

IMPROVING JUSTICE FOR CRIMINAL DEFENDANTS WITH SERIOUS MENTAL ILLNESSES: THREE STEPS INDIANA'S JUDICIARY SHOULD TAKE

PAUL D. MATHIAS* & JONATHAN B. WARNER**

Synopsis: Indiana is in the midst of a mental-health crisis, with a lack of community resources available to meet the needs of Hoosiers. Because of this, a disproportionate number of Hoosiers with serious mental illnesses become involved in the criminal justice system every year, a substantial number of whom may well have lacked the ability to form the requisite culpability for a charged criminal offense. To improve the identification of, monitoring and treatment of, and access to justice for these Hoosiers, this Article recommends that Indiana's judiciary: (1) use a freely available, one-page medical instrument at the initial hearing with a criminal defendant to assess whether he or she may suffer from a serious mental illness; (2) establish standards to allow Indiana probation officers to become qualified mental-health specialists within their departments so they may better supervise criminal defendants with mental-health needs and assist jail staff and others pending trial; and (3) reconsider and clarify appellate review of a fact-finder's rejection of an insanity defense when there is nonconflicting, credible expert testimony in support of the defense.

I. TABLE OF CONTENTS

- I. Table of Contents
- II. Introduction
- III. Current Statistics of Serious Mental Illnesses Among Indiana Offenders
 - A. Current Court Treatment of Indiana Criminal Defendants with Serious Mental Illnesses
 - B. Stakeholders Across the Political Spectrum, Across All Branches of Government, and Across all Levels of Government Plead for Community Investment
 - C. Indiana's Process for Criminal Defendants with Serious Mental Illnesses
- IV. Recommendations for Identification of Criminal Defendants with Serious Mental Illnesses; for Reduction of the Cost of Safely Treating Them; and to Improve Their Outcomes in Indiana's Criminal Justice System
 - A. Amend Indiana Criminal Rule 2.3 to Require Judicial Officers at an Initial Hearing to Administer a Peer-Reviewed Mental-Health Screening Instrument to Defendants
 - 1. Indiana's Current Initial Hearing Procedures Under

* Judge, Court of Appeals of Indiana.

** Senior Deputy Judicial Clerk to the Honorable Paul D. Mathias; Lecturer and Advisor, Indiana University–Robert H. McKinney School of Law.

Indiana Criminal Rule 2.3

2. Judicial Officers Are Already Required to Ask Defendants Meaningful Questions at Initial Hearings

3. Adding a Brief Mental Health colloquy with the Defendant Would Be Easy and Effective

B. Amend Criminal Rule 2.3 to Require Judicial Officers to Administer the BJMHS

C. Strengthen Mid-Stream Monitoring and Care by Enabling Indiana Probation Officers to Become Mental-Health Specialists

D. Back-End Review: Reconsider the Role of Appellate Review of Rejected Insanity Defenses

1. Essential foundations

2. Cate and Barany: Our Supreme Court Allows Juries to Reject Unanimous Expert Testimony Based on Behavior That Fleetinglly Appears Rational

3. Gambill and Thompson: Our Supreme Court Allows Juries to Find That the Experts Have Been “Fooled”

4. Interlude: The Court of Appeals Questions Barany, and a Plurality of the Justices of our Supreme Court Take Note

5. Galloway v. State: Our Supreme Court Reconsiders the Probative Value of Apparently Rational Demeanor Evidence

6. Myers and Barcroft: Our Supreme Court Reads Galloway Narrowly

7. Payne v. State: Our Supreme Court Gives Preferred Status to Defendants with a Well-Documented Medical History in Support of an Insanity Defense

8. Reconsidering Appellate Review of Rejected Insanity Defenses

V. Conclusion

II. INTRODUCTION

Indiana is in the midst of a mental-health crisis,¹ and Indiana’s criminal justice system, a system that is “antitherapeutic for most patients whose serious mental disorders prevent them from being able to control their behaviors,”² has

1. Suzanne Crouch, *Indiana must address its lack of behavior health beds—lives depend on it*, IND. CAP. CHRON. (Apr. 10, 2025), <https://indianacapitalchronicle.com/2025/04/10/indiana-must-address-its-behavioral-health-bed-shortage-lives-depend-on-it/> [https://perma.cc/AQ9F-YUL9].

2. Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U.L. REV. 1169, 1184 (1997). (As Dr. Miller explains: “mentally disordered inmates are at a significant disadvantage in correctional facilities. Their behavior exposes them to ridicule at best and abuse at worst, both from other

become the de facto repository for many Hoosiers who suffer from serious mental illnesses.³ Stakeholders throughout Indiana have brought to light, repeatedly, not just the prevalence of serious mental illnesses among Indiana's general population, but also the disproportionate prevalence of those same illnesses in our prison populations.⁴

The disproportionate prevalence of serious mental illnesses within our prison populations is an outcome of the lack of political and popular will to allocate already scarce resources into our local communities to treat mental illnesses.⁵ This lack of community resources makes Hoosiers with serious mental illnesses more likely to come into contact with the criminal justice system, but Indiana's judiciary is generally focused on what the law refers to, confusingly, as the defendant's "competency," *i.e.*, his ability to understand the judicial process and to assist his counsel at trial.⁶ And, when defendants with

inmates and from guards. They are frequently placed in maximum security facilities, are systematically denied placements at minimum security facilities, and are denied the opportunity to reduce their sentences significantly by participation" in credit-time programs. *Id.* Dr. Miller further notes that the placement of mentally disordered persons "in correctional facilities drastically compromises continuity of care for such persons." *Id.* Dr. Miller notes that changes to the civil commitment process in many states, including in Indiana, to require an overt showing of dangerousness to support an order of involuntary commitment has resulted in "large numbers of mentally disordered persons . . . being jailed" for offenses that historically "would have led to hospitalization..." *Id.* at 1183; *see also* IND. CODE §§ 12-26-5-0.5(c)(2), 5-1(c)(1), 6-1, 7-1 (2024). Moreover, potentially compounding matters in Indiana is the fact that the Indiana Department of Correction has, at least in part, relied on for-profit contractors for medical care of inmates, and the profit motives of those contractors might not align with providing inmates with quality medical care; *see, e.g.*, *Williams v. Ind. Dep't of Corr.*, 142 N.E.3d 986, 1005–06 (Ind. Ct. App. 2020) (holding that an inmate's for-profit care providers provided "systemic and gross deficiencies in her medical care throughout her incarceration, which deficiencies [her estate's] expert directly connected to her cause of death"), *aff'd on reh'g*, 142 N.E.3d 1009, 1009–10 (2020).

3. *See, e.g.*, JAIL OVERCROWDING TASK FORCE, 2019 REPORT 1, <https://www.in.gov/courts/iocs/files/jail-overcrowding-report.pdf> [<https://perma.cc/QY2J-E7VJ>] (last visited Nov. 15, 2025).

4. *See* Hannah Price, *Shattered Brains in Shackles: The Future of Mentally Ill Defendants Following Kahler v. Kansas*, 55 IND. L. REV. 831, 839–41 (2022).

5. *Id.* at 837.

6. As Judge Mathias has frequently observed, there is a "clear failure . . . of our criminal justice system to adequately and properly respond to and treat those with mental health issues" *Wampler v. State*, 67 N.E.3d 633, 634 (Ind. 2017) (quoting *Wampler v. State*, 57 N.E.3d 884, 890 (Ind. Ct. App. 2016) (Mathias, J., dissenting)). (In particular, there is a "large and ironic lapse in the logic of our criminal justice system" in which the "initial imperative is to determine the competency of defendants prospectively, to assist counsel at trial," rather than to determine whether the defendant was capable of forming a culpable mens rea at the time the crime was committed. *Habibzadah v. State*, 904 N.E.2d 367, 370–71 (Ind. Ct. App. 2009) (Mathias, J., concurring), *trans. denied*); *See also* *A.J. v. Logansport State Hosp.*, 956 N.E.2d 96, 117–18 (Ind. Ct. App. 2011) (Mathias, J., concurring); *Gross v. State*, 41 N.E.3d 1043, 1051–52 (Ind. Ct. App. 2015) (Mathias, J., concurring); *Robinson v. State*, 53 N.E.3d 1236, 1243–44 (Ind. Ct. App. 2016) (Mathias, J., concurring), *trans. denied* (all citing *Habibzadah*) ("[O]ur criminal procedure should permit a psychiatric examination of a defendant who likely suffers from serious mental illness

serious mental illnesses go to trial, the issue of their legal sanity or other mental state at the time of the offense will be adjudicated well after the fact, often by a number of years,⁷ and typically by fact-finders who are predisposed to reject a not-responsible-by-reason-of-insanity verdict as a “get out of jail free” card.⁸ Indeed, the competency-restoration process often results in *disguising* a defendant’s mental illness by having the defendant *appear* rational at trial.⁹ That appearance, coupled with a typical fact-finder’s predisposition against finding a defendant to be insane, all but guarantees guilty and guilty-but-mentally-ill verdicts, the latter having no practical difference from the former.¹⁰

Given the difficulties encountered by Indiana’s General Assembly to invest necessary resources into local communities to address Hoosiers’ mental-health needs outside of the criminal justice system, this Article advocates for the implementation of three adjustments that Indiana’s judiciary, as an independent branch of government, can implement within existing judicial infrastructures and processes to better ensure due process for and treatment of criminal defendants who may suffer from serious mental illnesses. The Indiana General Assembly has recognized Indiana Chief Justice Loretta H. Rush and Indiana’s judiciary for an “innovative mindset” and for being a national leader in innovation.¹¹ This innovation includes not only technological changes but also improving “litigation processes.”¹²

Article 1, Section 18 of the Indiana Constitution demands that Indiana’s criminal justice system “be founded on principles of reformation, and not of vindictive justice.” In the spirit of that innovative leadership and those rehabilitative principles, this Article first reviews current national statistics on serious mental illnesses and then reviews both Indiana stakeholders’ repeated pleas for resources and Indiana’s legal processes for criminal defendants with serious mental illnesses. This Article then recommends that Indiana’s judiciary can and should: (1) use a freely available, one-page medical instrument at the initial hearing with a criminal defendant to assess whether he or she may suffer

very early after arrest to determine whether the defendant could have possibly had the requisite scienter or mens rea at the time of the crime.” Gross, 41 N.E.3d at 1052 (Mathias, J., concurring)). (Part 1 of this Article describes a process in which Indiana’s judiciary can make real the opportunity to assess whether defendants suffer from serious mental illnesses at the judiciary’s first opportunity).

7. The length of time between an alleged offense and a trial is often compounded by the competency restoration process itself; *See, e.g.*, Payne v. State 144 N.E.3d 706, 709 (Ind. 2020) (noting that, after allegedly having committed offenses in 2005, the defendant spent the next eleven years undergoing competency restoration before being tried).

8. Price, *supra* note 4, at 836.

9. *Cf.* Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (noting that a defendant must have “a reasonable degree of rational understanding” of the proceedings against him to be tried).

10. *See, e.g.*, Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience & Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 79 n.179 (2006).

11. Derek R. Molter, *Joining the Indiana Supreme Court: Rookie Year Reflections*, 57 IND. L. REV. 1, 2 (2023).

12. *Id.* at 3.

from a serious mental illness; (2) establish standards to allow Indiana probation officers to become qualified mental-health specialists within their departments so they may better supervise criminal defendants with mental-health needs and assist jail staff and others pending trial; and (3) reconsider and clarify appellate review of a fact-finder’s rejection of an insanity defense when there is nonconflicting, credible expert testimony in support of the defense.

III. CURRENT STATISTICS OF SERIOUS MENTAL ILLNESSES AMONG INDIANA OFFENDERS

The population overlap between those who suffer from serious mental illnesses and offenders is well known. As the Substance Abuse and Mental Health Services Administration (“SAMHSA”) of the United States Department of Health and Human Services has explained:

A significant and growing number of people in the justice system have [mental and substance use disorders]. For example, over 70 percent of offenders have substance use disorders, and approximately 17-34 percent have serious mental illnesses¹³—rates that greatly exceed those found in the general population. Several populations, such as juveniles, female offenders, and veterans, are entering the justice system in increased numbers and have elevated rates of [co-occurring mental and substance use disorders], including substance use, trauma, and other mental disorders. These individuals often require specialized interventions to address their [disorders] and staff who are familiar with their unique needs.

People with [co-occurring mental and substance use disorders] present numerous challenges within the justice system. These individuals can at times exhibit greater impairment in psychosocial skills and are less likely to enter and successfully complete treatment. They are at greater risk for criminal recidivism and relapse. The justice system is generally ill-equipped to address the multiple needs of this population, and few specialized treatment programs exist in jails, prisons, or court and community corrections settings that provide integrated mental health and substance use services.¹⁴

In 2024, Indiana’s prosecutors filed more than 250,000 new criminal

13. Substance Abuse & Mental Health Servs. Admin., *Screening and Assessment of Co-occurring Disorders in the Justice System*, Dep’t Health & Hum. Serv., 1 (June 2019), <https://store.samhsa.gov/sites/default/files/pep19-screen-codjs.pdf> [<https://perma.cc/82WR-NMMV>]. (SAMHSA defines “serious mental illness” to include “depressive disorders, bipolar disorders, and posttraumatic stress disorder” along with “psychotic disorders.”).

14. *Id.* at 1.

cases.¹⁵ SAMSHA's assessment that 17–34% of offenders suffer from mental disorders means 42,500 to 85,000 of the people charged with criminal offenses in Indiana in 2024 likely suffer from some mental disorder.

But those are the broad numbers, and SAMSHA gets more specific. Namely, SAMSHA concludes that “approximately 3 percent of offenders” have serious “psychotic disorders,”¹⁶ which may implicate an offender's ability to appreciate the wrongfulness of his or her conduct. For Indiana defendants in 2024-filed criminal cases, that would imply that 7,500 people in 2024 were charged with an offense for which they may not have been legally culpable.

