime is logical when dealing with a defendant who is not prone to delusional or hallucinogenic episodes. However, when a defendant has a serious and well-documented mental disorder, such as schizophrenia, one that causes him to see, hear, and believe realities that do not exist, such logic collapses. In the interests of

justice, we hope that the supreme court will revisit this rule.

Moler, 782 N.E.2d at 459.

II. Looking for ways to get around the almost insurmountable burden of proving insanity: are there exceptions to IRE 704(b)'s ban on expert testimony regarding intent?

IRE 704

(b) Witnesses may not testify to **opinions** concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or **legal conclusions**.

The federal version is far more restrictive. Professor Miller notes that IRE 704(b) “differs completely” from its federal counterpart.

FRE 704(b):

No expert witness testifying with respect to the **mental state or condition** of a defendant in a criminal case may state an **opinion or inference** as to whether the defendant did or did not have the mental state or condition constituting an **element of the crime charged or a defense thereto**. Such **ultimate issues** are matters for the trier of fact alone.”

Notice, for example, that the Indiana rule does not bar opinions regarding defenses. The federal rule does. So, for example, an Indiana defendant mounting a duress defense should argue that he can present expert psychological testimony that he was paranoid, suffered from dependent personality disorder, or the like, which impaired his capacity to resist pressure from others.

III. Does IRE 704(b)'s ban on psychiatric evidence of intent violate the defendant's constitutional right to present a defense?

- a. Not under the federal constitution. In *Clark v. Arizona*, 548 U.S. 735 (2006), the US Supreme Court held that there is no right under the due process clause to a diminished capacity defense. Clark cited *Holmes v. South Carolina*, 164 L.Ed.2d 503 (2006): well established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” The *Clark* majority found three of these factors of concern when admitting psychological expert testimony on mens rea: 1) “the controversial character of some categories of mental disease,” – that is the fact that “the diagnosis may mask vigorous debate within the [psychiatric] profession about the very contours of the disease itself.” 2) “the potential of mental-disease evidence to mislead jurors through the power of this kind of evidence to suggest that a defendant suffering from a recognized mental disease lacks cognitive, moral,

volitional, or other capacity, when that may not be a sound conclusion at all.” 3) “the danger of according greater certainty to capacity evidence than experts claim for it,” as such evidence “consists of judgment, and judgment fraught with multiple perils,” as “a defendant’s state of mind at the crucial moment can be elusive no matter how conscientious the enquiry, and the law’s categories that set the terms of the capacity judgment are not the categories of psychology that govern the expert’s professional thinking.”

- b. As a matter of federal constitutional law, what’s left of the diminished capacity defense after *Clark*?
 - i. *Clark* excludes psychiatric expert testimony in part due to “the controversial character of **some** categories of mental disease.” This leaves open the possibility of a right to present mental health evidence regarding diminished capacity where the underlying mental condition is universally recognized by psychiatric experts.
 - ii. As psychiatric knowledge increases – and more objective evidence, such as neurobiological evidence is generated to support the validity of psychological diagnosis, the exclusions in *Clark* may no longer apply.
 - iii. The majority in *Clark* said that “**observation evidence**,” i.e. “testimony from those who observed what Clark did and heard and what he said,” which could include testimony that an expert witness might give about Clark’s tendency to think in a certain way and his behavioral characteristics,” was admissible.
- c. Indiana has never had a diminished capacity defense. We should argue for the right to present such a defense under Article 1, Sec. 13, the right to present a defense, and the due course of law clause of Article 1, Sec. 12.
- d. Hints of movement by the Supreme Court, albeit in dicta?
 - i. See *Overstreet v. State*, 877 N.E.2d 144 (Ind. 2007), rehearing denied, (February 25, 2008). On post-conviction, Overstreet alleged his trial counsel had been ineffective for failing to present the evidence of his mental illness at trial, even though none of the four psychiatric experts who evaluated him thought him insane. According to the defendant, “If trial counsel had contested Overstreet’s mens rea due to mental illness, the jury could have had the option of returning a verdict of GBMI.” In denying this claim, the Indiana Supreme Court could have said that such psychiatric evidence would not have been admissible to negate intent. However, that was not the basis for the denial. Rather, the claim was denied because the defendant had always maintained that he did not commit the crime – and that his brother was the perpetrator- and therefore, claims of mentally compromised

intention were made irrelevant due to Overstreet's theory of the defense.

