G. APPEAL

G.1. Appealable orders

TITLE: Barlow v. State
INDEX NO.: G.1.
CITE: (2d Dist. 8/15/88), Ind. App., 526 N.E.2d 1212
SUBJECT: Appealable orders - drug/alcohol abuse treatment
HOLDING: Deferment of criminal proceeding pursuant to Ind. Code 16-13-6.1-15.1(b) is neither final judgment nor proper subject for interlocutory appeal. After bench trial, D was found guilty of DUI & driving with .10 or more BAC, with the latter merging into the former. Tr. Ct. offered D option of withholding judgment for one year, conditioned upon D's successful completion of alcohol counseling & not committing additional alcohol related offenses curing that period. If D met conditions during year, charges would be dismissed, pursuant to Ind. Code 16-13-6.1-15.1. D accepted this offer. D then filed Motion to Correct Errors (MCE). State filed Motion to Dismiss Appeal, alleging that Tr. Ct. has entered no appealable order. C.R. 16 provides that D has 60 days from date of sentencing to file MCE. Here, Tr. Ct. deferred entry of judgment. If D fails to meet conditions of deferment, Tr. Ct. will enter judgment of conviction & sentence D. Then D would have right to appeal. At this point, however, since there has been no conviction or sentence, D may not appeal. Held, appeal dismissed. Sullivan, J., DISSENTS

G. APPEAL

G.1. Appealable orders

G.1.a. Final judgment (AR 4(A))

TITLE: Eminger v. State
INDEX NO.: G.1.
CITE: (2/10/23), Ind. Ct. App., 204 N.E.3d 926
SUBJECT: Forfeiture -- State's successive Trial Rule 60(B) motion could not serve as a substitute for a direct appeal
HOLDING: Trial court abused its discretion in granting the State's motion for relief from judgment under Indiana Trial Rule 60(B)(8), which the State filed after the court had previously granted Defendant's own Rule 60(B) motion. Defendant's T.R. 60(B) motion claimed that he had not been properly served notice of the State's motion to transfer seized currency to the U.S. Department of Justice and that the transfer order violated the procedures outlined in Indiana Code 34-24-1 on the disposition of seized property. Court of Appeals held that granting Defendant's T.R. 60(B) motion was correct because he was not afforded due process protections in the transfer proceeding. And instead of presenting a previously unknown or unknowable procedural or equitable basis for relief from the trial court's judgment on Defendants motion, the State simply rehashed its original arguments against Defendant's motion. The proper procedure for the State to challenge the trial court's order granting Defendant's T.R. 60(B) motion was to timely appeal the trial court's judgment pursuant to T.R. 60(C), not to wait more than three months before filing its own 60(B) motion. The State's only "new"" argument--that the U.S. had afforded Defendant his due process protections in the forfeiture proceeding-- was of no force or effect because it did not address the due process problems in the transfer proceeding. Thus, this "new" argument by the State was not a sufficient basis from which the trial court could have revisited its order granting Defendant's Trial Rule 60(B) motion. Held: judgment on State's T.R. 60(B) motion reversed, trial court's decision on Defendant's motion is reinstated on its merits and remanded with instructions for hearing to allow Defendant to challenge the lawfulness of the State's seizure of currency. Should the trial court on remand determine that the State's seizure of the currency was unlawful, the State shall "reimburse" Defendantr "instanter," and the State may then "choose to try to recoup that money from the federal government." Lewis v. Putnam Cnty. Sheriff's Dep't, 125 N.E.3d 655, 6600 (Ind. Ct. App. 2019).

G. APPEAL

G.1. Appealable orders

G.1.a. Final judgment (AR 4(A))

G.1.a.1. By D (Ind. Code 35-38-4-1)

TITLE: Alexander v. State
INDEX NO.: G.1.a.1.
CITE: (3/13/2014), 4 N.E.3d 1169 (Ind. 2014)
SUBJECT: Court of Appeals erroneously dismissed appeal as premature
HOLDING: Per Curiam. Court of Appeals erroneously dismissed D's appeal of his aggravated battery conviction on grounds that he appealed before the issue of $96,000 in restitution for medical expenses had been settled. Tr. Ct. had set unresolved issue of restitution for hearing "in a couple weeks" and then told D if he wanted to appeal he had to file his notice within 30 days. He filed his notice of appeal five days before the restitution hearing. Tr. Ct.'s advisement "sufficiently put matters in a state of confusion about [D's] appeal deadline, we think, such that he is entitled to have his direct appeal decided on the merits now" even though restitution issue remains unresolved. Held, transfer granted, Court of Appeals' opinion at 987 N.E.2d 182 vacated and remanded to consider D's appeal on the merits.

TITLE: D.A. v. State
INDEX NO.: G.1.a.1.
CITE: (04-30-12), 967 N.E.2d 59 (Ind. Ct. App. 2012)
SUBJECT: Juvenile's conditional plea not final order subject to appeal
HOLDING: A conditional plea is equivalent to a withheld judgment, and thus, there is no final judgment or appealable final order from which to appeal. See Ind. Appellate Rule 5. Here, Tr. Ct. took D.A.'s guilty plea to child molesting under advisement pending his successful completion of probation on an attendant count of battery. On appeal, he claimed that the juvenile court's acceptance of his conditional plea on the child molesting count was an abuse of discretion because there was an inadequate factual basis to support the plea. Court agreed that there was no testimony or mention during plea hearing regarding the intent to arouse or satisfy sexual desires element of child molesting. However, Court did not have jurisdiction to resolve the issue because the conditional plea was not a final order subject to appeal. Also, juvenile court did not err in placing juvenile in inpatient treatment at Resolute. Held, judgment affirmed.