And SAMHSA's statistics are the most favorable to Hoosiers. Other reputable sources estimate that the number of Indiana inmates suffering from serious mental illnesses is significantly higher. For example, relying on recent data from the National Alliance on Mental Health, the December 2024 Annual Report of the Status of Indiana's Criminal Justice System, prepared by the Indiana Criminal Justice Institute and the Justice Reinvestment Advisory Council (“JRAC”), estimates that 6.8% of Indiana's *general* population suffers from a serious mental illness.¹⁷ That same report, relying on data from the Division of Mental Health and Addiction (“DMHA”) within Indiana's Family and Social Services Administration, estimates that 16% of Indiana's inmate population suffers from a serious mental illness.¹⁸ Applying that 16% to the 250,000 new criminal filings in 2024 implies that 40,000 Hoosiers were charged with a criminal act for which they may well not have been legally culpable or had the ability to appreciate the wrongfulness of their conduct.¹⁹

A. Current Court Treatment of Indiana Criminal Defendants with Serious Mental Illnesses

All three branches of Indiana's government are well-aware of both the scarcity of community-based resources to provide Hoosiers who suffer from serious mental illnesses with appropriate care as well as the prevalence of

15. Chief Justice Loretta H. Rush, *2025 State of the Judiciary: Your Indiana Judiciary*, IN.GOV 3 (Jan. 29, 2025), <https://www.in.gov/courts/supreme/state-of-judiciary/> [<https://perma.cc/NX2C-5X7U>] (of those 250,000-plus new criminal filings, 69,474 were felony cases); Ind. Crim. Just. Inst. & Just. Reinv. Advisory Council, *Annual Evaluation of the Status of Indiana's Criminal Justice System*, 7 (2024), https://www.in.gov/cji/grant-opportunities/files/1006_Report_2024_PDF.pdf [<https://perma.cc/S5KD-JDRK>].

16. Substance Abuse & Mental Health Servs. Admin., *supra* note 13, at 5.

17. Ind. Crim. Just. Inst., *supra* note 15, at 60 (JRAC's report does not define its use of the phrase “serious mental illness,” but the implication is that these are individuals whose mental or behavioral disorders require some measure of personalized care beyond a diagnosis and prescription).

18. *Id.* at 61.

19. *Id.* at 7 (The 16% statistic refers to the inmate population, which is nearly all felony convictions. Of course, the vast majority of the 250,000 new criminal filings in 2024 were misdemeanor charges; however, data with respect to all charged individuals rather than the inmate population has not been published by the DMHA).

serious mental illnesses within our criminal justice population. Nonetheless, the Indiana General Assembly has yet to adopt the repeated recommendations of numerous groups of stakeholders on these concerns. And that lack of community investment has limited the efficacy of well-intended diversion opportunities within the judiciary for these vulnerable Hoosiers.

B. Stakeholders Across the Political Spectrum, Across All Branches of Government, and Across all Levels of Government Plead for Community Investment

In the 1990s, Indiana's judiciary began implementing various "problem-solving courts" to "accommodate justice[-]involved individuals with specific needs and problems that were not or could not be adequately addressed in traditional courts."²⁰ Our problem-solving courts include mental-health courts that are "focused on addressing the mental health needs of individuals in the court system" by "bringing together mental health professionals, local social programs, and intensive judicial monitoring" as well as "linking eligible individuals to individually tailored programs or services."²¹ However, some thirty years later, Indiana has just fifteen mental-health courts in fourteen of our ninety-two counties.²² Meanwhile, Indiana has forty-nine adult drug courts in forty-seven counties.²³

In 2015, the Indiana General Assembly established JRAC.²⁴ JRAC consists of "leadership from the executive, legislative, and judicial branches of government" and is "charged with conducting state-level reviews of local corrections programs, county jails[,] and probation services," among other tasks.²⁵ Meanwhile, in 2019, the Indiana General Assembly also established the Jail Overcrowding Task Force to determine "why some Indiana jails are overcrowded and what can be done to ease or eliminate jail overcrowding."²⁶ Then-Justice Steven H. David chaired the Jail Overcrowding Task Force, and Justice Christopher M. Goff regularly participated in the Jail Overcrowding Task Force meetings.²⁷ The Jail Overcrowding Task Force concluded that at least one major reason for jail overcrowding in Indiana was due to "an increasing number of inmates with severe mental health issues and substance use disorders."²⁸

20. *What Are Problem-Solving Courts?*, IND. JUD. BRANCH, <https://www.in.gov/courts/iocs/pscourts/about/> [<https://perma.cc/5HAB-4M76>] (last visited Apr. 30, 2025).

21. IND. CODE §§ 33-23-16-7, 11(2) (2024).

22. Ind. Crim. Just. Inst., *supra* note 15.

23. *Id.*

24. Just. Reinv. Advisory Council, *About*, IN.GOV, <https://www.in.gov/justice/about/> [<https://perma.cc/9HPP-MLDA>] (last visited May 9, 2025).

25. *Id.*

26. JAIL OVERCROWDING TASK FORCE, *supra* note 3.

27. *Id.* at 2.

28. *Id.* at 1.

Justice Goff also chairs JRAC,²⁹ and JRAC publishes annual reports on its review of Indiana's prison populations and services.³⁰ In 2021, the Indiana General Assembly established local justice reinvestment advisory councils (local JRACs) in each Indiana county.³¹ The purpose of the local JRACs, among other things, is to collect local prison data and communicate them to JRAC.³²

JRAC's 2021 Report, the first after the establishment of the local JRACs, noted the utility of Indiana's problem-solving courts but lamented that "there is no system in place to capture the effectiveness of mental health or substance use programming in [county] jails, nor is there a system in place to capture the effectiveness of mental health programming in the [Indiana Department of Correction]."³³ JRAC's 2021 Report agreed with the recommendations of the Jail Overcrowding Task Force³⁴ and further recommended that the Indiana General Assembly:

enhance the accessibility of community-based mental health and substance use treatment programs that support the full range of needs for the criminal justice population, including recovery residences, medication-assisted treatment, and psychiatric services. It is recommended that these services be offered during and after incarceration, as both impact recidivism. State funding for behavioral health services has not increased with inflation and [t]he Indiana Behavioral Health Commission recommends a 60% increase in funding over the next four years. The Commission also recommends more mental health courts and more data collection on recidivism specific to mental health courts.³⁵

Those recommendations were repeated in JRAC's 2022 Report,³⁶ its 2023 Report,³⁷ and its 2024 Report.³⁸ And, in September 2022, Indiana's judiciary held a statewide mental-health summit with numerous stakeholders to discuss

29. Just. Reinv. Advisory Council, *Members*, IN.GOV, <https://www.in.gov/justice/members/> [https://perma.cc/ZFD8-4KJ7] (last visited May 9, 2025).

30. Just. Reinv. Advisory Council, *Reports*, IN.GOV, https://www.in.gov/justice/reports/#Annual_Reports [https://perma.cc/2RWJ-A4TV] (last visited May 9, 2025).

31. IND. CODE § 33-38-9.5-4(a) (2024).

32. IND. CODE § 33-38-9.5-6(6) (2024).

33. Christine Reynolds, et al., *Indiana Criminal Code Reform Annual Evaluation*, Ind. Crim. Just. Inst. & Just. Reinv. Advisory Council, 7 (Dec. 2021), <https://www.in.gov/justice/files/jrac-2021-12-01-annualreport.pdf> [https://perma.cc/6DME-E6YR].

34. *Id.* at 47.

35. *Id.* at 48.

36. *Id.*

37. *Id.* at 78.

38. *Id.* at 82.

these and related mental-health issues.³⁹

JRAC's 2023 Report added an additional recommendation, namely, that the Indiana General Assembly at least prioritize "program capacity, staffing, and follow-up services" for substance-use and mental-health programs in county jails "to increase program accessibility and success."⁴⁰ JRAC's 2024 Report repeated that prioritized need and expounded upon it:

In last year's survey of criminal justice stakeholders, prioritizing program capacity, staffing, and follow-up services would be most beneficial for substance use and mental health programs to increase program accessibility and success. In this year's focus groups, participants provided additional recommendations that counties need greater access to a mental health professional in county jails and more local mental health and dual diagnosis providers, especially in rural areas. Recent budgetary and legislative actions, as well as the long-term plans to improve mental health and substance use infrastructure in the state are all steps in the right direction. However, continued attention, funding, and evaluation of existing mental health and substance use programs are needed to provide these services to individuals currently and formerly involved in the justice system.⁴¹

At the same time the Jail Overcrowding Task Force and JRAC were making their repeated and overlapping recommendations for additional resources in our local communities, in March 2020, the Conference of Chief Justices and the Conference of State Court Administrators established the National Judicial Task Force to Examine State Courts' Response to Mental Illness.⁴² Chief Justice Loretta H. Rush served as a co-chair to the Education and Partnerships Work Group within the National Judicial Task Force, and Justice Goff was also a member of that Work Group.⁴³ The National Judicial Task Force published its revised findings in February 2023 under the leadership of Chief Justice Rush as the President of the Conference of Chief Justices.⁴⁴ As the National Judicial Task Force summarized:

39. Press Release, Indiana Judicial Branch, Community teams from 92 counties to attend Mental Health Summit (Sept. 19, 2022), <https://www.in.gov/courts/news/2022/0919/> [<https://perma.cc/UDP5-3YWZ>].

40. *Annual Evaluation: Indiana Criminal Code Reform* (9th ed.), Ind. Crim. Just. Inst. & Just. Reinv. Advisory Council, 78 (Dec. 2023), <https://www.in.gov/cji/grant-opportunities/files/1006-Report-2023.pdf> [<https://perma.cc/TMF3-G9NU>].

41. Ind. Crim. Just. Inst., *supra* note 15, at 82.

42. Nat'l Jud. Task Force to Examine State Courts' Response to Mental Illness, State Courts Leading Change: Report and Recommendations 4–5, <https://www.ncsc.org/behavioralhealth> [<https://perma.cc/LGV7-BLXL>] (last visited May 1, 2025).

43. *Id.* at 5.

44. Nat'l Jud. Task Force to Examine State Courts' Response to Mental Illness, State Courts Leading Change: Report and Recommendations 4, <https://www.ncsc.org/behavioralhealth> [<https://perma.cc/7XYX-XMGP>] (last visited May 1, 2025).

The prevalence of mental illness in the United States has an enormous impact on states and communities and a disproportionate impact on our state and local courts. According to the National Institute of Mental Health, nearly one in five U.S. adults live with a mental illness—over 50 million in 2020—and over 13 million adults live with serious mental illness. For too many individuals with serious mental illness, substance use disorder, or both, the justice system is the de facto entry point for obtaining treatment and services. There are many causes, not the least of which is the criminalization of mental illness and the lack of alternative approaches and resources to support the diversion of individuals from the courts and into treatment.

People with mental illnesses in the U.S. are 10 times more likely to be incarcerated than they are to be hospitalized. Every year, approximately 2 million arrests are made of people with serious mental illnesses. As a result, more than 70 percent of people in American jails and prisons have at least one diagnosed mental illness or substance use disorder, or both. Up to a third of those incarcerated have serious mental illnesses, a much higher rate than is found at large. On any given day, approximately 380,000 people with mental illnesses are in jail or prison across the U.S., and another 574,000 are under some form of correctional supervision.⁴⁵

After nearly three years of hard work, the National Judicial Task Force published a number of recommendations states may employ to address the mental-health needs of justice-involved individuals, including best practices for problem-solving courts and civil commitment proceedings.⁴⁶

The repeated requests for community investment in mental-health resources crosses the political spectrum and all branches and levels of government. They are not requests to whimsically dispose of scarce funds; they are requests for investments with well-established returns. As former Indiana Lieutenant Governor Suzanne Crouch recently recognized:

The United States is in a behavioral health crisis, and Indiana is no exception. Millions of Americans struggle with mental illness and substance use disorders. Yet, too many lack access to the vital care necessary due to the extreme shortage of behavioral health beds. To remedy the situation and avoid further dire consequences, we must prioritize action to expand access to treatment.

....

45. *Id.* at 9.

46. *Id.* at 23–44.

Indiana only has 11.9 psychiatric beds per 100,000 people, which is far below the recommended 50 beds per 100,000 necessary for adequate care. This means thousands of Hoosiers with severe mental illnesses are left without access to proper treatment, and health care providers are at risk of being overrun. In Marion County alone, 26,000 adults required but did not receive treatment for severe mental health conditions.

The consequences of this shortage are devastating. Individuals experiencing crisis who do not receive inpatient care often end up in emergency rooms where they can wait days or even weeks for a bed to open up. Others land in jails, where their conditions only worsen, or on the streets, where they struggle to survive without proper treatment.⁴⁷

As The Honorable Ms. Crouch further noted, the toll on Hoosiers is not only personal but also economic. In 2023 alone, Indiana lost an estimated \$4.2 billion to lost productivity, emergency care costs, and costs on the criminal justice system from untreated mental illnesses.⁴⁸ Thus:

Investing in more psychiatric beds is not just a moral obligation; it's a practical necessity. When patients receive the right care in the right setting, it ultimately improves their chances of recovery and reduces strain on other public systems. States that have prioritized mental health care have seen significant reductions in ER visits, incarceration rates, and overall health care costs.⁴⁹

And not only do investments in local substance-abuse and mental-health treatments produce positive returns, but they are also substantially cheaper than incarceration costs. Indiana's counties spend an average of about \$74 per inmate per day to keep an adult incarcerated.⁵⁰ Meanwhile, behavioral therapy is estimated to cost an average of \$105 per offender in total; home confinement with electronic monitoring is estimated to cost an average of \$2 to \$4 per defendant per day; pretrial probation is estimated to cost an average of \$3.42 per defendant per day; participation in a problem-solving drug court is estimated to cost an average of \$8 to \$14 per defendant per day; and placement in a halfway

47. Crouch, *supra* note 1.

48. *Id.*

49. *Id.*

50. Niki Kelly, *Indiana Department of Correction readies to pay \$12 million in jail back payments*, IND. CAP. CHRONICLE (June 11, 2025), <https://indianacapitalchronicle.com/2025/06/11/indiana-department-of-correction-readies-to-pay-12-million-in-back-jail-payments/> [https://perma.cc/5XLN-LLAP] (last visited June 11, 2025) (Incarceration of adults in the Indiana Department of Correction, by contrast, costs approximately \$52.61 per inmate per day); *Frequently Asked Questions, How much does it cost to keep an offender in prison?*, IN.GOV, <https://faqs.in.gov/hc/en-us/articles/115005238288-How-much-does-it-cost-to-keep-an-offender-in-prison> [https://perma.cc/CK4C-WLHK] (last visited May 9, 2025).

house is estimated to cost an average of \$31.47 per defendant per day.⁵¹

The following chart demonstrates the daily cost differentials of those placements using the data above that as many as 40,000 Hoosiers in 2024 may have been charged with an offense while suffering from a serious mental illness:

Placement	Average Cost <i>Per Day</i> Per Defendant	Average <i>Daily</i> Cost if 40,000 Defendants Suffering from Serious Mental Illnesses Were Placed Here	Average Cost Savings <i>Per Day</i> if 40,000 Inmates Were Moved from County Incarceration to this Placement
Incarceration in the County Jails	\$74	\$2,960,000	\$0
Placement in Halfway Houses	\$31.47	\$1,258,800	\$1,701,200
Release to the Supervision of a Problem-Solving Court	\$8 to \$14	\$320,000 to \$560,000	\$2,40400,000 to \$2,640,000
Release on Pretrial Probation	\$3.42	\$136,800	\$2,823,200
Release to Home Confinement with Electronic Monitoring	\$2 to \$4	\$80,000 to \$160,000	\$2,800,000 to \$2,880,000
Behavioral Therapy	\$105/defendant	\$4,200,000 <i>total</i>	Cheaper than just 35 hours of incarceration.

