*Members*

*Sen. Brent Steele, Chairperson*
*Sen. Timothy Lanane*
*Rep. Eric Turner*
*Rep. Linda Lawson*

# LEGISLATIVE COUNCIL BARNES V. STATE SUBCOMMITTEE

*LSA Staff:*

*Andrew Hedges, Attorney for the Subcommittee*

*Authority: Established by LCR01-2011*

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## MEETING MINUTES[1]

| | |
|---|---|
| **Meeting Date:** | **June 29, 2011** |
| **Meeting Time:** | **1:00 P.M.** |
| **Meeting Place:** | **State House, 200 W. Washington St., Room 431** |
| **Meeting City:** | **Indianapolis, Indiana** |
| **Meeting Number:** | **1** |

**Members Present:** **Sen. Brent Steele, Chairperson; Sen. Timothy Lanane; Rep. Eric Turner.**

**Members Absent:** **Rep. Linda Lawson.**

Senator Steele convened the meeting at 1:05 p.m.

Legislative Services Agency staff attorney Andrew Hedges gave a brief overview of the Supreme Court's opinion in *Barnes v. State*. Mr. Hedges noted that in one part of the opinion, the Court stated that public policy disfavored the common-law right to reasonably resist unlawful entry, and in another part of the opinion the court stated that the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.

State Police Lieutenant Mark Carnell testified that he did not believe that the *Barnes* opinion changed current law. In response to a question by Senator Lanane, Officer Carnell stated that exigent entry is sometimes necessary in a fluid domestic violence situation. In response to a question from Rep. Turner, Officer Carnell stated that

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[1] These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at http://www.in.gov/legislative Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of $0.15 per page and mailing costs will be charged for hard copies.

sometimes police officers were required to make quick decisions and use their best judgment. Officer Carnell noted that some cases were not clear cut, and that there were a small number of close cases.

Senator R. Michael Young distributed a packet to committee members containing: (1) draft legislation specifying that a person may use reasonable force against a law enforcement officer in certain cases; (2) an *amicus* brief filed by members of the General Assembly in support of the appellant's Petition for Rehearing in *Barnes v. State*; and (3) the Supreme Court's opinion in *Powell v. State*, which involved the conviction of a police officer for felony murder and attempted robbery. See Exhibit 1.

Senator Young testified that the common law right to resist unlawful entry by police is ancient. Senator Young also stated that the Supreme Court erred by finding that the common law to resist unlawful entry by police was against public policy, noting that many cases hold that legislative statutes embody the public policy of the state, and that Indiana's statutes, including recent amendments expanding the right to self-defense, do not disfavor the right to resist unlawful entry. Senator Young testified that the legislature should defend people against the government, and that in close situations police can seek additional guidance or obtain a warrant.

Senator Young noted that police misconduct could be a problem, as could people who pose as police officers. Senator Young testified that the Supreme Court should reconsider its opinion in *Barnes* in light of both the public policy of the state as reflected in Indiana statutes, as well as in light of the self-defense statute itself.

In response to a question from Senator Lanane suggesting that the right to resist may not help individuals because police would probably arrest them in any event, Senator Young suggested that police could back down, de-escalate the situation, and seek advice from superior officers.

Senator Steele stated that he believed that the legislature had a responsibility to express its opinion on this matter to the Supreme Court.

Senator Steele adjourned the meeting at 2:05 p.m.

Exhibit 1, Barnes v. State Subcommittee 6/29/11

SECTION 1. IC 35-41-3-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2012] Sec. 2. (a) **As used in this section, "person" includes a law enforcement officer.**

(b) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force, **including an unlawful search, seizure, or arrest.** However, a person:

(1) is justified in using deadly force; and

(2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

~~(b)~~ (c) A person:

(1) is justified in using reasonable force, including deadly force, against another person; and

(2) does not have a duty to retreat;

if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of, **unlawful search of,** or **unlawful** attack on the person's dwelling, curtilage, or occupied motor vehicle.

(c) With respect to property other than a dwelling, curtilage, or an occupied motor vehicle, a person is justified in using reasonable force against another person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect. However, a person:

(1) is justified in using deadly force; and

(2) does not have a duty to retreat;

only if that force is justified under subsection ~~(a).~~ (b).