IV. To Think Rather than Opine: IRE 702(a) provides that a witness may testify "in the form of an opinion or otherwise."

Professor Miller interprets this to mean that, "an expert witness may simply articulate principles or knowledge within the relevant field and leave it to the factfinder to apply that information to the facts of the case." Miller, Indiana Practice Series, Vol. 13, Indiana Evidence, Sec. 702.117 p. 495 (3rd ed. 2007).

Miller cites:

3 Graham Handbook Sec. 702:1 at 59 (6th ed. 2006)("Thus the expert may, but need not, testify in the form of an opinion. He may instead give an exposition of relevant scientific principles permitting the trier of fact to draw its own inference or conclusion from the evidence presented, or he may combine the two.")

Advisory Committee's Note to Fed.R.Evid. 702 ("The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.")

Miller notes that using the expert to teach rather than opine, "may be particularly helpful if the opinion testimony would run afoul of one of the prohibitions contained in Rule 704(b). Indiana Evidence, Sec. 702.117, pp. 495-6.

Take this case: D is on trial for a knowing murder. D wishes to call a psych expert to testify that D scored very poorly on IQ tests, is borderline retarded, and to describe the cognitive deficits that borderline retarded persons suffer. D has told his expert NOT to testify that in his opinion D did not have the specific intent necessary for the crime. Will the testimony be admitted? Since the expert is teaching, rather than opining, Professor Miller's reasoning would support the admissibility of this instructional, background evidence.

V. *Intent vs. Capacity to Form Intent*

Expert testimony that directly states what the defendant knew or intended at the time of the crime is a clear violation of IRE 704(b). Thus, for example, in *Moore v. State*, 771 N.E.2d 46, 56 (Ind. 2002), the Indiana Supreme Court upheld the exclusion of expert testimony by a psychiatrist who evaluated D and was prepared to testify that Moore was surprised to learn that the man he shot was a police officer and that he had not been aware he was a cop when he shot.¹ Moore faced the death penalty for the

¹ Although 703 allows an expert to testify as to opinions based on hearsay, if it is "reasonably relied upon by experts in the field," this exception can't be used as a conduit for placing statements of a nontestifying defendant before the jury. *Schmidt v. St.*, 816/925, 941 (Ind.App. 2004)

murder of a police officer. Pursuant to I.C. 35-50-2-9(b)(1)(6), the state bore the burden of proving the aggravating circumstance of a knowing murder of an officer beyond a reasonable doubt. In upholding the trial court's refusal to allow this testimony, the Indiana Supreme Court relied on IRE 704(b), which states that "witnesses may not testify to opinions concerning intent...in a criminal case...."

- a. Generalizing from limitations on capacity recognized in *Atkins*: In *Atkins v. Virginia* (2002) 536 U.S. 304, 318 [153 L. Ed. 2d 335, 122 S. Ct. 2242], the United States Supreme Court held that to execute the mentally retarded is cruel and unusual punishment, reasoning that retarded persons "**have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.**"

"Because of their **disabilities in areas of reasoning, judgment, and control of their impulses**, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."

- b. **IQ**: under 401, evidence of a low IQ certainly has some tendency to make knowledge of a high probability of harm more likely than not. And, IQ testing is so reliable as to dissipate concerns expressed in *Clark v. Arizona*. Let's say a murder involves extensive planning. If D has a low IQ, doesn't D's limited intellect make it less likely that he committed a crime involving a sophisticated plan? And if so, doesn't D have a constitutional right to present this evidence to the jury? The expert testimony could focus on the IQ limitations without rendering an opinion regarding the reduced likelihood that D is the murderer because he was unlikely to have had the intent and knowledge necessary for an intricately planned killing.