Further, the practices of the Indiana Department of Corrections (“DOC”) have exacerbated the drain of county-jail costs on local economies.⁵² Indiana law caps the per diem payment the DOC pays to county jails that are holding DOC-sentenced inmates who are awaiting transportation to a DOC facility at \$40 per day,⁵³ while the average cost to the DOC to house one adult inmate per day is \$52.61.⁵⁴ As a result, it is in the DOC’s fiscal interests to simply pay the

51. Linda Layton et al., *An Elected Official’s Guide to Community Correctional Options* (2d ed.), Bureau Just. Assistance, 48 (July 2010), <https://www.appa-net.org/eweb/docs/appa/pubs/EOGCCO.pdf> [<https://perma.cc/S9PJ-EWDB>] (last visited Nov. 15, 2025).

52. See Ind. Crim. Justice Inst., *supra* note 15, at 75.

53. *Id.* Indiana’s 2025 budget increases this amount to \$42 per day, which an executive officer of the Indiana Sheriffs’ Association described as “better than nothing.”; Niki Kelly, *Indiana Department of Correction readies to pay \$12 million in jail back payments*, IND. CAP. CHRONICLE (June 11, 2025), <https://indianacapitalchronicle.com/2025/06/11/indiana-department-of-correction-readies-to-pay-12-million-in-back-jail-payments/> [<https://perma.cc/5XLN-LLAP>] (last visited Nov. 15, 2025).

54. IN.GOV, *supra* note 50.

per diem and to not transport the inmate to a DOC facility.⁵⁵ Local officials have complained that the DOC's practice is especially prevalent with respect to level six felony offenders and inmates with "complex medical or mental health needs."⁵⁶ The DOC's practice results in substantial additional costs for our county jails and further prevents local communities from using their limited funds "toward things like mental health and substance use programs or professionals."⁵⁷

Many Hoosiers with mental illnesses could avoid the criminal justice system altogether with adequate local and state mental-health facilities and professional care. Indiana's current path of not investing necessary funds into local communities so that Hoosiers with mental illnesses can be diverted into medically appropriate programming below incarceration is the worst-case scenario for Hoosiers. Not only are Hoosiers overspending, we are overspending on prison care, which produces the worst return on investment.

C. Indiana's Process for Criminal Defendants with Serious Mental Illnesses

In Indiana, individuals who suffer from mental illnesses and who are charged with criminal offenses have limited placement opportunities and even more limited opportunities for relief at trial.⁵⁸ If they have counsel, and counsel is aware or becomes aware of mental-health issues with the defendant, or if the court becomes aware of those issues, they may be ordered to participate in competency-restoration services at any time.⁵⁹ Those services are not focused on whether defendants are legally culpable or have the ability to understand the wrongfulness of their conduct at a time of the alleged offenses. Instead, these services are narrowly focused on the defendant's ability to understand the judicial processes to which they are being subjected to and to assist their counsel at trial.⁶⁰

Pretrial diversion options for criminal defendants who may suffer from serious mental illnesses are scarce, even when the presiding judicial officer becomes aware of a mental-health issue. As noted above, there are only fifteen mental-health problem-solving courts in fourteen Indiana counties, and the ultimate focus of Indiana's problem-solving courts in general is just that—to solve the underlying "problem" that resulted in defendants' interactions with the justice system.⁶¹ For our mental-health courts, that means providing defendant-participants with "treatment plans" that address their mental-health issues by: "(a) identifying an individual participant's strengths and needs through

55. Ind. Crim. Just. Inst., *supra* note 15, at 75.

56. *Id.*

57. *Id.*

58. See IND. R. CRIM. P. 2.1 to 2.7 (2024).

59. IND. CODE § 35-36-3-1 (2024).

60. *Id.*

61. See, e.g., Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1478 (2012).

assessment, (b) defining goals and objectives based on identified need, and (c) establishing the services to be provided to assist with achieving the stated goals and objectives.”⁶² Because of Indiana’s substantial bed shortage, Indiana’s mental-health courts often refer defendant-participants to expensive private vendors and monitor their progress in those facilities.⁶³

The more serious the charged offense or the more serious the apparent mental illness, the less likely any trial judge may be to place defendants into a pretrial community placement option. Recognizing this, in 2023 the Indiana General Assembly added Indiana Code Chapter 33-23-18 as a new chapter to the Indiana Code.⁶⁴ According to the provisions of that chapter, local JRACs may establish mental-health referral programs in compliance with established DMHA rules.⁶⁵ If a sheriff, prosecutor, or defense counsel has reason to believe that a person who has been both detained and charged with an offense might benefit from the referral program, they may petition the trial court to select an appropriate mental-health professional to examine the defendant.⁶⁶ That mental-health professional must then evaluate the defendant and make a confidential written recommendation to the trial court regarding the defendant’s pretrial placement.⁶⁷

If the defendant has not been charged with or convicted of a crime of violence, the court may, as a condition of pretrial release, refer the defendant to an appropriate mental-health treatment provider.⁶⁸ If the defendant has been charged with or convicted of a crime of violence, the court may refer him or her to an appropriate mental-health treatment provider in a secure facility operated by the DOC or operated or licensed by the DMHA.⁶⁹

To date, however, DMHA has yet to establish the prerequisite rules for local JRACs to implement a mental-health referral program.⁷⁰ Accordingly, neither any local JRAC reports⁷¹ nor state-level JRAC reports⁷² indicates that any such programs have been implemented. And, again, it is not clear how effective a mental-health referral program, once established, might be without community resources. So, mentally ill defendants charged with violent crimes have no alternative to DOC placement.

62. IND. PROBLEM-SOLVING COURT RULE 3 (2024), <https://www.in.gov/courts/iocs/files/pscourts-psc-rules.pdf>.

63. *Id.*

64. IND. PUB. L. 205-2023, § 27 (eff. July 1, 2023).

65. IND. CODE § 33-23-18-2.

66. IND. CODE § 33-23-18-3.

67. IND. CODE §§ 33-23-18-4, 5.

68. IND. CODE § 33-23-18-5(a).

69. IND. CODE § 33-23-18-5(b).

70. *See generally* 440 IND. ADMIN. CODE 1-2-1 to 11-3-8 (2024).

71. *See generally* Just. Reinv. Advisory Council, *Local JRAC 2023 Annual Report Summary*, State of Ind. (Sept. 2024), <https://www.in.gov/justice/files/jrac-2023-localjracs-annual-report.pdf> [<https://perma.cc/T4F9-TMXT>].

72. Ind. Crim. Just. Inst., *supra* note 15; Ind. Crim. Just. Inst., *supra* note 40.

Defendants with the most serious of mental illnesses,⁷³ who proceed to trial and wish to challenge their ability to have appreciated the wrongfulness of their conduct at the time of the offense, must proceed by way of Indiana's statutory insanity defense.⁷⁴ That defense provides that:

(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.⁷⁵

In general, to interpose the defense of insanity, defendants must file their notices of intent with the trial court no later than twenty days before the omnibus date.⁷⁶ However, the trial court may permit that notice to be filed "at any time before the commencement of the trial" when doing so is "in the interests of justice" and supported by a "showing of good cause."⁷⁷

The purpose of the notice requirement is to enable the trial court to "appoint independent experts to examine th[e] defendant's particular psychiatric characteristics and offer an opinion on the validity of the claim."⁷⁸ Indeed, once a defendant has provided the requisite notice, the trial court must then appoint two or three competent and disinterested medical experts, at least one of which must be either a psychiatrist or a psychologist, if a homicide has not been alleged, and at least one psychiatrist and one psychologist if a homicide has been alleged.⁷⁹ If a defendant refuses to cooperate with the court-appointed medical experts, the defendant may be excluded from presenting other evidence relevant to his or her defense unless the defendant can show that his or her lack of

73. Notably, the ability to *form* a criminal intent is not equivalent to the question of whether the defendant *had* any such intent; *See, e.g., State v. Brooks-Brown*, 246 N.E.3d 312, 317-23 (Ind. Ct. App. 2024), *trans. denied*.

74. Nationally, an insanity defense is raised in "less than 1%" of felony cases and is successful "only . . . 25% of the time" it is raised, with "approximately 70% of the cases in which the defense has been successfully employed" coming from a pretrial agreement between the defense and the prosecution; *In support of the insanity defense*, MENTAL HEALTH AM., <https://mhanational.org/position-statements/in-support-of-the-insanity-defense/#:~:text=Despite%20public%20fears%2C%20defendants%20do,successful%2025%25%20of%20the%20time> [https://perma.cc/7WH4-86CA] (last visited Nov. 16, 2025).

75. IND. CODE § 35-41-3-6 (2024).

76. IND. CODE § 35-36-2-1 (2024).

77. IND. CODE § 35-36-2-1 (2024).

78. *McClain v. State*, 678 N.E.2d 104, 109 (Ind. 1997) (citing IND. CODE § 35-36-2-2).

79. IND. CODE § 35-36-2-2(b), (c) (2024).

cooperation was caused by the mental illness.⁸⁰ And the Indiana Code permits both the defendant and the State to employ their own experts to testify with the court's experts.⁸¹

Once the defense of insanity is properly interposed, the legal truth of that defense will be determined by the fact-finder.⁸² To present an insanity defense, a defendant must prove by a preponderance of the evidence (1) that the defendant suffers from a "mental disease or defect" and (2) that the "mental disease or defect" rendered the defendant unable to appreciate the wrongfulness of his or her conduct at the time of the offense.⁸³ A "mental disease or defect . . . connotes a disorder naturally occurring or a condition of the mind, as opposed to an induced condition (whether self-induced or otherwise)."⁸⁴

The fact-finder may find the defendant guilty, not guilty, not responsible by reason of insanity ("NRBRI"), or guilty but mentally ill ("GBMI").⁸⁵ If the fact-finder agrees with the defendant's defense and finds the defendant NRBRI, the State must then initiate civil commitment proceedings.⁸⁶ If the fact-finder finds the defendant GBMI, the court "shall sentence the defendant in the same manner as a defendant found guilty."⁸⁷ However, the court may consider a physician's evaluation prior to sentencing, and, once incarcerated, the defendant "shall be further evaluated and then treated in such a manner as is psychiatrically indicated for the defendant's mental illness."⁸⁸ But the defendant will be in the custody of the Indiana Department of Correction,⁸⁹ which, again, is an "antitherapeutic" placement for those with serious mental illnesses.⁹⁰

While a GBMI finding may be established by proof of a mental illness at the time of the offense,⁹¹ "[p]roof of mental illness alone is not enough" to obtain an NRBRI finding.⁹² For that, a defendant must also demonstrate that, "as a result" of the mental illness, he or she was unable to appreciate the wrongfulness of his or her conduct at the time of the offense.⁹³ The Indiana Supreme Court has said that the statutory language of being "unable to appreciate the wrongfulness of the conduct at the time" simply means "the

80. IND. CODE § 35-36-2-2(d) (2024).

81. IND. CODE § 35-36-2-2(d) (2024).

82. IND. CODE § 35-36-2-3 (2024).

83. IND. CODE §§ 35-41-3-6(a) (2024); IND. CODE §§ 35-41-4-1(b) (2024).

84. *McClain v. State*, 678 N.E.2d 104, 109 (Ind. 1997) (the Indiana General Assembly has since included the mental condition of the "effects of battery" as a mental disease or defect that may proceed under the insanity defense); IND. CODE § 35-41-3-11(b)(1) (2024).

85. IND. CODE § 35-36-2-3 (2024).

86. IND. CODE § 35-36-2-4 (2024).

87. IND. CODE § 35-36-2-5(a) (2024).

88. IND. CODE § 35-36-2-5(b), (c) (2024).

89. IND. CODE § 35-36-2-5(a) (2024).

90. *Miller*, *supra* note 2, at 1183-84 (1997).

91. *Weeks v. State*, 697 N.E.2d 28, 29 (Ind. 1998).

92. *Barcroft v. State*, 111 N.E.3d 997, 1002 (Ind. 2018).

93. IND. CODE § 35-41-3-6(a) (2024).

inability to differentiate right from wrong.”⁹⁴ Following the Indiana General Assembly’s revision of the insanity defense in 1984,⁹⁵ the Indiana Supreme Court has held that a fact-finder erred in rejecting an insanity defense on only two occasions: Once where the defendant had been diagnosed with chronic paranoid schizophrenia and delusional disorder,⁹⁶ and once where the defendant had been diagnosed with bipolar disorder, paranoid delusions, and intermittent psychosis.⁹⁷

IV. RECOMMENDATIONS FOR IDENTIFICATION OF CRIMINAL DEFENDANTS WITH SERIOUS MENTAL ILLNESSES; FOR REDUCTION OF THE COST OF SAFELY TREATING THEM; AND TO IMPROVE THEIR OUTCOMES IN INDIANA’S CRIMINAL JUSTICE SYSTEM

A. Amend Indiana Criminal Rule 2.3 to Require Judicial Officers at an Initial Hearing to Administer a Peer-Reviewed Mental-Health Screening Instrument to Defendants

This Article’s first recommendation to improve the judicial processes received by criminal defendants with possible serious mental illnesses is to amend Indiana Criminal Rule 2.3, which establishes the procedure for initial hearings. The initial hearing is the judiciary’s first contact with criminal defendants. As SAMHSA has explained:

The absence of adequate screening for [mental health disorders] prevents early identification of problems; often undermines successful progress in treatment; and can lead to substance use relapse, recurrence of mental health symptoms, criminal recidivism, and use of expensive community resources such as crisis care and hospital beds. Lack of screening for [mental health disorders] also prevents comprehensive treatment/case planning, matching justice-involved people to appropriate levels of treatment and supervision, and rapid placement in specialized programs to address [mental health disorders].