~~(d)~~ (e) A person is justified in using reasonable force, including deadly force, against another person and does not have a duty to retreat if the person reasonably believes that the force is necessary to prevent or stop the other person from hijacking, attempting to hijack, or otherwise seizing or attempting to seize unlawful control of an aircraft in flight. For purposes of this subsection, an aircraft is considered to be in flight while the aircraft is:

(1) on the ground in Indiana:

(A) after the doors of the aircraft are closed for takeoff; and

(B) until the aircraft takes off;

(2) in the airspace above Indiana; or

(3) on the ground in Indiana:

(A) after the aircraft lands; and

(B) before the doors of the aircraft are opened after landing.

(e) Notwithstanding subsections ~~(a),~~ (b), (c), and ~~(c)~~ (d), a person is not justified in using force if:

(1) the person is committing or is escaping after the commission of a crime;

(2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or

(3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

(f) Notwithstanding subsection ~~(d)~~ **(e)**, a person is not justified in using force if the person:

(1) is committing, or is escaping after the commission of, a crime;

(2) provokes unlawful action by another person, with intent to cause bodily injury to the other person; or

(3) continues to combat another person after the other person withdraws from the encounter and communicates the other person's intent to stop hijacking, attempting to hijack, or otherwise seizing or attempting to seize unlawful control of an aircraft in flight.

# In the

# Indiana Supreme Court

No. 82S05-1007-CR-343

| | | |
|---|---|---|
| RICHARD L. BARNES,<br><br>Appellant (Defendant below),<br><br>vs.<br><br>STATE OF INDIANA,<br><br>Appellee (Plaintiff below). | ) | On Petition to Transfer from the Indiana Court of Appeals<br>No. 82A05-0910-CR-592<br><br>Appeal from the Vanderburgh Superior Court<br><br>Cause No. 82D02-0808-CM-759<br><br>The Honorable Mary Margaret Lloyd, Judge |

**BRIEF OF *AMICUS CURIAE* MEMBERS OF THE GENERAL ASSEMBLY [INSERT ALL NAMES] IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING**

## STATEMENT OF THE INTEREST OF AMICUS CURIAE

This Court's opinion, which broadly holds "there is no right to reasonably resist unlawful entry by police officers" into a home, is a matter of great concern to members of the General Assembly and their constituents. Although the decision is grounded in the common law, its holding sweeps further and purports to extinguish any right of Indiana citizens to protect themselves from any unlawful police entry. This cannot be reconciled with Indiana's self-defense statute.

Amicus are current members of the General Assembly who also served in 2006 and supported House Bill 1028, which significantly broadened the longstanding ability of Hoosiers to protect themselves from unlawful entry into their homes under the self-defense statute. This brief discusses that crucial statute and the manner in which it informs public policy, which were not addressed in the earlier briefing of this case.[1] The interests of amicus appear to be aligned with both parties to the extent they seek to narrow this Court's holding allowing unlawful entry by police into homes.

## SUMMARY OF THE ARGUMENT

Few issues before this Court have galvanized the public's attention and concern as the declaration in this case that "the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law." Slip op. at 6. Rehearing is appropriate to reconsider that holding in light of Indiana's robust self-defense statute.

Indiana's self-defense statute has long allowed citizens to use *reasonable* force to if the person *reasonably* believes such force is necessary to prevent or terminate unlawful entry into their home. The statute was furthered broadened by overwhelming majorities of both houses in 2006 to make clear that Hoosiers do not have a duty to retreat when faced with unlawful entry. That statute, by its plain language, applies to unlawful entry by police or persons pretending to be police officers, and rehearing would be helpful in clarifying this important point of law for our citizens and trial courts. Moreover, rehear-

[1] Although this case also raises significant Fourth Amendment concerns, this brief focuses solely on areas of legislative expertise: the self-defense statute and the public policy concerns underlying it.

ing would allow an opportunity to reconsider the abrogation of the common law rule in light of this important statute and the public policy considerations underlying it. Although some states have abrogated the common law right to *resist arrest*, Indiana has not. The right to resist arrest in the *streets* is quite different from the right to resist unlawful entry into one's *home*—for arrest, investigation, or any other purpose. The public policy of this state, as embodied in the 2006 legislation, has been to grant our citizens greater autonomy to protect themselves from unlawful incursions into their homes.