In *Brown v. State*, 448 N.E.2d 10 (Ind. 1983) and *Brown v. Trigg*, 791 F.2d 598 (7th Cir. 1986)(2-1), a 16 year old's arson-murder convictions were upheld despite the trial court precluding her from presenting testimony regarding her low IQ and lack of awareness of the volatility of gasoline. However, the cases are distinguishable if a more thorough record is made of the reliability of IQ testing and the testimony is limited to the defendant's capacity to know that the fire would burn out of control. The dissent in the federal habeas case distinguished earlier defense efforts to negate intent via expert testimony re personality testing. Here, the expert was basing his opinion on "the use of standard IQ tests to establish defendant's intellectual and psycho-educational level....such tests are far more recognized as reliable and probative than are the opinions of psychiatrists about the relation of personality disorders to the formation of criminal intent. Cudahy, J., *Id.* at 602.

Certainly, the reliability of IQ testing has only increased in the twenty years since these cases were decided.

- c. What of Mental illnesses that are less reliably diagnosed and even less reliably relevant to knowledge or intent? One such case is *Byrd v. St.*, 593 N.E.2d 1183 (App. 1992). *Byrd* upheld the trial court's barring testimony that the defendant's MMPI test results showed a personality profile inconsistent with murder. The court noted that Byrd had failed to make a record on the reliability of MMPI testing and its predictive ability – leaving open the chance for this ruling to be revisited. Are there now studies that show the reliability of the MMPI in predicting a lack of dangerousness, or a lack of a propensity for violence? The answer is likely to be no as psychiatric expertise has been largely unsuccessful in predicting dangerousness.
- d. **On its face, much of the reasoning in *Atkins* seems logically to apply to persons with serious mental illness and brain impairment.** The same mental capacities are impaired in a person suffering, for example, from chronic paranoid schizophrenia, and the impairment in capacity form intent may be equally grave.

-*Bryan v. Mullin* (10th Cir. 2003) (dissenting opinion, the Supreme Court's logic in *Atkins* applies to those with "severe mental deficiencies")

-*Corcoran v. State*, 774 N.E. 2d 495 (Ind. 2002) (Rucker J., dissenting) (*Atkins* rationale is "just as compelling" for prohibiting the execution of the "seriously mentally ill")

-*State v. Nelson*, 803 A2d 1 (NJ 2002) (Zappala, J. concurring) ("lesser culpability" of a seriously mentally ill D is indistinguishable from a mentally retarded D).

-*People v. Danks*, 32 Cal. 4th 269, Kennard, concurring/dissenting

Granted, the aggravating evidence was strong. But the majority ignores the strong *mitigating* evidence presented to the jury. Five defense experts (three psychiatrists and two psychologists) described defendant, who was 30 years old at the time of trial, as severely ill mentally, suffering from paranoid schizophrenia. He complained that certain well-known entertainers were "in the kitchen excreting in his food." He was convinced that the Mayor of Los Angeles, the Governor of California, and the President of the United States all conspired against him. He thought people watched him through the television set. He talked of conversations with his dead grandparents, and said his mother printed counterfeit money in her basement. He insisted that the homeless men he had killed were not really dead, and he felt compelled to clean his jail cell with a toothbrush six to 10 times a day. In short, the defense presented compelling evidence that defendant, although not legally insane at the time of the offenses suffered from a mental illness that destroyed his capacity for rational thought.

e. **Fetal Alcohol Spectrum Disorders (FASD):** Damage to the brain is the most serious consequence of prenatal alcohol exposure. Common neurobehavioral deficits include several conditions that would impair the capacity to form intent:

Hyperactivity, Impulsivity, Attention deficits, Learning and memory deficits, Poor spatial and motor coordination, Impaired social ability, Deficits in executive function

Most individuals with a FASD (80%) are not mentally retarded. But they have most of the deficits in judgment, reasoning, impulse control, difficulty with abstract thinking, problems with sequencing, processing, organizing information, difficulty generalizing information from one setting to another, inability to change behavior depending on situation, and poor short term memory that characterize mental retardation. A defendant suffering from FASD should be allowed to present psychological evidence of reduced capacity to form intent.