Screening for [mental health disorders] should be provided at the earliest possible point in the justice system to expedite consideration of these issues in decisions related to sentencing, release from custody, placement in institutional or community settings, and referral to treatment and other related services. Screening provides a brief review of symptoms, behaviors, and other salient background information that may indicate the presence of a particular disorder or psychosocial

94. *Benefiel v. State*, 578 N.E.2d 338, 350 (Ind. 1991).

95. *Baird v. State*, 688 N.E.2d 911, 915 n.3 (1997).

96. *Payne v. State*, 144 N.E.3d 706, 709 (Ind. 2020).

97. *Galloway v. State*, 938 N.E.2d 699, 703, 706 (Ind. 2010).

problems. Results of screening are typically used to determine the need for further assessment. Assessment provides a lengthier and more intensive review of psychosocial problems that can lead to diagnoses and placement in different types or levels of treatment and supervision services.⁹⁸

As explained below, Criminal Rule 2.3 already goes beyond constitutional and statutory requirements, albeit to ensure that criminal defendants do not receive abusive or unwanted processes. And Indiana's judicial officers at initial hearings already ask numerous questions of defendants to discern the need to appoint counsel and to set bail. Thus, the framework in which to add a process for judicial officers to administer a one-page, publicly available, and peer-reviewed screening instrument to identify those defendants with serious mental illnesses is already in place.

1. Indiana's Current Initial Hearing Procedures Under Indiana Criminal Rule 2.3

The criminal process in Indiana begins when a county prosecutor, or his or her deputy, files a charging information against a defendant.⁹⁹ The decision to charge a defendant is almost wholly within the prosecutor's discretion,¹⁰⁰ and our Rules of Professional Conduct require the prosecutor's decision to be based on his or her own assessment of probable cause.¹⁰¹

If a defendant is not already in custody at the time the information is filed, a judicial officer will issue an arrest warrant. This requires the judicial officer to determine, *ex parte*, that "probable cause exists" that "the person [identified as the defendant] committed a crime."¹⁰² Likewise, if a defendant is already in custody when the prosecutor files the information, the judicial officer must promptly determine (again, *ex parte*) that there exists probable cause that "any crime was committed and that the arrested person committed it."¹⁰³ These front-end probable-cause determinations by judicial officers are required under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution for the State to hold a defendant,¹⁰⁴ and, if the judicial officer finds probable cause to be lacking, the remedy is the defendant's

98. Substance Abuse & Mental Health Servs. Admin., *supra* note 13, at 2 (emphasis added).

99. IND. R. CRIM. P. 2.1 (2024) (Indiana also permits grand juries to issue indictments that allege the commission of a criminal offense, but grand jury indictments in Indiana are exceedingly rare); *See id.*

100. *Lamotte v. State*, 495 N.E.2d 729, 733-34 (Ind. 1986). (However, a prosecutor may not file charges out of vindictiveness or "based upon an unjustifiable standard such as race, religion, or other arbitrary classification;" *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *See also Warner v. State*, 773 N.E.2d 239, 243 (Ind. 2002).

101. IND. R. PROF. COND. 3.8(a) (2024).

102. IND. CODE § 35-33-2-1(b), (c)(2) (2024).

103. IND. CODE §§ 35-33-7-2 to 3 (2024).

104. *Gerstein v. Pugh*, 420 U.S. 103, 122-25 (1975).

release, not the dismissal of the information.¹⁰⁵

Upon arrest, a defendant is entitled to a “prompt[] . . . initial hearing.”¹⁰⁶ At that hearing, Indiana Code section 35-33-7-5 directs that the judicial officer “shall inform” the defendant of his or her right to counsel, including the right to counsel at public expense; the right to a speedy trial; the amount and conditions of bail; the right against self-incrimination; the nature of the charges; and that a preliminary plea of not guilty will be entered.¹⁰⁷ The court also must give a copy of any felony charges to the defendant¹⁰⁸ and set the omnibus date.¹⁰⁹ Additional advisements may be required depending on the circumstances.¹¹⁰

Indiana Criminal Rule 2.3 implements those statutory requirements and also supplements them:

(A) Advisements. The court must advise the defendant of all applicable constitutional rights and deadlines under Ind. Code § 35-33-7-5.

(B) Preliminary Plea. The court must enter a preliminary plea of not guilty unless a defendant enters a different plea.

(C) Unrepresented Defendant. If the defendant is unrepresented and has not waived the right to counsel, the state must not engage in plea negotiations or diversion agreements and the court must not accept a plea of guilty.

(D) Waiver of Hearing. Upon a request from defendant’s counsel, a court may waive an initial hearing.¹¹¹

Subparts (C) and (D) are unique to the Rule and are not codified in the Indiana Code.¹¹² Subpart (C) prohibits the State from engaging in plea negotiations prior to a judicial determination of a defendant’s representation by counsel, which prevents potentially abusive negotiation tactics by the State.¹¹³ Subpart (C) also prohibits the court from accepting a potentially uninformed plea of guilty prior to the determination of a defendant’s representation by counsel, which reinforces the constitutional guarantee that a guilty plea be made knowingly and voluntarily.¹¹⁴ Likewise, subpart (D) allows a defendant to waive his or her right

105. *Flowers v. State*, 738 N.E.2d 1051, 1054-55 (Ind. 2000).

106. IND. CODE §§ 35-33-7-1, 4 (2024).

107. IND. CODE § 35-33-7-5 (2024).

108. IND. CODE § 35-33-7-5 (2024).

109. IND. CODE § 35-36-8-1 (2024).

110. IND. CODE § 35-33-7-5(8) (2024).

111. IND. R. CRIM. P. 2.3 (2024).

112. *See* IND. CODE § 35-33-7-5 (2024).

113. *See* IND. R. CRIM. P. 2.3(C) (2024).

114. *See Ponce v. State*, 9 N.E.3d 1265, 1274 (Ind. 2014).

to an initial hearing only through counsel.¹¹⁵

While Criminal Rule 2.3's supplemental procedures are not inconsistent with Indiana's statutes, even if they were, Indiana law is well settled that a rule of procedure supersedes a conflicting statute on matters of procedure.¹¹⁶ As the Indiana Supreme Court has explained:

The Indiana Constitution vests the General Assembly with the “[l]egislative authority,” Ind. Const. art. 4, § 1, vests our state courts with the “judicial power,” *id.* art. 7, § 1, and instructs that neither independent branch “shall exercise any of the functions” of the other. *Id.* art. 3, § 1. Enacting laws to protect Hoosiers’ ““peace, safety, and well-being”” is a legislative function. *Whittington v. State*, 669 N.E.2d 1363, 1369 n.6 (Ind. 1996) (quoting Ind. Const. art. 1, § 1). And promulgating procedural rules for litigating disputes about those laws is part of the judicial function. *State ex rel. Bicanic v. Lake Cir. Ct.*, 260 Ind. 73, 76, 292 N.E.2d 596, 598 (1973) (“The Supreme Court has the inherent power to create rules of procedure and [that] right has been recognized by the Indiana General Assembly.”).

Generally speaking, laws which establish rights and responsibilities are substantive (the legislative prerogative), and laws which “merely prescribe the manner in which such rights and responsibilities may be exercised and enforced” are procedural (the judicial prerogative). *Church [v. State]*, 189 N.E.3d [580,] 588 [(Ind. 2022)] (quotations omitted). So under our separation of powers, if a “statute is a substantive law, then it supersedes our Trial Rules, but if such statute merely establishes a rule of procedure, then our Trial Rules would supersede the statute.” *Id.* (cleaned up).¹¹⁷

Thus, it is inherently within the function of the judiciary to develop rules of judicial procedure, and that function includes the promulgation of rules like Criminal Rule 2.3. Indeed, Criminal Rule 2.3 proves the point, both implementing the statutory procedure for initial hearings and supplementing the Indiana Code by imposing on the State and our judicial officers’ additional requirements with respect to unrepresented defendants at initial hearings to provide them with more effective process.

2. Judicial Officers Are Already Required to Ask Defendants Meaningful Questions at Initial Hearings

Two of the essential purposes of the initial hearing are to determine a

115. IND. R. CRIM. P. 2.3(D) (2024).

116. *Mellowitz v. Ball State Univ.*, 221 N.E.3d 1214, 1221 (Ind. 2023).

117. *Id.* (first paragraph alterations original to *Mellowitz*).

defendant's ability to afford counsel and to set the conditions of his or her bail.¹¹⁸ In determining whether a defendant can afford counsel, the Indiana Supreme Court has stated:

The guarantee of the right to be represented by counsel includes the right for an indigent defendant in a criminal prosecution to have counsel provided for him at state expense. It is a judicial function to determine whether counsel shall be appointed at public expense, and this determination is within the sound discretion of the trial judge. While it is not possible to set specific monetary guidelines which would determine a defendant's indigency, there are several factors which must be considered. Since we are dealing with such a fundamental constitutional right, the record in each case must show that careful consideration commensurate with the right at stake has been given to the defendant.

....

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.¹¹⁹

Similarly, in a recent opinion that reviewed Indiana's history of bail and our judiciary's modern practices in determining bail, our Supreme Court held that Indiana's trial courts "should consider *any* factor relevant to the [defendant's] risk of nonappearance and potential danger to the community."¹²⁰ These factors include the charges against the defendant; the defendant's criminal history; whether the defendant is already on pretrial release; and whether the defendant has a history of probation, parole, or other community supervision.¹²¹ They also include, among other things:

the length and character of the defendant's residence in the community;

118. IND. CODE § 33-35-7-5 (2024).

119. *Moore v. State*, 273 Ind. 4, 7-8, 401 N.E.2d 676, 678-79 (1980) (citations omitted).

120. *DeWees v. State*, 180 N.E.3d 261, 266 (Ind. 2022) (bold font removed; italicized font in original).

121. *Id.* at 267 n.6.

the defendant's employment status and history; the defendant's criminal history or juvenile record; the defendant's family ties and relationships; the defendant's character, reputation, habits, and mental condition; the nature and gravity of the offense and the potential penalty; and any other factors that may indicate that the defendant might not recognize and adhere to the authority of the court to bring the defendant to trial.¹²²

The presiding judicial officer's authority to obtain this information is by way of Indiana Criminal Rule 2.6 and Indiana Code Chapter 35-33-8. The information obtained is then input into a Court-approved evidence-based risk assessment tool to determine that defendant's likelihood to re-offend.¹²³

Notably, Criminal Rule 2.6(D) provides as follows with respect to statements made by a defendant to a judicial officer in the determination of bail or other pretrial release:

(1) Prohibited Uses. Evidence of an arrestee's statements and evidence derived from those statements made for use in preparing an authorized evidence-based risk assessment tool are not admissible against the arrestee in any civil or criminal proceeding.

(2) Exceptions. The court may admit such statements:

(a) in a pretrial proceeding involving the arrestee; or

(b) in any proceeding in which another statement made in preparing an authorized evidence-based risk assessment tool has been introduced, if in fairness the statements ought to be considered together.

(3) Statements. No statements made for these purposes may be used in any other court except in a pretrial proceeding.¹²⁴

Thus, Indiana's initial hearing requirements already require our judicial officers to ask meaningful questions of defendants to properly assess their

122. *Id.* at 267 (citations and quotation marks omitted).

123. IND. R. CRIM. P. 2.6(B) (2024). For adult offenders, Indiana's evidence-based risk assessment tool is called the Indiana Risk Assessment System ("IRAS"). See *Indiana's New Risk Assessment Tools: What You Should Know*, IND. CT. TIMES (Apr. 13, 2011), <https://times.courts.in.gov/2011/04/13/risk-assessment/> [<https://perma.cc/KFF3-GFQL>] (Although one of the six key "domains" upon which an IRAS assessment is based includes information relating to the defendant's "mental health," that information is derived from the defendant's self-reporting of the quality of his or her own mental health; IRAS itself is focused not on discerning the impact of the defendant's mental health on his or her ability to appreciate the wrongfulness of the alleged conduct but is instead focused only on determining "the individual's risk for re-offense").

124. IND. R. CRIM. P. 2.6(D) (2024).

ability to afford counsel and the conditions of any appropriate pretrial release. And, at least in some circumstances, a defendant's responses to the judicial officer's questions may not be used against the defendant later.

3. Adding a Brief Mental Health Colloquy with the Defendant Would Be Easy and Effective

In December 2023, the National Center for State Courts' National Judicial Task Force to Examine State Courts' Response to Mental Illness issued a Judges' Guide to Mental Health Diversion (the "Judges' Guide").¹²⁵ The Judges' Guide "is intended to serve as a resource framework for courts to use to promote and implement diversion strategies for individuals with behavioral health needs in their communities."¹²⁶ As the Judges' Guide recognizes, "[t]he goal" for judicial officers "should be to identify individuals who are appropriate for diversion based on objective criteria," as "subjective information leads to perceptions of, if not actual, implicit or explicit bias" as well as "poor public safety outcomes."¹²⁷ "Ideally, everyone who is booked, even if it is a book-and-release process, is screened."¹²⁸

The Judges' Guide then endorses the use of SAMHSA's Report on Screening and Assessment of Co-Occurring Disorders in the Justice System (the "SAMHSA Report") to identify the best tool for a given jurisdiction's needs.¹²⁹ The SAMHSA Report, in turn, identifies numerous peer-reviewed mental-health screening instruments.¹³⁰ For each instrument, the SAMHSA Report identifies the ideal context in which that instrument should be used as well as evidence-backed strengths and weaknesses.¹³¹ And the SAMHSA Report provides helpful internet links to access the identified instruments along with identifying each instrument as either a licensed product or a product in the public domain.¹³²

Included in the SAMHSA Report for general screening instruments for mental disorders is the Brief Jail Mental Health Screen (the "BJMHS").¹³³ The BJMHS is a one-page screening instrument, is in the public domain, and is included with this Article as Appendix A.¹³⁴ Policy Research Associates, Inc. developed the BJMHS to be administered by jail or judicial officers who have

125. Judges' Guide to Mental Health Diversion 1 (Dec. 2023), <https://cdm16501.contentdm.oclc.org/digital/collection/spcts/id/593> [<https://perma.cc/S2S5-8WBS>].

126. *Id.* at 2.

127. *Id.* at 7, n.12.

128. *Id.* at 7.

129. *Id.* at 9.

130. *See generally* Substance Abuse & Mental Health Servs. Admin., *supra* note 13.

131. *Id.*

132. *Id.*

133. *Id.* at 91.