Amicus respectfully requests this Court narrow its broad holding to square it with Indiana's self-defense statute by making clear citizens retain the right to reasonably resist unlawful police entry into their homes.

## ARGUMENT

**This Court's broad declaration of "no right to resist unlawful entry by police" into a home is inconsistent with Indiana's robust self-defense statute.**

In the wake of this Court's opinion, many Hoosiers are concerned that they are powerless to take any action when a person claiming to be a police officer appears at their door or attempts to enter their home. Rehearing is appropriate to narrow this Court's broad holding in a manner consistent with Indiana's expansive self-defense statute and the public policy underlying it.

### A. The 2006 broadening of the self-defense statute

In 2006, the General Assembly enacted House Bill 1028 overwhelmingly with bipartisan support in both houses.[2] That bill, like "stand your ground" legislation passed in many other states, expanded the self-defense statute to make clear that citizens faced with an unlawful entry into their homes were not required to retreat. Specifically, the following **bolded** language was added:

> (b) A person:
> **(1)** is justified in using reasonable force, including deadly force, against another person; **and**
> **(2) does not have a duty to retreat;**
> if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, or curtilage, **or occupied motor vehicle.**

[2] The vote in the House was 82-18, and the Senate vote was 44-5.

Ind. Code § 35-41-3-2.[3]

This Court's broad holding renders citizens faced with unlawful entry into their home by police helpless to do anything but watch and wait for the encounter to end before pursuing legal recourse later in the courts. This is wholly at odds with the self-defense statute, which is not a license to engage in violence at whim but explicitly informs Hoosiers they need not retreat and may use "reasonable force" when they "reasonably" believe such force is necessary to prevent unlawful entry into a home. Rehearing is appropriate to clarify that Hoosiers retain the right to defend themselves and their homes under the self-defense statute.[4]

### B. The public policy concerns underlying the self-defense statute support a right to reasonably resist unlawful entry by police.

Beyond clarifying the right to pursue a self-defense claim, this Court may wish to reconsider the abrogation of the common law rule in light of Indiana statutes and the public policy considerations underlying them. This Court's opinion alluded to the trend of state's abolishing the common law right to resist an unlawful arrest. Slip op. at 4; *see generally State v. Valentine*, 935 P.2d 1294, 1302 (Wash. 1997). But Indiana has not, by statute, followed that course. The most re-

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[3] Similar language was also added to parts (a) and (c) of the statute, but this brief discusses only part (b), which applies to entries into a home.

[4] Even some states that have adopted statutes prohibiting the use of force to resist arrest have acknowledged their self-defense statutes allow citizens to use force in self-defense under some circumstances against officers who use excessive force. *See, e.g., Commonwealth v. French*, 611 A.2d 175, 179 (Pa. 1992).

levant statutory change in recent years has been House Bill 1028, which *broadened* the rights of citizens in their homes and elsewhere.

Moreover, the right to resist an unlawful arrest on the street is quite different from the right to keep police from unlawfully entering one's home. Indiana courts have previously and appropriately recognized "a greater privilege to resist an unlawful entry into private premises than to resist an unlawful arrest in a public place." *Casselman v. State*, 472 N.E.2d 1310, 1315 (Ind. Ct. App. 1985). A citizen's home has long been viewed as a "castle, a place where safety from enemies should be guaranteed" and which "confer[s] a certain degree of immunity from the state." Benjamin Levin, Note, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 Harv. J. on Legis. 523, 530 (2010) (citing William Blackstone 4 *Commentaries* 223). Few interactions between citizens and police involve unlawful entry issues, and the utmost protection should be provided to our citizens in that setting. *See generally* Bureau of Justice Statistics, *Contacts between Police and the Public* 3 (2007) (noting 56.3% of encounters were traffic-related and another 23.7% were discussions about citizen-reported problems).