f. *Wallace v. St.*, 640 N.E.2d 374 (Ind. 1994), cert denied, 514 U.S. 1115 (1995) It would be entirely proper for a physician or layman for that matter to recite their belief that a defendant did not have *the ability to form intent* at the time of the commission of a crime based on a number of factors including mistreatment, medication, or intoxication. This does not mean that the childhood treatment, the medication, or intoxication are in and of themselves an excuse for committing a crime. It is the inability to form the intent at the time the crime was committed that is the issue before the court notwithstanding the cause therefor. (Dicta).

g. *Weaver v. St.*, 643/342, 345-46 (Ind. 1994), DeBruler, concurring:
While the rules prohibit opinion testimony of a person's intent, **the rules do not prohibit opinion testimony of a person's capacity to form intent.** Opinion testimony of a person's capacity to form intent does not directly establish or negate a person's intent. Rather, opinion looks directly to a person's ability to form the intent. Of course, such an opinion must be rationally based upon the opinion giver's perceptions and observations. The distinction between opinion of intent and opinion of capacity to form intent is especially important in the case at bar. Appellant raised the defense of voluntary intoxication, in order to attack the prosecution's proof of intent. Appellant might have called the witness, his girlfriend, to testify as to her opinion about appellant's state of intoxication. The girlfriend might have formed the opinion that appellant was so intoxicated that he was incapable of forming any intent to commit the charged crimes. Such an opinion would have been admissible under the evidentiary rules.

Here, however, appellant sought to introduce the girlfriend's opinion as to whether she believed appellant intended to kill her. This is the type of opinion testimony that the rule specifically precludes. Therefore, I concur with the majority opinion.

h. See also, *Griffin v. State*, 692 N.E.2d 468 (App. 1998) reversed on other grounds, where the Court of Appeals upheld the exclusion under 704(b) of psychological testimony regarding the defendant's inability to form an agreement, which was an essential element of the conspiracy charge. However, *Griffin* is distinguishable as some of the expert testimony proffered explicitly ran afoul of 704(b) as it directly bore on Griffin's intent. One of the psychological reports the trial court excluded contains the psychologist's statement that "I do not know the

legal meaning of 'conspiracy', but if it implies planning and thought and/or careful activity I would think that this would be beyond him." The Court of Appeals noted that "both psychological reports contained impermissible conclusions regarding Griffin's intent. It was for the trier of fact to make such determinations. The evidence was properly excluded."

VI. Expert Psychological Testimony re an Alleged *Victim's* Characteristics Has been Allowed:

1. Autistic Children *Lack the Capacity* to Deceive:

"When [jurors] are faced with evidence that falls outside common experience, we allow specialists to supplement the jurors' insight." [Carter v. State, 754 N.E.2d 877, 882 \(Ind. 2001\)](#) In Carter, we held that a psychologist's testimony that autistic children find it difficult to deceive² "came close to, but did not cross the line into impermissible Rule 704(b) vouching. [Id. at 883-84.](#)

2. A Specific Child Has *the Capacity to Understand Sexual Matters* and *Lacks the Capacity to Exaggerate*:

Edgin v. State, 657 N.E.2d 445, 447 (app. 1995), rehearing denied, transfer denied (1995). In the context of a child molestation case, a witness is permitted to testify concerning the child's general competence, tendency to exaggerate, and ability to understand sexual matters. *Id.* However, the witness cannot make any direct assertions concerning his belief in the child's testimony. Only the jury can determine the weight to give to testimony. *Id.* Therefore, Detective Lawson's statement concerning the children's credibility amounted to improper vouching testimony. An objection to the testimony would have been sustained.

3. Alleged vic's **behavior inconsistent** with having been raped: Post Traumatic Stress Disorder (PTSD) expert testimony allowed:

In *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989), the defendant was convicted of raping J.O. At trial he had not been allowed to introduce testimony from a PTSD expert

² The expert in *Carter* "... testified that autistic children generally "have a very, very difficult time manipulating what's in someone's mind," i.e., deliberately deceiving others. She substantiated this conclusion by describing a study in which autistic children could follow an instruction to lock a box to prevent a "thief" from taking the candy inside, but could not lie on command and tell the "thief" that there was no candy in the box. Although the expert did not at any point directly state an opinion that M.C. was telling the truth, the jury could easily have drawn a logical inference: autistic children do not deliberately lie, M.C. is autistic, therefore M.C. is not lying.