134. *Id.*

little to no mental-health training.¹³⁵ The goal of the BJMHS is to provide those officers with “an efficient mental health screen that will aid in the early identification of severe mental illnesses and other acute psychiatric problems during the intake process.”¹³⁶ The BJMHS consists of the following eight questions:

1. Do you *currently* believe that someone can control your mind by putting thoughts into your head or taking thoughts out of your head?
2. Do you *currently* feel that other people know your thoughts and can read your mind?
3. Have you *currently* lost or gained as much as two pounds a week for several weeks without even trying?
4. Have you or your family or friends noticed that you are *currently* much more active than you usually are?
5. Do you *currently* feel like you have to talk or move more slowly than you usually do?
6. Have there *currently* been a few weeks when you felt like you were useless or sinful?
7. Are you *currently* taking any medication prescribed for you by a physician for any emotional or mental health problems?
8. Have you ever been in a hospital for emotional or mental health problems?¹³⁷

The BJMHS allows the defendant to answer “yes” or “no” to each of those questions.¹³⁸ If the defendant refuses to answer or does not know an answer, the BJMHS instructs the administering officer to not mark a response and instead to indicate in a provided comments section how the defendant responded along with any information the defendant provided with that response.¹³⁹ The BJMHS likewise instructs the administering officer to provide any additional information that the officer “feels relevant and important” in those comments,

135. *Brief Jail Mental Health Screen*, POL’Y RSCH. ASSOCS., INC., 2, <https://www.prainc.com/wp-content/uploads/2015/10/bjmhsform.pdf> [https://perma.cc/CR37-8FR6] (last visited Nov. 14, 2025).

136. *Id.*

137. *Id.* at 1.

138. *Id.*

139. *Id.* at 2.

especially if the defendant answers “yes” to any of the questions.¹⁴⁰ Finally, the BJMHS advises that the defendant should be referred for further mental-health evaluation if the defendant answered “yes” either to question 7 or question 8, or if he or she answered “yes” to any two of questions 1 through 6.¹⁴¹ The administrating officer may also refer the defendant for further mental-health evaluation if the officer “feel[s] it is necessary for any other reason.”¹⁴²

The SAMHSA Report notes, “The BJMHS has been tested in forensic populations and is readily adaptable for a range of correctional settings. The instrument has been widely used among jail populations and is recognized as an effective tool in identifying severe mental disorders.”¹⁴³ However, the SAMHSA Report cautions that the BJMHS “screens only for severe mental disorders and does not address anxiety or personality disorders.”¹⁴⁴ The SAMHSA Report also cautions that the BJMHS may produce higher false-positives among female defendants.¹⁴⁵

B. Amend Criminal Rule 2.3 to Require Judicial Officers to Administer the BJMHS

The Indiana Supreme Court should follow the guidance of the National Center for State Courts and SAMHSA and require all judicial officers presiding at initial hearings to administer the BJMHS to defendants. This can be readily accomplished by amending Criminal Rule 2.3. For good measure, the Court can include the BJMHS in an appendix to the Criminal Rules as it is in the public domain.

Amending Criminal Rule 2.3 in this manner would accomplish numerous goals. Mandating the administration of a mental-health screen at the time of the judiciary's first contact with a defendant would meet all the concerns noted by the National Center for State Courts and SAMHSA. Namely, it would provide a foundational record of the defendant's mental health at the judiciary's earliest opportunity relative to the alleged commission of the charged offenses. This, in turn, would enable the judiciary to divert those with serious mental illnesses away from prison populations and into more appropriate settings based on objective criteria as soon as practicable.

Further, the BJMHS appears to be an ideal instrument for Indiana's needs. It is a one-page screening instrument in the public domain designed to be administered by judicial officers who have little to no medical training. It is designed to be administered at the point of initial contact with a defendant. Requiring judicial officers to include the administration of a one-page, eight-

140. *Id.*

141. *Id.*

142. *Id.*

143. Substance Abuse & Mental Health Servs. Admin., *supra* note 13, at 91.

144. *Id.*

145. *Id.* at 92.

question screening assessment at initial hearings would not impose a meaningful additional burden; at most, this process would add a few minutes of additional time for any given defendant and judicial officer.

So long as the BJMHS is even moderately effective, the small burden of administering it is heavily outweighed by the substantial gain to those who would benefit from it—both defendants and the public at large. Defendants who need essential mental-health services can be identified and processed objectively and promptly, saving significant costs that occur from less-than-ideal placements and in the absence of proper treatment. Even if many defendants are not referred for further mental-health evaluation, for those who are, the proper placement for that defendant may be life-changing. And those who are not affected by the screening process will not have lost anything substantial in completing the assessment.

Moreover, once DMHA establishes rules to enable local JRACs to implement mental-health referral programs, amending Criminal Rule 2.3 to have judicial officers implement the BJMHS will supplement Indiana Code Chapter 33-23-18 much the same way the Rule already supplements the right to counsel and the setting of bail.¹⁴⁶ Sheriffs, prosecutors, or defense counsel may still refer a defendant to the court when they have a subjective reason to believe he or she would benefit from a mental-health referral program,¹⁴⁷ having the judicial officer always administer the BJMHS takes the initial burden off of our other officers. It also puts the question of a defendant's mental health onto a scientific instrument designed for that purpose and away from the subjective perceptions of our officers.

Perhaps, some of those who are not referred for further mental-health evaluation may later argue that they were suffering from a serious mental illness at the time of the offense. And, perhaps, some of those who are referred will be found by medically trained professionals to have been referred unnecessarily. Indeed, as noted in the SAMHSA Report, there is a higher risk of false positives among female defendants than males, but neither of those concerns should prevent the beginning of constitutionally required, rehabilitative treatment of criminal defendants.¹⁴⁸ The first scenario is simply the status quo of Indiana's current procedures, and the second scenario is likely an inevitable outcome to some degree. The BJMHS is limited to serious mental-health issues and is designed to err on the side of identifying the presence of a mental-health disorder when a defendant presents a close case on the questionnaire, a reasonable approach based on objective criteria. Further, if Criminal Rule 2.3 were amended to require the BJMHS assessment but the referral process then in

146. An administered BJMHS form may also be used by probation officers as a complementary assessment tool under Indiana Probation Standard 4.2. *See* INDIANA PROBATION STANDARDS, BD. OF DIRS. JUD. CONF. OF IND. 4.2, <https://www.in.gov/courts/iocs/files/prob-standards-standards-2024.pdf> [<https://perma.cc/G6NJ-YY3S>].

147. IND. CODE § 33-23-18-3 (2024).

148. IND. CONST. art. 1, § 18 (emphasizing that Indiana's penal system is constitutionally oriented toward reformation rather than punitive justice).

fact showed to be substantially misapplied by our judicial officers, nothing would prevent the Indiana Supreme Court from course-correcting based on new evidence at that time.

Additionally, in amending Criminal Rule 2.3 the Indiana Supreme Court should make clear that a judicial officer administering the BJMHS does not lose placement discretion based on the defendant's BJMHS answers. The BJMHS is a guide for determining best placement, but, if the administering judicial officer concludes that a defendant is likely not being honest in his or her answers, or otherwise concludes that circumstances outside the questionnaire compel a different placement, the judicial officer should state as much in the comments section and make the placement decision accordingly.

Criminal Rule 2.6 should also be amended, along with Rule 2.3, to make clear that a defendant's answers to the BJMHS are not admissible against him or her without later consent or if the defendant opens the door to those answers at trial. In this way, a defendant's responses to the one-page BJMHS assessment may hold some marginal probative value to a later-sought defense, but any attempt to admit those answers at trial would be subject to the court's exercise of discretion in the usual admission of evidence.

Finally, Indiana's Rules on Access to Court Records should also be amended to accommodate BJMHS responses. In particular, because a defendant's responses to the BJMHS are personal mental-health information of a party, access to Court Records Rule 5(B)(9), which requires the exclusion of "[m]ental health records compiled or created by a mental health services provider for treatment purposes," should be amended to include pretrial BJMHS responses under Criminal Rule 2.3 as excluded from public access. If the responses later become necessary to the merits of the case, the existing Access to Court Records rules would then take over. Further, to protect the privacy of the defendant's mental-health responses, the BJMHS could be administered by a court officer prior to the defendant's open-court initial hearing in accordance with part 2 below.

C. Strengthen Mid-Stream Monitoring and Care by Enabling Indiana Probation Officers to Become Mental-Health Specialists

Identifying at the initial hearing those criminal defendants who may suffer from serious mental illnesses is an important step forward both in ensuring both that some record of a mental illness is created as early as feasible and that those defendants receive proper placement and care pending trial. However, currently and for the foreseeable future, even with those individuals properly identified, many of them will continue to be placed in our county jails as they await trial. And, as JRAC made clear in its 2023 and 2024 reports, our county jails are understaffed and disproportionately burdened by inmates with serious mental

illnesses.¹⁴⁹

As our local communities await a comprehensive legislative response, Indiana's trial courts already have a structure in place that could be used to at least mitigate issues with seriously mentally ill inmates in our county jails. Trial courts have the statutory authority to hire their own probation officers,¹⁵⁰ and probation officers "shall serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of the court."¹⁵¹ A probation officer's duties include: assisting the trial court in making pretrial release decisions; assisting in making decisions regarding the diversion of charged individuals to appropriate noncriminal alternatives; and supervising and assisting persons on probation consistent with conditions of probation imposed by the court.¹⁵²

The Indiana Code further requires the Board of Directors of the Indiana Judicial Conference to adopt minimum standards for the "educational and occupational qualifications for employment as a probation officer."¹⁵³ The Judicial Conference also prepares a written entrance examination with an established passing score for new probation officers and a set of minimum standards for hired probation officers.¹⁵⁴ In addition, the Indiana Code directs that the Judicial Conference:

shall, in cooperation with the [DMHA] and the division of disability and rehabilitative services . . . , provide probation departments with training and technical assistance concerning mental illness, addictive disorders, intellectual disabilities, and developmental disabilities, including evidence based treatment programs for mental illness and addictive disorders and cognitive behavior treatment.¹⁵⁵

The Judicial Conference has implemented that statutory direction by issuing guidance to Indiana's probation departments and officers with respect to suicide awareness and prevention¹⁵⁶ and by requiring probation officers, at their initial orientation, to complete a course on "Substance Use and the Mental Health

149. Ind. Crim. Just. Inst., *supra* note 15, at 82; Ind. Crim. Just. Inst., *supra* note 40, at 78.

150. IND. CODE § 11-13-1-1(a) (2024).

151. IND. CODE § 11-13-1-1(c) (2024).

152. IND. CODE § 11-13-1-3 (2024).

153. IND. CODE § 11-13-1-8(b)(1) (2024).

154. IND. CODE §§ 11-13-1-8(c)–(d) (2024).

155. IND. CODE § 11-13-1-8(g) (2024).

156. See INDIANA PROBATION SAFETY AND SECURITY GUIDE: JUDICIAL CONFERENCE OF INDIANA, IND. OFF. OF CT. SERVS., 26–27 (Sept. 6, 2018) <https://www.in.gov/courts/iocs/files/prob-standards-safety.pdf> [<https://perma.cc/XRL6-LC3R>].

Continuum.”¹⁵⁷

Indiana's judiciary can do more. While “most probation officers are inadequately prepared to handle persons with mental illness,” probation departments in New York, California, Chicago, and numerous federal districts have developed specialized programs for probation officers to become mental-health specialists within their departments.¹⁵⁸ Requirements and resources across and within these states vary greatly; however, in New York, probation officers becoming mental-health specialists receive mandatory training on:

understanding and responding to persons with serious mental illness and co-occurring substance abuse disorders, matching services to needs for [New York's] population, developing and improving partnerships between probation and other service providers—such as in the mental health arena—and identification of key issues pertaining to supervision of persons with serious mental illness and co-occurring substance abuse disorders.¹⁵⁹

Further, with a state-wide minimum baseline established in Indiana, local departments could then pick and choose the components and topics for additional mandatory training consistent with what makes the most sense for their particular jurisdictions, including serious mental illness issues, particular challenges for probation officers, red flags pertaining to safety issues, and best practices to meet needs and promote wellness.¹⁶⁰

The nuances of how to approach a training program through which Indiana probation officers would become qualified mental-health specialists within their departments is beyond the scope of this Article. There are numerous valid and reasonable paths forward here, and stakeholders in any such training include the Judicial Conference, the DMHA, our trial courts, JRAC, and local JRACs; Indiana's judiciary is already structured to hire and train probation officers and to place those probation officers in positions of engagement and monitoring of inmates with serious mental illnesses. Indeed, much of the groundwork may already be in place, as the Judicial Conference has established a number of *optional* mental-health educational programs that are already available to Indiana probation officers.¹⁶¹ Thus, the opportunity currently exists for Indiana's judiciary to promptly fill the urgent need for specialized attention to

157. Email from Vicki Davis, Dir. of the Educ. Div. of the Ind. Off. of Ct. Servs. in the Off. of Jud. Admin., to Jonathan B. Warner (May 19, 2025, at 11:18 a.m. EST) (on file with authors). Probation officers in Indiana have access to other mental-health educational content, but that content is optional. *Id.*

158. Risdon N. Slate et al., *Training Federal Probation Officers as Mental Health Specialists*, 68 FED. PROB. 3, 4–5 (2004), https://www.uscourts.gov/sites/default/files/68_3_2_0.pdf [<https://perma.cc/W9ZR-T4TB>].

159. *Id.* at 5.

160. *Id.*

161. Davis, *supra* note 157.

our most vulnerable inmates during the pretrial process.

*D. Back-End Review: Reconsider the Role of Appellate Review
of Rejected Insanity Defenses*

This Article's final recommendation is for the Indiana Supreme Court to reconsider and clarify its case law regarding appellate review of cases in which the fact-finder has rejected an insanity defense that was supported by nonconflicting¹⁶² and credible¹⁶³ expert testimony.

1. Essential Foundations

Indiana's statutory insanity defense traces back to 1843, when the English House of Lords announced what is known today as the M'Naghten Rule: criminal culpability requires defendants "at the time of doing the act" to have known "the difference between right and wrong."¹⁶⁴ That is, defendants cannot be held criminally responsible if, at the time of their offenses, they were unable to appreciate the moral wrongfulness of their conduct.¹⁶⁵

As the Indiana Supreme Court has made clear, "Indiana's test for insanity is a purely cognitive one, as it looks only to what the defendant was thinking and whether he or she could appreciate the wrongfulness of his or her conduct."¹⁶⁶ A "cognitive" test, in this context, thus refers to a defendant's *ability* to know *right from wrong*.¹⁶⁷ And "right" and "wrong" are not scientifically objective standards—the "ability to know right from wrong" or the ability to "appreciate the wrongfulness" of one's conduct are therefore references to a normal moral code or society's common morality.¹⁶⁸

162. The Indiana Supreme Court has referred to "unanimous" expert testimony and "nonconflicting" expert testimony with equal value; *See, e.g.*, *Galloway v. State*, 938 N.E.2d 699, 710–12 (Ind. 2010). ("Nonconflicting" expert testimony might occur where two experts agree that the defendant was insane while a third is unable to render an opinion. *See id.* It might also occur where the experts agree on the bottom line—the defendant was insane—but give varying degrees of confidence to that conclusion. *See Payne v. State*, 144 N.E.3d 706, 711 (Ind. 2020)).