This Court has previously recognized statutes "as a legislative declaration of the public policy of the state." *Loza v. State*, 263 Ind. 124, 325 N.E.2d 173, 176 (1975). It presumes "the legislature, in writing the statute, intended its language to be applied in a logical manner consistent with public policy and convenience." *Alberici Constructors, Inc. v. Ohio Farmers Ins. Co.*, 866 N.E.2d 740, 746 (Ind.

2007). Well-settled legal doctrines are generally revised or rejected by legislatures rather than courts. *Meyers v. Meyers*, 861 N.E.2d 704, 707 (Ind. 2007).

Any rule that encourages "immediate surrender" whenever a person hears the word "police!" or sees a badge could expose citizens to a great risk of harm. Dimitri Epstein, Note, *Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police*, 26 Ga. St. U. L. Rev. 585, 609 (2010). Cases of police impersonation are common throughout the country and allow criminals to "disarm their victims" easily. *Id.* For example, a serial killer in Pennsylvania used a police disguise to gain entry into a home where he raped and strangled a woman, and men claiming to be narcotics agents in Alabama kicked in a door and stole money and prescription drugs after hitting the occupant on the head. *Id.* at 609-10. Two former policemen in Los Angeles were convicted of "home-invasion robberies that were designed to look like legitimate police searches of homes and businesses." *Id.* at 610 (quoting Wendy Thomas Russel, *Ferguson Brothers Convicted of Felonies*, Long-Beach Press-Telegram, Jan. 31, 2008, at 1A).

These headlines need not be replicated in Indiana. Rather, granting rehearing is appropriate to narrow this Court's holding and apprise our citizens that they retain the venerable right to *reasonably* resist unlawful entry into their homes by police.

## CONCLUSION

For the foregoing reasons, [insert names], members of the General Assembly, respectfully request this Court grant rehearing and narrow the scope of its holding in a manner consistent with the ability of Hoosiers to protect themselves and their homes from unlawful entry as provided in Indiana's self-defense statute.

Respectfully submitted,

[insert all names]

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was duly served by personal delivery on this ____ day of June 2011 upon:

Attorney General Greg Zoeller
219 Statehouse
Indianapolis, Indiana 46204

A copy was also served by first-class mail upon:

Erin L. Berger
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_____
Joel M. Schumm

1 of 100 DOCUMENTS

**MYRON A. POWELL, Appellant-Defendant, v. STATE OF INDIANA, Appellee-Plaintiff.**

**Supreme Court Cause Number 49S00-0009-CR-562**

**SUPREME COURT OF INDIANA**

*769 N.E.2d 1128*; *2002 Ind. LEXIS 506*

**June 18, 2002, Decided**

**SUBSEQUENT HISTORY:** [**1] Petition for Rehearing Denied November 22, 2002, Reported at: *2002 Ind. LEXIS 1011*.

**PRIOR HISTORY:** APPEAL FROM THE MARION SUPERIOR COURT, ROOM NO. 3. The Honorable Cale Bradford, Judge. Cause No. 49G03-9712-CF-183028.

**DISPOSITION:** On direct appeal, trial court's judgment was affirmed.

**COUNSEL:** ATTORNEY FOR APPELLANT: ERIC K. KOSELKE, Indianapolis, Indiana.

ATTORNEYS FOR APPELLEE: STEVE CARTER, Attorney General of Indiana, CHRISTOPHER L. LAFUSE, Deputy Attorney General, Indianapolis, Indiana.

**JUDGES:** RUCKER, Justice. SHEPARD, C.J., and DICKSON, SULLIVAN and BOEHM, JJ., concur.

**OPINION BY:** RUCKER

**OPINION**

[*1130] **ON DIRECT APPEAL**

RUCKER, Justice

A jury convicted Indianapolis police officer Myron Powell of felony murder for his role in the attempted robbery and shooting death of a suspected drug dealer. The trial court sentenced him to sixty-five years imprisonment. In this direct appeal, Powell raises four issues for our review, which we rephrase as follows: (1) is Powell's conviction for felony murder inconsistent with his acquittal for robbery; (2) did the trial court err in refusing Powell's tendered instruction on accomplice liability; (3) did the trial court err in sentencing Powell; and (4) is Powell's sentence manifestly unreasonable. We affirm.