On cross-examination, defense counsel attacked this inference by probing further into whether autistic children are capable of relating events that did not actually happen. The expert testified that autistic children lack imagination. She said, "I've never had a child with autism lie to me about what actually occurred. That's not to say that they absolutely will never lie. But, when they do, they tend to be very poor liars."

that J.O.'s return to the bar – which was the scene of the supposed rape earlier that night - and her dancing and drinking at the bar for two hours was inconsistent with rape. The expert had neither evaluated the alleged victim or familiarized himself with the facts of the case. The defendant asked the expert:

[If] a person has allegedly suffered a traumatic, forcible rape, would it be consistent in [his] experience that a person who had gone through a situation such as that would go back to the same place the act allegedly occurred and socialize, drink, dance, on the same day of the alleged act?

The Indiana Supreme Court overturned the trial court's finding, and held that a clear probative value existed as to whether J.O. had been raped, and thus the question was relevant. The court also ruled that a proper foundation existed because the hypothetical stemmed from facts in evidence, providing the expert requisite information on which to form an opinion. The court noted that if the prosecution believed that the hypothetical did not include sufficient facts from the case, it could highlight the absence of such facts in a hypothetical on cross-examination. Finally, the court rejected the prosecution's argument that the expert's response to the hypothetical would be equivalent to testimony on the victim's credibility:

The record shows that the PTSD expert would have testified merely that some of J.O.'s behavior was inconsistent with that of a person who had suffered a traumatic rape. While this would have tended to show that J.O.'s testimony was not credible, **it was not direct testimony as to her credibility**. All testimony which contradicts one party's version of a set of events raises questions about that party's credibility; however, that does not make the testimony inadmissible. If that were the case, a defendant would be hard pressed to ever present any sort of defense in his own behalf since the core of any defense usually involves a denial that the alleged criminal conduct occurred.

VII. How litigating the voluntariness of a confession in front of the jury entitles the defense to present otherwise inadmissible psychiatric evidence of mental disorders such as mental retardation, PTSD, drug psychosis, and other mental diseases that impair the capacity to know and intelligently waive rights.

- a. See pleadings in *State v. Tucker Hunt*.
- b. Under IRE 101(c)(1), the evidence rules are inapplicable to the determination of questions of fact preliminary to the admissibility of evidence, so 704(b) does not apply.
 1. *Miller v. State*, 770 N.E.2d 763, 773-74 (Ind. 2002): The trial court must make a preliminary factual determination of voluntariness when assessing the admissibility of a statement made by a defendant. The jury, however, remains the final arbiter of all factual issues under [Ind. Const. art. I, § 19](#). Even if a trial court preliminarily determines that the statement is voluntary and admits it for the jury's

consideration, the defendant is still entitled to dispute the voluntariness of the statement in front of the jury. Although a trial court has previously determined voluntariness in connection with the statement's admissibility, the jury may find that the statement was involuntarily given. If the jury makes such a determination, then it should give the statement no weight in deciding the defendant's guilt or innocence.

Held: Defendant has a state constitutional right to present a defense which embraces his right to present expert testimony re coercive interrogation procedures, and the interrogation of mentally retarded persons, both matters outside the common knowledge and experience of jurors. The expert cannot say this D's confession was false as this would run afoul of IRE 704(b).

2. Same *Carew v. St.*, 817 N.E.2d 281, 288 (App. 2004), transfer denied (2005): IRE 704(b) does not prohibit general opinion testimony that coercive police techniques could increase the likelihood of a false confession from an individual with diminished intellectual functioning.
3. See also: [*U.S. v. Shay*, 57 F.3d 126, 133 \(1st Cir. 1995\)](#), which reversed a trial court's decision to exclude expert testimony on Munchausen's Disease, a mental disorder characterized by extreme pathological lying. The expert would have testified that the defendant's psychological condition would cause him to make statements similar to those in his confession. Holding the exclusion of that testimony erroneous, the *Shay* court wrote that the jury "plainly was unqualified to determine without assistance the *particular* issue of whether [the defendant] may have made false statements against his own interests because he suffered from a mental disorder." (Emphasis in original.).
4. In [*U.S. v. Hall*, 93 F.3d 1337, 1345 \(7th Cir. 1996\)](#), the trial court excluded psychiatric testimony that the defendant was easily led and had a propensity for giving false confessions on the ground that it would invade the prerogative of the jury to assess the credibility of witnesses. The appellate court vacated the defendant's conviction and remanded the cause, holding that the trial court "missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision."