163. An unstated assumption in Indiana's case law is that a GBMI finding is a finding that the medical experts were credible, even if the fact-finder declined to accept their conclusions on insanity, unless another basis for the GBMI finding was expressly identified by the fact-finder. *Cf.* *Galloway*, 938 N.E.2d at 711 (noting that the trial court, acting as the fact-finder, based its GBMI finding not on the experts' opinions but on other evidence).

164. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843).

165. *Galloway*, 938 N.E.2d at 716.

166. *Barcroft v. State*, 111 N.E.3d 997, 1004 (Ind. 2018) (quotation marks omitted).

167. *Cognitive*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/cognitive_adj?tab=meaning_and_use#9078894 [<https://perma.cc/657P-J8QC>] (last visited May 20, 2025).

168. This is not to say that an "idiosyncratic, subjective sense that an action is morally correct . . . constitute[s] [an] exception[] to the generally coextensive nature of legal and moral wrong in society so as to support being excused from criminal responsibility." *State v. Winder*, 979 A.2d 312, 317 (N.J. 2009). Rather, it is the defendant's *ability to discern* the "legal and moral wrong in society" that matters for Indiana's insanity defense. *See id.* at 324.

The general rule in Indiana's case law is that the fact-finder may reject an insanity defense for any reason supported by the record. As the Indiana Supreme Court has summarized:

Whether a defendant appreciated the wrongfulness of his or her conduct at the time of the offense is a question for the trier of fact. Indiana Code section 35-36-2-2 provides for the use of expert testimony to assist the trier of fact in determining the defendant's insanity. Such expert testimony, however, is merely advisory, and even unanimous expert testimony is not conclusive on the issue of sanity. The trier of fact is free to disregard the unanimous testimony of experts and rely on conflicting testimony by lay witnesses. And even if there is no conflicting lay testimony, the trier of fact is free to disregard or discredit the expert testimony.¹⁶⁹

As noted above, defendants who seek to interpose the insanity defense must file an appropriate notice of the intent to raise that defense with the trial court.¹⁷⁰ Best practice for defense counsel in interposing the defense of insanity may well be to move to waive the defendant's right to a jury trial simultaneously with that notice, if such a waiver is not yet on record.¹⁷¹ An insanity defense is statistically more likely to be successful in a bench trial than in a jury trial by a difference of about thirty percent.¹⁷² That difference arises out of the public's well-known tendency to view and reject the concept of an NRBRI judgment as a "get out of jail free" card.¹⁷³

Once a fact-finder, whether the jury or the court, has rejected an insanity defense, appellate relief has proved to be unlikely. Considering only cases where our legislature's 1984 revision¹⁷⁴ of the insanity defense applied, in six of eight opinions, the Indiana Supreme Court has affirmed the fact-finder's decision to reject an insanity defense that was supported by nonconflicting expert testimony. Those six cases demonstrate the general difficulty of appellate relief. However, the other two cases create tension with that general body of law, and the Court's explanations and applications of its own precedents are inconsistent, difficult for practitioners to predict, and results in trial and appellate judges being unsure of how to apply the law.

169. Galloway, 938 N.E.2d at 709 (citations and footnote omitted).

170. IND. CODE § 35-36-2-1 (2024).

171. *See generally* Carmen Cirincione, *Revisiting the Insanity Defense: Contested or Consensus?*, 24 BULL. AM. ACAD. PSYCHIATRY L. 165, 168 (1996), <https://jaapl.org/content/jaapl/24/2/165.full.pdf> [<https://perma.cc/YHR9-A6MY>].

172. *Id.*

173. Hannah Price, *Shattered Brains in Shackles: The Future of Mentally Ill Defendants Following KAHLER V. KANSAS*, 55 IND. L. REV. 831, 836 (2022).

174. *See* Baird v. State, 688 N.E.2d 911, 915 n.3 (1997) (explaining Indiana's 1984 revision of the insanity defense and elimination of the volitional prong).

2. *Cate and Barany: Our Supreme Court Allows Juries to Reject Unanimous Expert Testimony Based on Behavior That Fleetinglly Appears Rational*

In its first two opinions reviewing a fact-finder's rejection of nonconflicting expert conclusions on insanity following the implementation of the 1984 statutory amendments to the insanity defense, the Indiana Supreme Court concluded that demeanor evidence and lay-witness observations of the defendant's behavior alone were sufficient to support the fact-finder's decisions. First, in *Cate v. State*, the defendant appealed the fact-finder's rejection of his insanity defense, which was unanimously supported by five expert witnesses.¹⁷⁵ In affirming the defendant's GBMI conviction, the Indiana Supreme Court stated that, while the experts were unanimous, their conclusions "were hardly uncontroverted."¹⁷⁶ The Court nevertheless relied on the following evidence, which it viewed as "conflicting," to support the defendant's conviction:

The record contains evidence of his lucidity after arrest, demonstrating both an awareness of what he had just done and his deliberation in accomplishing the killing. Furthermore, despite his subsequent claims that he was mimicking the biblical story of Abraham's willingness to sacrifice his son Isaac, Cate had previously denied such a motivation when asked by a coworker within a week of the murder.

Each of the psychiatrists, of course, evaluated Cate after the incident, based on his representations about his motivation on the evening in question. The jurors may have agreed with the prosecution's suggestion that Cate had a strong incentive to lie and could have told his doctors a tall tale to avoid a guilty verdict. . . .¹⁷⁷

Second, in *Barany v. State*, the Court affirmed the defendant's GBMI conviction and the fact-finder's rejection of his insanity defense based on the following explanation:

[T]he medical experts were unanimous in concluding that appellant was

175. *Cate v. State*, 644 N.E.2d 546, 547 (Ind. 1994). (The defendant in *Cate* received a sixty-year prison sentence; *Id.* At the current cost of \$52.61 to incarcerate one defendant per day, and assuming he spends that entire term in the DOC, his sentence will have cost Hoosier taxpayers \$1,152,159 by the time of his release); IN.GOV, *supra* note 50.

176. *Cate*, 644 N.E.2d at 547.

177. *Id.* at 548. (In *Galloway v. State*, the Court described its holding in *Cate* as demonstrative of feigning because the defendant inconsistently described the reasons for his own behavior. 938 N.E.2d 699, 713 (Ind. 2010). But "feigning" in medical contexts most often implies the fabrication of an illness, and, accordingly, the cases described in part 3.3 *infra* describe inconsistencies provided by a defendant with medical information specifically. *Cf.* *Barcroft v. State*, 111 N.E.3d 997, 1001 (Ind. 2018) (noting that the medical experts found no evidence of feigning or malingering). Indeed, in *Barcroft* our Supreme Court squarely described the evidence at issue in *Cate* as "demeanor evidence" rather than evidence of feigning. *Id.* at 1005.)

insane at the time of the killing. However, the State offered testimony from several lay witnesses that indicated that appellant was sane. Indiana State Police Detective Stotts described how, only a few hours after the crime, appellant talked about the victim's complaints and nagging. One of appellant's friends . . . testified as to unusual topics of conversation, such as conspiracies, but indicated that appellant "seemed O.K." In a conversation with his sister, appellant indicated that he believed that the victim was calling the police when he killed her. The jury could have decided that this testimony about appellant's behavior was more indicative of his actual mental health at the time of the killing than medical examinations conducted four weeks after the arrest. . . .¹⁷⁸

Thus, the Court's holdings in *Cate* and *Barany* allowed the fact-finders to reject the unanimous expert conclusions of insanity based on lay evidence of *fleeting*, *apparently* rational, or lucid demeanor evidence.

3. Gambill and Thompson: *Our Supreme Court Allows Juries to Find That the Experts Have Been "Fooled"*

The Court's next two opinions held that lay juries can tell when experts have been fooled. In *Gambill v. State*, the Court affirmed the defendant's GBMI conviction based on the following statement:

Although all four of the expert medical witnesses at this trial testified that Appellant was legally insane at the time of the murder, two lay witnesses testified otherwise. These witnesses testified that, in their opinions, the Appellant was able to appreciate the wrongfulness of her actions at the time the offense occurred. Sergeant Pierce, who had attended high school with Appellant, testified that after spending time with Appellant at the hospital on the morning after the murder, he believed that Appellant was able to appreciate the wrongfulness of her conduct. Also, the jail-house informant . . . testified that she believed that Appellant knew it was wrong to drown [her son]. Thus, there was a conflict of opinion on the question of Appellant's ability to appreciate the wrongfulness of her conduct. . . .

Additionally, Appellant failed to disclose to medical personnel that, in the hours before she took her son's life, she had ingested a substantial quantity of methamphetamine. Appellant lied to the individual who found her wandering on the street early on the morning after the murder.

178. *Barany v. State*, 658 N.E.2d 60, 64 (Ind. 1995). (The defendant in *Barany* received a sixty-year prison sentence. *Id.* at 62. At the current cost of \$52.61 to incarcerate one defendant per day, and assuming he spends that entire term in the DOC, his sentence will have cost Hoosier taxpayers \$1,152,159 by the time of his release); IN.GOV, *supra* note 50.

She told him that she had been beaten and raped, and that a former boyfriend had hurt her son. Such self-serving exculpatory statements might indicate to the jury that Appellant was aware of the wrongfulness of her actions. . . .¹⁷⁹

Likewise, in *Thompson v. State*, the Court affirmed the defendant's GBMI conviction after the trial court, acting as the fact-finder, expressly found that the defendant had a "history" of using her mental illness to "avoid[] criminal responsibility."¹⁸⁰ The trial court also found that the evidence demonstrated "conflicting stories about what happened to [the defendant's] medication, her decision to use illegal drugs and drink alcohol while on her medication, and lies she told one of the examining psychiatrists regarding the use of drugs and alcohol."¹⁸¹ After concluding that the trial court's findings were supported by the record, the *Thompson* Court added that conflicting evidence was "not required" at all because "fact[-]finders are not required to believe a witness's testimony even when it is uncontradicted."¹⁸²

Both *Gambill* and *Thompson* represent a straightforward conclusion, namely, that evidence the defendant feigned mental illness or failed to disclose relevant medical information is sufficient to support a fact-finder's rejection of expert testimony regarding the defendant's alleged mental illness.

4. Interlude: The Court of Appeals Questions Barany, and a Plurality of the Justices of Our Supreme Court Take Note

Before continuing with the Indiana Supreme Court's precedents, a notable dialogue between the Indiana Supreme Court and intermediate Court of Appeals emerged in 2003 and 2004 surrounding the application of *Barany*. In two opinions handed down on the same day and written by the same panel, the Court of Appeals concluded that the evidence rebutted the experts' nonconflicting conclusions on insanity in *Moler v. State*,¹⁸³ but the evidence failed to rebut the experts' nonconflicting conclusions on insanity in *Thompson v. State*.¹⁸⁴

The Court of Appeals reached its conclusion in *Moler* reluctantly. As the panel explained:

179. *Gambill v. State*, 675 N.E.2d 668, 672–73 (Ind. 1996). (The defendant in *Gambill* received a forty-year prison sentence. *Id.* at 678. At the current cost of \$52.61 to incarcerate one defendant per day, and assuming he spends that entire term in the DOC, his sentence will have cost Hoosier taxpayers \$768,106 by the time of his release); IN.GOV, *supra* note 50.

180. *Thompson v. State*, 804 N.E.2d 1146, 1150 (Ind. 2004). (The defendant in *Thompson* received a three-year prison sentence. *Id.* at 1148. At the current cost of \$52.61 to incarcerate one defendant per day, and assuming she spent that entire term in the DOC, her sentence cost Hoosier taxpayers \$57,607.95); IN.GOV, *supra* note 50.

181. *Thompson*, 804 N.E.2d at 1150.

182. *Id.* at 1149.

183. *Moler v. State*, 782 N.E.2d 454, 458 (Ind. Ct. App. 2003), *trans. denied*.

184. *Thompson v. State*, 782 N.E.2d 451, 454 (Ind. Ct. App.), *vacated*, 792 N.E.2d 46 (Ind. 2003) (table).

Barany has made it very difficult even for defendants with well-documented mental illnesses to successfully raise the insanity defense. Under the rule of *Barany*, even if all expert testimony regarding a defendant's state of mind points to the fact that the defendant could not have appreciated the wrongfulness of his actions at the time of a crime, the jury is free to disregard the experts' opinions in favor of lay evidence of the defendant's demeanor before and after the crime.

While the jury is the ultimate finder of fact, we fail to see how evidence of a defendant's demeanor before and after a crime can have much probative value when a schizophrenic defendant is involved. Persons that suffer from schizophrenia can experience unpredictable delusions and hallucinations. Am. Psychiatric Ass'n, DSM-IV: Diagnostic and Statistical Manual of Mental Disorders 274-75 (4th ed. 1994). A delusion is "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary." *Id.* at 765. A hallucination involves "a sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ." *Id.* at 767.

....

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. . . .¹⁸⁵

The Court of Appeals's concerns notwithstanding, a majority of the Indiana Supreme Court voted to deny the defendant's petition to transfer.¹⁸⁶ Then-Justices Sullivan and Boehm dissented from the denial of transfer.¹⁸⁷

However, after accepting the State's petition to transfer following the Court of Appeals' reversal in *Thompson*, the Indiana Supreme Court affirmed the fact-finder's judgment and relied in substantial part on evidence of the defendant's history of feigning mental illness.¹⁸⁸ Although Justice Sullivan concurred in

185. Moler, 782 N.E.2d at 458-59.

186. Moler v. State, 792 N.E.2d 43 (Ind. 2003) (table).

187. *Id.* (table).

188. *Thompson v. State*, 804 N.E.2d 1146, 1150 (Ind. 2004).