***Facts***

The facts most favorable to the verdict show that in the evening hours [**2] of December 11, 1997, David Hairston was present at his home in Indianapolis. Also present were twenty-year-old Khalalah and fifteen-year-old Michael. When the doorbell rang, Khalalah answered and observed two men, one of whom was wearing a police uniform. She also observed an Indianapolis Police Department patrol car parked in front of the house. The man wearing the uniform asked to speak with "Big C," which was Hairston's nickname. Khalalah shut the door, leaving the men outside, and yelled to Hairston that the police wanted to talk to him. In the meantime, the two men entered the house and waited in the foyer. Hairston came to the door and inquired, "What's the problem, Officers?" R. at 1373. The man in the uniform responded, "We just busted one of your friends and [he] said you had a lot of drugs over here." R. at 1374. When Hairston asked to see a search warrant, the uniformed officer replied that additional police officers were en route to the house with the document. Hairston then told the pair to wait outside until the other officers arrived. However, the two men refused to leave. Hairston then demanded their names and badge numbers. The officer in uniform stated that his [**3] name was "Thompson." Suspecting something was amiss, Hairston brushed aside

the officer's coat and saw a nametag that read "Powell." R. at 1291.

At that point, the second man, later identified as Michael Highbaugh, produced a handgun, placed the barrel against Hairston's temple, and ordered him to lie on the floor. Hairston refused, and Highbaugh shot him once in the head. He died as a result. In the meantime, Khalalah [*1131] and Michael had run from the foyer into the kitchen. Highbaugh shot Michael in the head as he was trying to exit through a kitchen window. The resulting wound was not fatal, and Michael lay motionless pretending to be dead. Highbaugh then placed the barrel of the gun against Khalalah's head and pulled the trigger. When it misfired, he grabbed a knife and stabbed her several times in the neck. She survived and identified Powell as the man in the uniform.

From his position on the kitchen floor, Michael heard footsteps running throughout the house. After several minutes, he saw Powell rushing out the front door carrying three bags, one of which appeared to contain marijuana. When Powell and Highbaugh were finally gone, Michael locked the door and called the police. Officers [**4] from the Indianapolis Police Department arrived and observed a large safe that had been moved from Hairston's bedroom closet to the front porch. It contained $ 75,000 in cash, a semi-automatic handgun, jewelry, and a $ 5000 Certificate of Deposit. Officers also recovered from the house a scale used to weigh narcotics, $ 22,000 in cash, and a large quantity of cocaine and marijuana.

The State charged Powell with murder, felony murder, two counts of attempted murder, and robbery. The State also sought the death penalty but later amended its complaint and sought life imprisonment without parole.

[1] After a jury trial, Powell was convicted of felony murder and acquitted of the remaining charges. The trial court sentenced Powell to sixty-five years imprisonment. This appeal followed.

1 Highbaugh was charged separately with the same offenses. And as with Powell, the State also sought the death penalty and later amended its complaint to a request for life imprisonment without parole. Highbaugh pleaded guilty to murder and two counts of attempted murder and was sentenced to life without parole. His direct appeal is pending before this Court.

[**5] *Discussion*

I.

Because the jury found Powell guilty of felony murder but acquitted him of robbery, Powell argues these verdicts are inconsistent because robbery was "the only . . . underlying felony used to support his felony murder conviction." Br. of Appellant at 8. Therefore, the argument continues, this Court should reverse his felony murder conviction.

When this Court reviews a claim of inconsistent jury verdicts, "we will take corrective action only when the verdicts are extremely contradictory and irreconcilable." *Mitchell v. State, 726 N.E.2d 1228, 1239 (Ind. 2000)* (quotation omitted). A jury's verdict may be inconsistent or even illogical but nevertheless permissible if it is supported by sufficient evidence. *Totten v. State, 486 N.E.2d 519, 522 (Ind. 1985)*; see also *Hodge v. State, 688 N.E.2d 1246, 1248-49 (Ind. 1997)* (noting that ordinarily when the trial of a defendant results in acquittal on some charges and convictions on others, the verdicts will survive a claim of inconsistency when the evidence is sufficient to support the convictions). In resolving such a claim, we neither interpret nor speculate [**6] about the thought process or motivation of the jury in reaching its verdict. *Mitchell, 726 N.E.2d at 1239*.