5. *State v. Buechler*, 572 N.W. 65 (Neb. 1998) Held: the trial court violated the defendant's confrontation and due process rights by excluding his expert psychologist's testimony that he was in the throes of ***methamphetamine withdrawal and depression*** at the time of his confession to murder and that this mental state rendered him ***particularly suggestible***. Without expert testimony, juries might not understand the seriousness of withdrawal or its effect, when combined with depression, on suggestibility.

VIII. Litigating the right to jury trial with GBMI on the verdict form even though no NGBRI plea will be filed

I.C. 35-36-1-1 GBMI

Mentally ill is defined as "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function."

Archer v. State, Ind., 689 N.E. 2d 678 (1997): Held, the trial court is required to make finding that D was guilty but mentally ill at time of offense when it accepts D's plea of guilty but mentally ill. *Archer* says that there are "**degrees of impairment**," and evidence of mental illness can be such that it does not justify an insanity verdict, and yet serious enough to justify "significant weight ... as a mitigating factor." This "degrees of impairment" perspective could be used to argue that there is a point between insanity and mere mitigation, that is the point where D suffered from serious mental illness at the time of the crime, and that we have the right to pursue a freestanding GBMI verdict without noticing an insanity defense.

- a. Advantages:
 - i. don't risk ire of jury due to failed insanity defense
 - ii. don't have to subject a client who is not insane to evaluation by two court appointed "experts," who are highly likely to generate opinions that are adverse to the defendant
 - iii. if law changes to bar death penalty for the mentally ill, you've made a good record to get your client relief
 - iv. GBMI sentences are often less than those for defendants who are simply found guilty: See *Prowell v. St.*, 741 N.E.2d 704, 717-18 (Ind. 2001): Although a guilty but mentally ill conviction or plea does not guarantee a defendant that the death penalty will not be imposed, [Harris v. State](#), 499 N.E.2d 723, 725-27 (Ind. 1986), as a practical matter, defendants found to be guilty but mentally ill of death-penalty-eligible murders normally receive a term of years or life imprisonment. See [Dunlop v. State](#), 724 N.E.2d 592, 596 (Ind. 2000) (sentenced to life imprisonment after jury verdict of guilty

but mentally ill); [McIntyre v. State, 717 N.E.2d 114, 119 \(Ind. 1999\)](#) (sentenced to life imprisonment after jury verdict of guilty but mentally ill); [Whipple v. State, 523 N.E.2d 1363, 1365 \(Ind. 1988\)](#) (sentenced to term of years after a jury verdict of guilty but mentally ill). Even James Allen Harris, the defendant in the case which established that the imposition of the death penalty for a defendant found to be GBMI is constitutional, eventually had his death sentence reduced to a term of 60 years. None of the current residents of Indiana's death row and none of those executed in Indiana since the death penalty was reinstated in 1977 were found to be GBMI.

IX. File for insanity, but only argue the evidence supports a GBMI verdict:

Advantage: the defense gets to put on mental health evidence at trial without forfeiting credibility by arguing that the jury should find the defendant NGBRI.

But see the perils of filing a notice of insanity, thereby triggering apptmt of two hacks to evaluate D at the court's request, then announcing at the start of jury selection that the insanity defense was withdrawn (for the first time), and offering to plead GBMI with no guarantee as to sentence, and under a mistaken impression that the Indiana Supreme Court had never upheld a death sentence for a defendant found GBMI.