Thompson, he wrote separately to note that “[i]t [wa]s probably not coincidence that the same panel of the Court of Appeals decided two cases involving exactly the same issues on exactly the same day, one if favor of the State and the other in favor of the defendant.”¹⁸⁹ Justice Sullivan continued:

The Court of Appeals likely expected petitions to transfer with respect to both cases to reach our Court at the same time. However, *Moler* reached our court and we disposed of it (denying Moler’s petition to transfer by a vote of 3-2) prior to receiving the petition to transfer in *Thompson*. As such, we did not consider them together.¹⁹⁰

Justice Sullivan then explained that he did not read our Supreme Court’s precedents to require affirming a finding of sanity when “(1) there is unanimous credible, expert testimony that a defendant is insane at the time of the crime at issue and (2) there is no other evidence of probative value from which a conflicting inference can be drawn.”¹⁹¹

5. *Galloway v. State: Our Supreme Court Reconsiders the Probative Value of Apparently Rational Demeanor Evidence*

In 2010, the Indiana Supreme Court took the opportunity to reconsider the probative value of apparently rational demeanor evidence, as sought by the Court of Appeals in *Moler* and noted by Justice Sullivan in his separate opinion in *Thompson*. In particular, in *Galloway v. State*, authored by Justice Sullivan, the Court concluded that the fact-finder erred as a matter of law in rejecting an insanity defense.¹⁹² In reaching that conclusion, the Court first noted that the expert testimony was not in conflict even though two of the experts had concluded that the defendant was insane and the third expert had no opinion.¹⁹³ From there, the Court turned to whether “other evidence of probative value” existed to support the conclusion of legal sanity.¹⁹⁴ Looking first to lay-witness testimony, the Court noted that those witnesses’ observations “support[ed] the experts’ opinions.”¹⁹⁵

The Court then considered demeanor evidence, but it did so with some novel caveats.¹⁹⁶ Specifically, the Court noted that demeanor evidence in insanity

189. *Id.* at 1151 (Sullivan, J., concurring).

190. *Id.* (Sullivan, J., concurring).

191. *Id.* at 1152 (Ind. 2004) (Sullivan, J., concurring) (emphasis added).

192. *Galloway v. State*, 938 N.E.2d 699, 714–16 (Ind. 2010). (The defendant in *Galloway* received a fifty-year prison sentence. *Id.* at 708. Had our Supreme Court affirmed his conviction, and applied the current cost of \$52.61 to incarcerate one defendant per day while also assuming he would have spent his entire term in the DOC, his sentence would have cost Hoosier taxpayers \$960,132.50); IN.GOV, *supra* note 50.

193. *Galloway v. State*, 938 N.E.2d 699, 711–12 (Ind. 2010).

194. *Id.* at 712.

195. *Id.* at 714.

196. *Id.* at 714–15.

cases must be “considered in light of other evidence” in order to “permit[] a reasonable inference of sanity to be drawn.”¹⁹⁷ This is because demeanor evidence invites the fact-finder “to infer what the defendant was thinking based on his or her conduct,” and, to do so, the fact-finder “uses its common knowledge of what is normal and what is abnormal.”¹⁹⁸ But, in the insanity context, the probative value of such “common knowledge” is dubious, at best. As the Court stated, “insanity is not limited to the stereotypical view of a ‘raging lunatic,’” and “a person experiencing a psychotic delusion may appear normal to passersby.”¹⁹⁹ Thus, the *Galloway* Court concluded that demeanor evidence is not a blank check for fact-finders to reject an insanity defense and is “most useful where there is some indication” in the evidence of “feigning mental illness and insanity.”²⁰⁰ The Court noted that demeanor evidence carried more significance prior to our legislature’s 1984 amendment to the insanity defense.²⁰¹

The Court explained that a contrary understanding would mean that not even a defendant with a “long history of mental illness with psychosis” would be immune to having demeanor evidence used against him or her.²⁰² On that point, the Court specifically acknowledged the following language from Court of Appeals’ opinion in *Moler*:

While the jury is the ultimate finder of fact, we fail to see how evidence of a defendant’s demeanor before and after a crime can have much probative value when a schizophrenic defendant is involved. . . .

. . . .

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. . . .²⁰³

Acknowledging this language, the Court added that evidence of the defendant’s demeanor “before and after a crime is of more limited value than the defendant’s demeanor during the crime.”²⁰⁴ The Court recognized that during the commission of an offense, a defendant may have been suffering from

197. *Id.* at 712.

198. *Id.* at 713.

199. *Id.* at 713–14.

200. *Id.* at 712.

201. *Id.* at 714.

202. *Id.* at 713.

203. *Id.* (quoting *Moler v. State*, 782 N.E.2d 454, 458–59 (Ind. Ct. App. 2003), *trans. denied*) (quotation marks omitted).

204. *Id.* at 714.

“temporary insanity” and Indiana law “allows for the possibility that a defendant will be legally insane at the time of the crime[] but *compos mentis* [, *i.e.*, sane,] immediately before and immediately after the crime.”²⁰⁵

The Court’s holding on the facts before it demonstrates how demeanor evidence must be evaluated in light of a defendant’s documented mental illness. The Court recognized that evidence of the *Galloway* defendant’s behavior before and after the offense may have “indeed represent[ed] the normal events of daily life” to an observer who does not suffer from a serious mental illness.²⁰⁶ However, when that same evidence was “viewed against the defendant’s [twenty-year] long history of mental illness with psychotic episodes, the defendant’s demeanor *during* the crime . . . , and the absence of any suggestions of feigning or malingering,” the *apparently rational* demeanor evidence from before and after the offense was “neutral and not probative of sanity.”²⁰⁷

The best reading of *Galloway* is that where demeanor or behavior evidence may be consistent with *either* rational behavior *or* delusional behavior, that evidence cannot be used by lay fact-finders and jurists to impeach the assessment of the medical experts on their nonconflicting conclusions of insanity.²⁰⁸ In this sense, as Justice Goff would later argue in a dissenting opinion, *Galloway* established that the nonconflicting opinions of the medical experts creates a “rebuttable presumption of insanity.”²⁰⁹ *Galloway* then recognized that, at least in some circumstances, demeanor evidence that may appear to support the fact-finder’s decision is legally insufficient to rebut the established presumption because the actual meaning of that evidence has become speculative and, therefore, cannot carry probative value.²¹⁰ And those circumstances occur most notably when there is no affirmative evidence of feigning.²¹¹

Moreover, while the Court in *Galloway* acknowledged the defendant’s long medical history, the Court’s holding is not *premised* on that medical history.²¹² Indeed, the Court made it a point to recognize that temporary insanity is a viable defense in Indiana—which of course would be a questionable proposition if only a “long history of mental illness” were required to support an insanity defense.²¹³ Thus, the Court’s reference in *Galloway* to that defendant’s medical history was only in conjunction with other potentially probative evidence to demonstrate that there was no legitimate evidentiary conflict on those facts. The Court was

205. *Id.*

206. *Id.* at 715.

207. *Id.*

208. *See generally id.*

209. *Barcroft v. State*, 111 N.E.3d 997, 1010 (Ind. 2018) (Goff, J., dissenting) (Justice Slaughter joined Justice Goff’s dissent).

210. *Galloway*, 938 N.E.2d at 715.

211. *Id.*

212. *See id.*

213. *Id.* at 715–16.

not saying that such medical history is required to negate demeanor evidence.²¹⁴

The Court's holding in *Galloway* is clearly contrary to its holdings in both *Cate* and *Barany*. Again, *Cate* relied *exclusively* on demeanor evidence with no affirmative evidence of feigning illness to support the fact-finder's rejection of the nonconflicting experts' conclusions on insanity.²¹⁵ Likewise, *Barany* relied *exclusively* on lay-witness observations of the defendant's behavior with no affirmative evidence of feigning to support the fact-finder's judgment.²¹⁶ And *Galloway* furthered a dialogue with the Court of Appeals that was critical of *Barany*'s viability. Thus, the Court's holding in *Galloway* that demeanor evidence without affirmative evidence of feigning is "not probative of sanity" is contrary to *Cate* and would at least appear to be equally contrary to the logic of *Barany*.²¹⁷ However, the Court in *Galloway* did not expressly overrule or disapprove of either of the Court's prior opinions but, instead, distinguished them on their facts.²¹⁸

Similarly, *Galloway* quoted the general-language rule from *Thompson* that conflicting evidence is "not required" at all to affirm the fact-finder's rejection of an insanity defense because fact-finders are not required to believe a witness's testimony even when it is uncontradicted.²¹⁹ Clearly, *Galloway*'s holding is completely contrary to that statement. Indeed, *Galloway* demonstrates that where all the evidence points one way but the fact-finder reached the opposite conclusion, the fact-finder erred and reversal is appropriate.²²⁰ That is not a novel proposition of normal appellate review.²²¹ However, in the insanity context, the history of appellate review has not followed that standard. Thankfully, *Galloway* appears to at least clarify, if not supersede, the Court's earlier statement in *Thompson* that the fact-finder needs no reason at all to reject an insanity defense.²²² *Galloway* demonstrates that the fact-finder may not willy-nilly reject credible expert evidence.

6. Myers and Barcroft: Our Supreme Court Reads Galloway Narrowly

But *Galloway* has been quickly fenced in. At the Court's next opportunity to consider a fact-finder's rejection of nonconflicting experts' conclusions on insanity, in *Myers v. State*, the Court affirmed the defendant's GBMI

214. *Id.*

215. *Cate v. State*, 644 N.E.2d 546, 548 (Ind. 1994).

216. *Barany v. State*, 658 N.E.2d 60, 64 (Ind. 1995).

217. *See Galloway*, 938 N.E.2d at 715.

218. *Id.* at 713.

219. *Id.* at 709.

220. *Id.* at 714-15.

221. *See, e.g., Corcoran v. State*, 246 N.E.3d 1223, 1225 (Ind. 2024).

222. *Thompson v. State*, 804 N.E.2d 1146, 1149-50 (Ind. 2004).

conviction.²²³ The Court explained that the evidence showed that, despite a long history of mental illness, the defendant “had seemingly been coping better with [it] over the past several years,” and the alleged delusions underlying the instant offense were unlike prior delusions in his medical record. The defendant’s “demeanor” during the offense—that is, evidence of the his behavior at times proximate to the offense—“did nothing” to demonstrate that he was suffering from a delusion at that time. and the manner in which the defendant both committed the offense and responded to law enforcement indicated that he had acted “in a rational manner.”²²⁴

Thus, the Court’s analysis in *Myers* relied in substantial part on the *newness* of the defendant’s specific mental illness at the time of the offense to affirm the defendant’s GBMI conviction.²²⁵ But *Galloway* had stated that a claim of “temporary insanity” is viable under Indiana law.²²⁶ The Court’s opinion in *Myers* provided no mention of that component of *Galloway* and instead incorrectly read *Galloway* to require that a defendant claiming an insanity defense must act in accordance with his historical illness, which the defendant in *Myers* had not done.²²⁷ Further, the Court in *Myers* cited no scientific authority for its apparent assumption that using evidence of a current diagnosis that is inconsistent with historical diagnoses is unreasonable to establish insanity and is instead probative of feigning.

Shortly after *Myers*, in *Barcroft v. State* the Indiana Supreme Court affirmed the defendant’s GBMI conviction for the following reasons:

- “demeanor evidence” that included planning for the offense, concealing the weapon prior to the offense, not killing a witness to the offense, fleeing from the scene, and telling arresting officers that she “planned on not getting caught”;²²⁸
- “conflicting diagnoses” among the experts, even though the experts were unanimous in their conclusions that the defendant was unable to appreciate the wrongfulness of her conduct at the time of the offense;²²⁹
- “[t]he lapse in time” between the commission of the offense and the

223. *Myers v. State*, 27 N.E.3d 1069, 1082 (Ind. 2015). (The defendant in *Myers* received an aggregate sentence of 120 years. *Id.* at 1073. At the current cost of \$52.61 to incarcerate one defendant per day, and assuming he actually serves half of his sentence, his sentence will cost Hoosier taxpayers \$1,152,159 by the time of his release); IN.GOV, *supra* note 50.

224. *Myers*, 27 N.E.3d at 1076–77.

225. *Id.* at 1077.

226. *Galloway*, 938 N.E.2d 699, 714 (Ind. 2010).

227. *See Myers*, 27 N.E.3d 1069, 1076–78 (Ind. 2015).

228. *Barcroft v. State*, 111 N.E.3d 997, 1005–06 (Ind. 2018). (The defendant in *Barcroft* received a fifty-five year sentence with five years suspended. *Id.* at 1001. At the current cost of \$52.61 to incarcerate one defendant per day, and assuming she spends her entire term in the DOC, her sentence will cost Hoosier taxpayers \$960,132.50 by the time of her release); IN.GOV, *supra* note 50.

229. *Barcroft*, 111 N.E.3d at 1006.

- experts' later examinations of the defendant;²³⁰
- inconsistencies in the experts' reviews of underlying records;²³¹ and
- "[t]he lack of a well-documented history of mental illness" consistent with the present diagnoses.²³²

The Court in *Barcroft* relied in substantial part on *Cate*'s demeanor analysis and gave *Galloway* short shrift as a case where the evidence was simply "without conflict,"²³³ with no mention of *Galloway*'s analysis that such evidence was without conflict *because* the Court had concluded that the demeanor evidence there *could have no probative value of sanity*.²³⁴ Thus, *Barcroft* appears to have given *Cate* new life despite the Court's contrary holding in *Galloway*.

7. *Payne v. State: Our Supreme Court Gives Preferred Status to Defendants with a Well-Documented Medical History in Support of an Insanity Defense*

The Court's final opinion on this topic reversed the fact-finder's rejection of the nonconflicting experts' opinions on insanity but did so in a way that may have exacerbated, rather than mitigated, the *Moler* panel's concerns that our Supreme Court's precedents make it "very difficult even for defendants with well-documented mental illnesses to successfully raise the insanity defense."²³⁵ In particular, in *Payne v. State*, the Court relied on the defendant's twenty-year medical history which showed that he had "long suffered from acute mental illness, having spent most of his life under psychiatric care for chronic paranoid schizophrenia and delusional disorder."²³⁶ The Court also noted that, after the State had charged the defendant with his offenses, he spent the next eleven years undergoing competency restoration before he was able to stand trial.²³⁷ The Court, relying again on the same reading of *Galloway* that it had relied on in *Myers*, then concluded that the purported demeanor evidence—the defendant's planning of the offenses, attempts to cover them up, and flight—was "insufficient . . . to rebut *both* the unanimous expert opinion[s] *and* [the defendant's] well-documented history of" acting in accordance with delusional

230. *Id.* at 1006–07.

231. *Id.* at 1007.