Powell's argument is based on a faulty premise. Rather than relying solely on the commission of a robbery as the crime underlying the felony murder charge, the record shows the State relied on alternative theories, namely: robbery *or* attempted robbery. [2] Evidence that a [*1132] locked safe in Hairston's home had been moved from the closet to the front porch was sufficient for the jury to conclude that Powell intended to rob Hairston but simply did not complete the job. Powell's conviction for felony murder with attempted robbery as the underlying felony is not inconsistent with his acquittal for robbery.

2 The charging information provides in relevant part, "MYRON A. POWELL . . . did kill another human being, namely DAVID HAIRSTON, while committing or attempting to commit ROBBERY." R. at 89.

II.

Powell tendered the following jury instruction on accomplice liability:

The criminal liability [**7] of an accomplice is negated by the principal's commission of an offense greater in severity than the offense originally planned if the resulting offense is not a probable and natural consequence of the planned offense.

R. at 969 (emphasis in original). The trial court refused to give Powell's tendered instruction and instead gave its own, which read in pertinent part:

A person is responsible for the actions of another person when, either before or during the commission of a

crime, he knowingly aids, induces, or causes the other person to commit a crime, even if the other person:

1. Has not been prosecuted for the offense

2. Has not been convicted of the offense; or

3. Has been acquitted of the offense.

To aid is to knowingly support, help, or assist in the commission of a crime.

In order to be held responsible for the actions of another, [a defendant] need only have knowledge that he is helping in the commission of the charged crime. He does not have to personally participate in the crime nor does he have to be present when the crime is committed.

. . .

It must be proved beyond a reasonable doubt that a defendant had knowledge of and participated in the [**8] commission of the crime.

R. at 1004-05 (Instruction No. 10 B). Powell complains the trial court erred in refusing to give his proposed tendered instruction.

The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. *Cline v. State, 726 N.E.2d 1249, 1256 (Ind. 2000)*. The test for reviewing the trial court's decision to refuse a tendered instruction is: (1) whether the instruction correctly states the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court. Id. Although Powell contends otherwise, the substance of his instruction - accomplice liability - is contained in the instruction given by the trial court. We find no error on this issue.

In a related argument, Powell also complains the trial court erred in refusing to give his tendered instruction on accomplice liability after the jury sent a note to the trial court. The facts are these. In the late evening hours during the first day of deliberations, the [**9] jury sent two questions to the trial court. The one at issue here read as follows:

Could we have clarification in relationship to Instruction 10B? Does the sentence, ["]a person is responsible for the actions of another person when either [*1133] before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime, even if the other person . . .["] does this crime, underlined, have to be the exact crime that eventually was committed, robbery, murder?

R. at 1763-64. After discussing the matter with the parties outside the jury's presence, the trial court returned the jury to the courtroom, advised them that court would be adjourned for the day, and that the trial court would answer the jury's questions the following morning. The next day, over Powell's objection, the trial court responded, "The Court may not answer this question. You should reread your Jury Instructions." R. at 1791. In this appeal, Powell contends the trial court should have re-read all of the final instructions along with his previously rejected tendered instruction. [3]

3 Although the record is not clear, apparently the trial court provided the jury with a set of final instructions to aid them during deliberations. Thus, rather than re-reading the instructions itself, the trial court directed the jury to do so. There was no error in that regard, and Powell makes no such claim. We take Powell's argument on appeal to mean that the trial court erred by not tendering his proposed instruction and directing the jury to read it along with the other final instructions.

[**10] *Indiana Code section 34-36-1-6* provides:

If, after the jury retires for deliberation:

(1) there is a disagreement among the jurors as to any part of the testimony; or

(2) the jury desires to be informed as to any point of law arising in the case;

the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

There is no dispute that the jury's question in this case concerned a point of law. Also there is no dispute that the trial court complied with the statutory mandate. Powell's complaint is that the trial court should have done more.