See *Baer v. State*, 866 N.E.2d 752 (Ind. 2007)

X. Involuntary Intoxication May be More Available than We Realize:

I.C. 35-41-3-5 Intoxication

It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body: without his consent; *or when he did not know that the substance might cause intoxication.*

See *Sanchez v. St.*, 749/509, 526, n. 20 (Ind. 2001), Sullivan, J. cc: "The fact that the legislature retained the defense of involuntary intoxication demonstrates that it considers evidence of intoxication relevant to the issue of intent. I.C. 35-41-3-5. The majority seemingly would also find evidence of intoxication to be relevant and reliable, as it would allow it to be introduced as '**general background.**'"

What if D says he consented to smoking marijuana – but did not consent to, and was not aware of the fact that it was laced with PCP?

What if D's knowledge of a drug is so limited that he does not realize that it could cause intoxication?

XI. Expert Psychological Character Evidence Using 404(a)(1) and 405:

- a. 404(a)(1) creates an exception for the defendant to the general rule that character evidence is not admissible to prove action in conformity with character.

404(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

- (1) Character of accused. Evidence of a pertinent trait of character offered by an accused....

405 tells us that character can be proved by opinion or reputation testimony.

- b. IF the defendant has no prior record for violence and no prior violent bad acts, the defendant could seek to admit expert mental health opinion evidence of the absence of a violent character. This could include an expert opinion that the defendant did not meet the DSM definition for an antisocial personality disorder. The reliability of the testing would have to be established. On demand, the defense is entitled to notice of specific acts to be inquired into on cross.

- c. This approach has been upheld in Wisconsin. See *King v. State*, 248 N.W.2d 458, 464-65 (Wis. 1977) a first degree murder case where the defendant raised the defense of accident, both through his own testimony and through the testimony of a psychologist and a psychiatrist. The defendant testified that he did not intend to shoot; that he did not realize that the revolver was loaded; and that the shooting was an accident. The psychologist testified that in his expert opinion the defendant possessed a passive-aggressive personality; that the defendant was not unduly hostile or aggressive; and that the defendant's typical response to stress would be withdrawal or nonresponse rather than an overt hostile act.

In offering the expert testimony of the psychologist, as it related to the defendant's character, the defendant was properly relying upon the provisions of 404 and 405. Thus in this first-degree murder case, the defendant was entitled to place into evidence not only opinion testimony but expert opinion testimony concerning his general character trait of nonhostility and nonaggressiveness.
at 464-65.

State v. Richard A.P., 598 N.W.2d 674 (Wis. App. 1998) conviction reversed where D not allowed to present expert testimony that he did not exhibit character traits consistent with the psychological profile of a pedophile.

XII. Voluntary act

I.C. 35-41-2-1(a) provides that "A person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense."

In *Baird v. St.*, 604 N.E.2d 1170, 1176-77 (Ind. 1992), the defendant contended that the state failed to prove he acted voluntarily. Baird was decided after the “irresistible impulse” test was stripped out of Indiana’s definition of insanity in 1984. The Indiana Supreme Court rejected this argument, noting that Baird had improperly “...conflated the meaning of ‘voluntary act’ with the concept of irresistible impulse...” The Supreme Court held that “The requirement of a voluntary act was meant to exclude from the kind of conduct which may be considered criminal that which, in the ordinary sense, occurs beyond the control of the actor such as convulsions and reflexes. Ind. Crim. Law Study Comm’n, Indiana Penal Code Proposed Final Draft, October 1974, at 12. See LaFave & Scott, Criminal Law 3.2; Model Penal Code 2.01(1).

XIII. Physical, medical conditions that impair the capacity to act voluntarily are admissible without noticing an insanity defense

- a. **Transient ischemic attacks** causing disorientation: *Reed v. St.*, 693 N.E.2d 998, 992-93 (Ind.App.1998). Held: the defendant has the right to offer evidence that she suffered a small stroke, known as a transient ischemic attack (TIA), to show that she did not voluntarily or knowingly commit shoplifting. TIA is a medical, not a mental condition and therefore the defendant was not required to notice an insanity defense to present this evidence. Expert medical testimony showed that a TIA patient might be “totally unaware of [her] surroundings and yet repeatedly going through common tasks that we’ve done a hundred times...enabling her to walk through the tasks but “without the awareness of what [she’s] doing.” Despite the expert evidence re a lack of knowledge, the *Reed* court interpreted the defense as one of showing that she did not voluntarily commit theft.