232. *Id.* at 1008.

233. *Id.* at 1005, 1008 (emphasis removed).

234. *Galloway v. State*, 938 N.E.2d 699, 715 (Ind. 2010).

235. *Moler v. State*, 782 N.E.2d 454, 458–59 (Ind. Ct. App. 2003), *trans. denied*.

236. *Payne v. State*, 144 N.E.3d 706, 709 (Ind. 2020). (The defendant in *Payne* received an aggregate sentence of ninety years. *Id.* at 709. Assuming he actually served two-thirds of that sentence at the current cost of \$52.61 to incarcerate one defendant per day, his sentence would have cost Hoosier taxpayers \$1,152,159 had our Supreme Court affirmed his convictions); IN.GOV, *supra* note 50.

237. *Payne*, 144 N.E.3d 706, 709 (Ind. 2020).

beliefs.²³⁸

Similarly critical to the Court's analysis in *Payne* was the following distinction of the Court's opinion in *Barcroft*, which had relied in substantial part on nearly identical demeanor evidence to affirm a GBMI conviction:

[Defendant's] well-documented and consistent history of mental illness, along with the unanimous expert opinion[s], fully undermines the probative value of any relevant demeanor evidence. And with no reasonable or logical inferences to draw from the evidence in support of the [GBMI] verdict, we come only to the conclusion that [the defendant] was insane when the crime[s were] committed. To be sure, the fact[-]finder's determination that a defendant was not insane at the time of the offense warrants substantial deference from an appellate court. But this standard does not and should not deprive this Court of meaningful appellate review. To conclude otherwise would amount to an abdication of our constitutional duty.²³⁹

Notwithstanding the Court's distinction, *Payne* is difficult to reconcile with *Barcroft* and the Court's historical practices. It may seem easy enough to say that *Payne* simply required both nonconflicting expert testimony and also a long-standing and consistent history of the specific mental illness at issue to warrant reversal of a rejected insanity defense. But, again, the premise for that analysis turns on a reading of *Galloway* that is not supported by the full context of that opinion.

Further, if demeanor evidence alone is sufficient to reject an insanity defense, as *Barcroft* and *Cate* make clear, then how does demeanor evidence become insufficient based on other evidence (namely, health records), as *Payne* holds, without reweighing the evidence on appeal? *Galloway* held that demeanor evidence coupled with an absence of affirmative evidence of feigning is, as a matter of law, *not probative* of sanity. This is a conclusion of law that is well-founded in reason and empiricism.²⁴⁰ But *Payne* does not say that. *Payne* allows for such demeanor evidence to be probative of sanity but holds that *both* the experts' conclusions *and* some sufficiently long history of the defendant's mental illness are needed to overcome that demeanor evidence.²⁴¹ Thus, *Payne* joins *Barcroft* and *Myers* in calling *Galloway* into question with respect to whether demeanor evidence may have probative value of sanity. *Payne* just departs from *Barcroft* and *Myers* in how to assess the sufficiency of that

238. *Id.* (italics added; bold font removed).

239. *Id.* at 713.

240. Cf. James L. Knoll IV & Phillip J. Resnick, *Insanity Defense Evaluations: Toward a Model for Evidence-Based Practice*, OXFORD UNIV. PRESS 4–5 (Dec. 28, 2007) (recognizing that demeanor evidence from the time of the offense should be considered in forming the medical experts' conclusions), https://www.upstate.edu/psych/pdf/education/fellowships/insanity_defense.pdf [<https://perma.cc/K75J-JFH4>].

241. See *Payne v. State*, 144 N.E.3d 706 (Ind. 2020).

evidence with the defendant's medical history.

The *Payne* Court's reading of *Galloway* is problematic for another, but similar, reason. The defendant in *Payne* had nearly twenty years of medical records in support of his mental illness.²⁴² But the defendant in *Barcroft* had approximately five years of testimony—albeit, not in the form of medical records—in support of her “nonsensical” behavior, which the Court in *Barcroft* considered insufficient to require a NRBRI judgment.²⁴³ *Payne* thus appears to give a preferred status to those defendants whose life circumstances have enabled them to obtain professional medical treatment for some unspecified but significant period of time, even if that treatment was ultimately unsuccessful. Defendants who are no less mentally ill but whose life circumstances prevented them from accessing treatment, let alone prolonged treatment, would appear to be captured by the holding in *Barcroft* and unable to obtain the same relief obtained by the defendant in *Payne*.

Finally, while the defendant in *Galloway* had a long-standing history of mental illness, the Court's holding in *Galloway* was that there was no evidentiary conflict, *not* that appellate relief was justified based on the defendant's medical history.²⁴⁴ In reading *Galloway* in this way in *Payne*, the Court, as it had also done in *Myers*, limits *Galloway* to circumstances in which the defendant's mental illness is “well-documented,”²⁴⁵ even though that exact concern was part of the dialogue between our Court of Appeals and our Supreme Court leading up to *Galloway* and seemed to be addressed by the *Galloway* Court's conclusion that claims of temporary insanity are viable in Indiana.²⁴⁶ Further, *Payne* reads *Galloway* even more narrowly than the Court had done in *Myers* by expressly concluding that such evidence is *required* in order for “the probative value of demeanor evidence” to “dissolve[.]”²⁴⁷ That extremely narrow reading of *Galloway* casts doubt on the scope of *Galloway*'s standing as good law.

8. *Reconsidering Appellate Review of Rejected Insanity Defenses*

While the totality of the circumstances in any given case matters, so too does treating likes alike in the law. The body of NGBRI/GBMI law has become very disjointed, giving the appearance of inconsistent justice based on factors not supported by the reality of serious mental illnesses.

Indiana's insanity defense is, again, fundamentally about *the defendant's cognitive state*, specifically, his or her *ability to discern a normal moral code or society's common understanding of right from wrong, at the time the crime was*

242. *Id.* at 712–13.

243. *Barcroft v. State*, 111 N.E.3d 997, 1000, 1008 (Ind. 2018).

244. *See Galloway v. State*, 938 N.E.2d 699, 715 (Ind. 2010).

245. *Payne*, 144 N.E.3d at 712, 713.

246. *See Galloway*, 938 N.E.2d at 713; *Moler v. State*, 782 N.E.2d 454, 458–59 (Ind. Ct. App. 2003), *trans. denied*.

247. *Payne*, 144 N.E.3d at 712.

committed. But what does it mean to be able to discern a normal understanding of right from wrong when, in your own internal reality, you are Jesus Christ?²⁴⁸ What does it mean to be able to discern society's common understandings when, in your own internal reality, you and your family are being hunted by a foreign mafia that has infiltrated the highest levels of government?²⁴⁹ Do you know what a normal moral code is when, in your own internal reality, only you know the truth of numerous government misdeeds, government officials are trying to stop you from exposing them, and you are "dutybound" to bring attention to the issues by burning down covered bridges?²⁵⁰ And what does it mean to say that the *external manifestations* of those internal realities *disprove* an insanity defense *because* those external manifestations *appear rational* to those of us who *do* understand society's common morality?

The Court should restore *Galloway* to its best reading and extend it to its logical ends, namely, that nonconflicting expert conclusions establish a rebuttable presumption of insanity, and our fact-finders are not free to simply disregard that presumption by guessing as to the meaning of other evidence. Trained medical experts already rely on demeanor evidence and lay-witness evidence contemporaneous to the time of an offense to formulate their medical opinions regarding the defendant's cognitive state at the time of the offense.²⁵¹ They also already rely on the defendant's medical history to formulate their medical opinions and conclusions.²⁵²

A proper Venn Diagram showing the overlap between the *medically* probative value of such evidence and the *legally* probative value of it should be a single circle in the insanity context. Thus, demeanor evidence, the subjective impressions of lay-witnesses, and the defendant's medical history lose any probative value of sanity once the medical experts have relied on that information and formulated nonconflicting diagnoses of insanity and there is no affirmative evidence of feigning.

In other words, *Galloway* correctly demonstrates that demeanor evidence alone does not carry probative value of sanity once multiple medical experts have, without conflict, determined that a defendant was insane at the time of the crime committed.²⁵³ That same reasoning extends to lay-witness observations of the defendant's behaviors and the defendant's medical history. *Galloway* expressly and correctly recognizes that medical history may be wholly irrelevant in some circumstances.²⁵⁴ Likewise, the Court should disapprove of relying on

248. See *Galloway*, 938 N.E.2d at 704 (where the defendant suffered from a psychotic delusion that he was Jesus Christ and believed his actions were divinely mandated).

249. See *Barcroft v. State*, 111 N.E.3d 997, 1001 (Ind. 2018) (where the defendant experienced persecutory delusions involving an alleged foreign conspiracy targeting him and his family).

250. *Payne*, 144 N.E.3d at 713.

251. *Knoll & Resnick*, *supra* note 240.

252. *Id.* at 5 (recognizing that demeanor evidence from the time of the offense should be considered in forming the medical experts' conclusions).

253. See *supra* Part IV.D.5.

254. *Galloway v. State*, 938 N.E.2d 699, 714 (Ind. 2010).

the passage of time between an offense and a mental-health examination to discredit the examination. There must be some passage of time between an offense and the examination of the defendant.²⁵⁵ If that passage of time—which the Court relied on in both *Barany* and *Barcroft*—can invalidate nonconflicting expert opinions, Indiana may as well not have an insanity defense at all.²⁵⁶

Along with restoring and extending *Galloway*, the Court should overrule *Cate* and *Barany*, both of which were premised on demeanor evidence or lay-witness testimony without affirmative evidence of feigning illness to set aside the nonconflicting opinions of credible medical experts.²⁵⁷ Similarly, the Court should overrule *Myers* and *Payne* to the extent those opinions require a defendant's actions at the time of an offense to conform to a well-documented medical history in order to obtain the benefits of Indiana's insanity defense.²⁵⁸

Once a defendant has demonstrated a rebuttable presumption of insanity, to obtain a guilty or GBMI verdict the State must disprove the existence of insanity beyond a reasonable doubt.²⁵⁹ To allow our fact-finders to use evidence that trained medical experts will have already concluded lacks probative value of sanity to rebut those experts' conclusions bases a conclusion of sanity on a lay person's *assumptions* that *apparent* behavior was *rational* behavior and the medical experts were duped.²⁶⁰ Such a conclusion is not based on evidence of probative value but on the fact-finder's speculation as to the meaning of that evidence, and speculation is constitutionally insufficient to support a criminal conviction.²⁶¹ Further, and importantly, the risk that a lay fact-finder will engage in that speculation is heightened by the competency-restoration process, which, as noted earlier, often results in disguising a defendant's mental illness by having the defendant *appear* rational during trial.

The insanity statutes require evaluation of defendants by psychiatrists or psychologists for a reason, and our Supreme Court should reconsider its body of law here to implement our General Assembly's intent for that requirement. The *only* nonspeculative, probative evidence of the defendant's internal cognitive state at the time of an offense is the opinion of an expert trained in discerning that cognitive state; that cognitive state is what Indiana's insanity defense is all about.²⁶²

255. Knoll & Resnick, *supra* note 240, at 5.

256. *Barcroft v. State*, 111 N.E.3d 997, 1006-07 (Ind. 2018); *Barany v. State*, 658 N.E.2d 60, 64 (Ind. 1995).

257. *See supra* Part IV.D.2.

258. *See supra* Part IV.D.6-7.

259. *See, e.g.*, *Adkins v. State*, 887 N.E.2d 934, 938 (Ind. 2008) (holding that, once a defendant places a mitigating or affirmative issue at issue, the State bears the burden of disproving that issue beyond a reasonable doubt).

260. As the Indiana Court of Appeals has long recognized in the context of medical malpractice claims: "An expert, who has the ability to apply principles of science to the facts, has the power to draw inferences from the facts which a lay witness or jury would be incompetent to draw." *Daub v. Daub*, 629 N.E.2d 873, 878 (Ind. Ct. App. 1994), *trans. denied*.

261. *See, e.g.*, *Smith v. State*, 270 N.E.2d 743, 745 (Ind. 1971).

262. *See supra* Part D.1.

This is not to say that the State cannot rebut nonconflicting experts who support an insanity defense, but the rebuttal must establish a substantial reason that is beyond a reasonable doubt to not rely on the experts' nonconflicting opinions. By all means, let the State present affirmative evidence of a defendant's history of feigning mental illness or other medical information.²⁶³ Let the State affirmatively challenge the credibility of the experts.²⁶⁴ Let the State challenge the quality of the experts' assessments of the defendant.²⁶⁵ Let the State emphasize substantial inconsistencies between the experts' reports.²⁶⁶ Any or all of these are valid challenges to expert medical testimony and may reasonably support affirming the fact-finder's rejection of a rebuttable presumption under the insanity defense.

However, the Indiana Supreme Court should not allow nonconflicting and credible experts to come to a singular conclusion about the defendant's cognitive state at the time of an offense only to have a lay fact-finder shrug it off based on assumptions, guesses, or biases. Nor should the Court allow lay fact-finders and jurists to selectively choose and prefer evidence that may appear rational to those with normal cognitive states but has already been considered by medical experts to come to their conclusions on insanity, including demeanor and observation evidence contemporaneous to the offense as well as the defendant's medical history and how the defendant presents himself or herself at trial, as a basis to impeach those experts' conclusions. And the Court should not allow, as it did in *Payne*, for the meaningfulness of appellate review for some of our most vulnerable citizens to depend on a life history of access to medical care, especially in a state where access to that care is so hard to come by.

V. CONCLUSION

Hoosiers are suffering from a lack of available mental-health care in our communities. But Indiana's judiciary need not stand idly by in these times when it comes to serious mental illness among criminal defendants. The Indiana Supreme Court should amend the Indiana Criminal Rules to require judicial officers at initial hearings to administer the BJMHS. The Judicial Conference and other stakeholders should enable Indiana probation officers to become qualified mental-health specialists within their departments. Finally, the Indiana Supreme Court should revisit appellate review of rejected insanity defenses and hold that nonconflicting and credible expert testimony of insanity at the time of the crime establishes a rebuttable presumption of insanity.

263. *E.g.*, *Gambill v. State*, 675 N.E.2d 668, 672–73 (Ind. 1996).

264. *Cf.* *Galloway v. State*, 938 N.E.2d 699, 711 (Ind. 2010) (noting that the trial court, acting as the fact-finder, based its GBMI judgment not on the experts' testimony but on other evidence).

265. *See* *Barcroft v. State*, 111 N.E.3d 997, 1006–07 (Ind. 2018).

266. *See id.*