At the time of Powell's trial, the generally accepted procedures in answering a jury's question on a matter of law was to reread all instructions in order to avoid emphasizing any particular point and not qualify, modify, or explain its instructions in any way. *Wallace v. State, 426 N.E.2d 34, 36 (Ind. 1981)*; see also *Jenkins v. State, 424 N.E.2d. 1002, 1003 (Ind. 1981)* ("The path is extremely hazardous for the court that would depart from the [**11] body of final instructions and do other than reread the final instructions in responding to jury questions."). [4] However, we have permitted departure from this procedure. In Riley v. State we said "'when the jury question coincides with an error or legal lacuna [gap] in the final instructions . . . a response other than rereading from the body of final instructions is permissible.'" *711 N.E.2d 489, 493 (Ind. 1999)* (quoting *Jenkins, 424*

*N.E.2d at 1003*). In this case, Powell contends there was a gap in the trial court's final instructions that would have been cured by a reading of his [*1134] tendered instruction. We disagree there was any gap. The trial court's instruction was thorough and more detailed than that proposed by Powell. As we have already determined, the substance of Powell's instruction was contained in the instruction given by the trial court. Further, reading Powell's instruction would not have provided the jury with any more guidance on the question raised. The court's instruction informed the jury, among other things, that it must find beyond a reasonable doubt that Powell had knowledge that Highbaugh intended to commit the "charged crime. [**12] " Powell's proposed instruction stated the same proposition, but simply in the negative. We find no error here.

4 With this Court's adoption of the Indiana Jury Rules, which become effective January 1, 2003, trial courts are afforded greater flexibility in responding to jury inquiries. Jury Rule 28 provides:

> If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

III.

The trial court sentenced Powell to the maximum term of sixty-five years. Powell challenges his sentence contending the trial court considered an improper aggravator, failed to consider several mitigating factors, and failed to balance substantial mitigating factors [**13] against the aggravating factors. Generally, sentencing determinations rest within the trial court's discretion. *Bonds v. State, 729 N.E.2d 1002, 1004 (Ind. 2000)*. We review trial court sentencing decisions only for abuse of discretion, including a trial court's decision to increase the presumptive sentence because of aggravating circumstances. Id.

At sentencing the trial court identified as aggravating factors: (1) the nature and circumstances of the crime; and (2) the commission of a forcible felony while wearing a garment designed to resist the penetration of a bullet. [5] Powell complains there is no evidence in the record to support the second aggravator. The State counters that in his statement given to investigating officers, Powell testified that he was wearing a "full uniform" at the time of the crime. R. at 1532. The State also points to testimony that Powell was wearing a bulletproof vest when arrested the morning after the crime was committed.

5 See *Ind. Code § 35-38-1-7.1(b)(7)*

[**14] The record shows that Powell was arrested during roll call at his precinct. That fact does not support the notion that he wore a bulletproof vest the night before. Also, although Powell testified that he was in "full uniform" at the crime scene, there is no evidence in the record that a full uniform includes a garment designed to resist the penetration of a bullet. Therefore, the use of this aggravator was inappropriate. [6]

6 Powell also contends that the trial court "relied on false assumption when pronouncing sentence" because the trial court referred to him as a "robber." Br. of Appellant at 19. Powell complains this amounts to error because the jury acquitted him of robbery. Our review of the record shows that the trial court's reference to Powell as a "robber," as opposed to an "attempted robber," was inadvertent. In its sentencing statement, the trial court explained that Powell "attempted to make his own personal gain in drugs and money" and later referred to the crime as an "attempted robbery." R. at 1970-71. In any event, Powell has failed to establish that this reference was used as an aggravating factor.

[**15] The trial court found Powell's lack of criminal history as the sole mitigating factor. Powell complains the trial court erred in failing to consider as mitigating factors his military service, his "chronically abusive childhood," and that he was a good father to his children and step-children. Br. of Appellant at 20. The finding of mitigating circumstances is within the discretion of the trial court. *McCann v.* [*1135] *State, 749 N.E.2d 1116, 1121 (Ind. 2001)*. "An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." Id. Further, the trial court is not obligated to accept the defendant's contention as to what constitutes a mitigating circumstance. Id.