- b. **Somnambulism or Automatism:**
 - i. Automatism due to sleep deprivation/ and dissociative state, *McClain v. St.* 678 N.E. 2d104, 106 (Ind. 1997) (holding as a matter of statutory law that "evidence of automatism can be presented to show lack of criminal intent"), *reh'g denied*.

 - ii. See also *Smith v. State*, S08A0256, 2008 Ga. LEXIS 540 (Supreme Court of Georgia, 2008), a unanimous opinion reversing the murder conviction of a defendant who shot his wife. At trial, Smith claimed that he suffered from **sleep disorders, narcolepsy and confusional arousal** and that he did not shoot voluntarily or with criminal intent. The trial court had forced Smith to raise his defense of sleepwalking under the insanity statute, despite Smith’s objection and the fact that his expert testified that he did not meet the legal definition of insanity. In ordering a new trial, the Georgia Supreme Court noted that unconsciousness or automatism is a

defense because the individual has not engaged in a voluntary act, and a crime requires a “joint operation of act and intent.”

- iii. *Ellis v. Jacob*, 26 M.J. 90 (U.S. Court of Military Appeals 1988). In this court martial regarding the defendant’s murder of his son, the defense sought to present expert psychological testimony that 1) a person suffering from extended sleep deprivation could suffer serious psychological impairment and, 2) the accused was incapable of forming specific intent due to **extreme sleep deprivation**. The motion was denied. On appeal, the court reversed, holding that the first type of expert testimony must be admitted, and reserving ruling on the second as the record was not fully developed.

Defendants who are chronic meth users often stay awake for days prior to the commission of the crime. We should seek to present expert testimony regarding the effects of sleep deprivation on the human mind where we can meet the exception in the intoxication statute regarding the defendant not realizing the intoxicating effect of the substance ingested.

- c. **Epilepsy:** See *Loven v. State*, 831 S.W.2d 387, 391-92 (Tex.App. 1992): A defendant’s claim that he acted unconsciously during the throes of an epileptic seizure is a valid defense. A defense expert testified that “in the last stage of a seizure, known as the post-ictal stage, a person suffering from “complex partial seizure disorder” may exhibit violent and aggressive behavior capable of causing personal injury to others,” and that the epileptic “would not have a vivid recollection of details....”

Investigate the medical history of a defendant who commits a single blow battery and has no memory of having committed any assault?

- d. **Lead poisoning.** See handout entitled: Association of Prenatal and Childhood Lead Concentrations with Criminal Arrests in Early Adulthood (2008). See also, *Crooked Creek Conservation & Gun Club v. Hamilton County N. Bd.*, 677 N.E.2d 544, 549 (Ind. App. 1997), rehearing denied, transfer denied, which addresses the neurotoxicity of lead:

[L]ead is a very dangerous, although often subtle, poison absorbed by the gut and lung. In humans, lead primarily attacks the nervous system with children being at highest risk. Children exposed to excessive levels of lead can suffer damage as subtle as a loss of IQ and developmental delays or as serious as mental retardation and death. Adults may also experience nervous system damage as a result of lead exposure although it is generally not as devastating as is seen in children. Additionally, lead will attack the digestive system, the blood, the kidneys, and the reproductive

system. Since lead can damage both male and female reproduction and will cross the placenta, miscarriage and birth defects can result.

- e. **Are there other physical, medical conditions** that could impair mental capacity or render conduct involuntary that would not require noticing an insanity defense?

Addendum: Use of 704(b) to shut down prosecution evidence:

- a. Testimony that the defendant is malingering *See: Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453 (Ind. 2001), Boehm, dissenting, joined by Shepard.
- b. See *Taylor v. State*, 689 N.E.2d 699, 706 (Ind. 1997). On appeal, Taylor contended that the detective's testimony as to why he did not think an alternate suspect was the guilty party (D had mounted a defense of SODDI/TODDI) violated 704(b). The Supreme Court noted that 704(b) bars testimony regarding *anyone's* guilt, innocence or intent, not just the defendant's, but declined to reach the issue because the defendant had never objected on this basis at trial.