The record shows that Powell was released from his second tour of duty in the United States Air Force with an "other than honorable discharge." R. at 1833. Apparently, he was accused of taking quarters from a slot machine and resigned rather than accept a reduction in rank. Even if Powell's record was exemplary to that point, the existence of an other than honorable [**16] discharge was a factor the trial court could properly consider in determining that his military record was entitled to no significant mitigating weight.

Concerning Powell's "chronically abusive childhood," the record shows that Powell's father had a drinking problem; his mother was hospitalized for psychiatric problems; his father-figure older brother was murdered; and he witnessed the stabbing death of another brother. A defendant's difficult childhood is not necessarily entitled to mitigating weight. See, e.g., *Loveless v. State, 642 N.E.2d 974, 977 (Ind. 1994)* (no weight given where sixteen-year-old defendant had been molested by her father as an infant; witnessed father molest her sisters, cousin, and other young girls; witnessed her parents' multiple attempts to commit suicide; and witnessed her father attempting to kill her mother); *Page v. State, 615 N.E.2d 894, 896 (Ind. 1993)* (no weight given where nineteen-year-old defendant was addicted to alcohol and abused by both parents). In this case, the trial court was not obligated to consider Powell's family background as a mitigating circumstance. By being qualified to serve as a police officer [**17] and having served for a number of years, Powell apparently was able to overcome whatever adversity he might have experienced in his youth. There is no indication that Powell's childhood was relevant to his level of culpability, and the trial court properly ignored it. The same is true for Powell's claim that he was a good father to his children and stepchildren. We conclude the trial court properly determined the foregoing factors were entitled to no mitigating weight.

As for Powell's complaint that the trial court failed to balance substantial mitigating factors against the aggravating factors, as explained by the foregoing discussion, there was only one proper mitigating factor that the trial court found: lack of criminal history. Because the trial court improperly relied on the "committing a forcible felony while wearing a garment designed to resist the penetration of a bullet" aggravator, we are left with a single aggravator: the nature and circumstances of the crime. However, the manner and circumstances in which a crime is committed can be considered as an aggravating circumstance. *Georgopulos v. State, 735 N.E.2d 1138, 1144 (Ind. 2000)*. Also, a single aggravating [**18] circumstance is adequate to justify a sentence enhancement. *Hawkins v. State, 748 N.E.2d 362, 363 (Ind. 2001)*. In this case, identifying the nature and circumstances of Powell's crime, the trial court noted Powell's abuse of police power and breach of public trust; the fact that his acts not only resulted in a death but also severe injury to a young woman and a minor child; and that the crime was motivated by drugs and money. The trial court gave substantial aggravating weight to the nature and circumstances of Powell's crime finding them to be "the main aggravating factors in this [*1136] case." R. at 1970. This sole aggravating factor outweighs the single mitigating factor even though one of the aggravators was invalid. [7] See, e.g., *Walter v. State, 727 N.E.2d 443, 447 (Ind. 2000)* ("Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist.").

> 7 This Court has held that the lack of criminal history should be given substantial mitigating weight. See *Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)*. However, "that does not mean that lack of criminal history automatically outweighs any valid aggravating circumstance. Rather, it is a balancing test." *McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001)*.

[**19] I V.

Finally, Powell contends his sentence is manifestly unreasonable and invites this Court to revise it to the presumptive term of fifty-five years. Although this Court is empowered to review and revise criminal sentences, we will not do so unless the sentence is "manifestly unreasonable in light of the nature of the offense and the character of the offender." *Prowell v State, 687 N.E.2d 563, 568 (Ind. 1997)*. While on duty as a police officer, sworn to "protect and serve," Powell entered a house on the pretext of serving a search warrant. While present he participated in killing the resident and seriously injuring two innocent bystanders. And he did so for the sake of stealing drugs and money. We are not persuaded that a sixty-five year sentence for Powell's crime is manifestly unreasonable.

***Conclusion***

*We affirm the trial court.*

*SHEPARD, C.J., and DICKSON, SULLIVAN and BOEHM, JJ., concur.*