TITLE: Haste v. State
INDEX NO.: G.1.a.1.
CITE: (05-25-12), 967 N.E.2d 576 (Ind. Ct. App. 2012)
SUBJECT: Sentencing order taking restitution under advisement was not final judgment
HOLDING: Pursuant to Indiana Appellate Rule 2(H)(1), a "final judgment" is one which "disposes of all claims as to all parties[.]" In a criminal matter, sentencing is a final judgment. Terrell v. State, 180 Ind. App. 634, 390 N.E.2d 208 (1979). Here, Tr. Ct. sentenced D for Class B felony dealing in methamphetamine but took the restitution issue under advisement, thus his notice of appeal filed within 30 days of date of sentence was not from a final judgment. The requirement that a D pay restitution is as much a part of a criminal sentence as any fine or other penalty, thus the sentencing order from which D appealed did not completely dispose of all sentencing issues. Held, appeal dismissed.

RELATED CASES: Alexander, 4 N.E.3d 1169 (Ind. 2014) (unlike Haste, Tr. Ct. advised D that notice of appeal had to be filed and appointed appellate counsel two days later; his appeal should be addressed on merits even though issue of restitution remains unresolved; see full review, this section); Denning, 991 N.E.2d 160 (Ind. Ct. App. 2013) (Court had jurisdiction over appeal, even though Tr. Ct. said at sentencing hearing that it would take restitution issue under advisement, because the actual sentencing order made no mention of restitution issue, unlike sentencing order in Haste).

TITLE: Scruggs v. State
INDEX NO.: G.1.a.1.
CITE: (1st Dist., 06-30-94), Ind. App., 637 N.E.2d 175
SUBJECT: Procedure where no valid judgment initially entered
HOLDING: It was not error for regular judge to conduct resentencing & adopt master commissioner's findings & recommendations, where original appeal was dismissed because conviction & sentence was entered by master commissioner. D's original appeal of his conviction was dismissed by Ct. when it found no valid judgment had been entered due to lack of appointment of special judge, Scruggs, App., 609 N.E.2d 1148. Following appeal, D appeared before regular judge for resentencing, & judge merely adopted master commissioner's findings of fact & sentencing recommendations. Ind. Code 33-5-35.1-8(f) provides for master commissioners to report their findings in writing to judge, & Ind. Code 33-4-7-8 (in effect at time) provides for Ct. to conduct sentencing & enter final order. Ct. found that at resentencing, regular judge acted in his discretion in adopting master commissioners findings & recommendations. Held, conviction & sentence affirmed.

TITLE: Woodfork v. State
INDEX NO.: G.1.a.1.
CITE: (2d Dist. 06/22/92), App., 594 N.E.2d 468
SUBJECT: Need for judge to sign off on master commissioner's ruling
HOLDING: Consideration of appeal of this case was originally suspended because record did not reveal that final judgment on sentence was entered by regular trial judge as required. When Ct. suspended review, it ordered regular judge of Tr. Ct. "to cause sentence to be entered by a proper judicial officer." Regular trial judge then complied with order & entered judgment, & Ct. App. resumed consideration, deciding all issues adversely to D. In concurrence in result, Justice Sullivan noted that various Ct. App. panels had attempted to remain consistent in dismissing purported appeals where judgments were entered only by commissioners, consistent with State ex rel. Smith v. Starke Cr.Ct. (1981), 275 Ind. 483, 417 N.E.2d 1115. He therefore concluded that dismissal of appeal was mandated, & that order suspending appeal & ordering trial judge to enter judgement appropriately, was improvident. He found that directing regular judge to cause sentence to be entered, presupposed that judge would approve commissioner's recommendations, making him mere rubber stamp. See also Schwindt, App., 596 N.E.2d 936, dismissing appeal & apparently finding order in Woodfork was improvidently granted.

RELATED CASES: Jordan App., 631 N.E.2d 537 (Retrial on remand ordered); Walls, App., 603 N.E.2d 903, (discussing nunc pro tunc entries); Richardson, App., 602 N.E.2d 178); Scruggs, App., 609 N.E.2d 1148, (No final judgement because no entries in record attempting to empower person sentencing D with authority to do so.); Hill, App., 611 N.E.2d 133, (No final judgement. Although record contained some references by Ct. reporter to affect that sentencer was acting as "special judge," it did not contain any purported appointment of him as special judge, & sentencing order was signed as judge pro tem.)

G. APPEAL

G.1. Appealable orders

G.1.a.2. By state (Ind. Code 35-38-4-2)

TITLE: Hardley v. State
INDEX NO.: G.1.a.2.
CITE: 905 N.E.2d 399 (Ind. 2009)
SUBJECT: State may challenge illegal sentence for first time on appeal
HOLDING: The State may challenge the legality of a criminal sentence on appeal without first filing a motion to correct erroneous sentence, and such appeal need not be commenced within thirty days of the sentencing judgment. Ind. Code 35-38-1-5 authorizes both the State and D to file a motion to correct erroneous sentence at the trial level. Allowing the State to challenge an illegal sentence on appeal is within the legislative intendment of Ind. Code 35-38-1-15, and such a challenge is the substantial equivalent of a statutory motion to correct erroneous sentence. Thus, like the motion to correct erroneous sentence, the State's appellate challenge to an illegal sentence is not required to be initiated within thirty days of the sentencing judgment. In other words, the timing requirements for the initiation of an appeal from a final judgment under Appellate Rule 9(a) do not apply to the State and a challenge to an incorrect sentence can be made for the first time in the State's reply brief.

Also, this Court held that unlike a D, the State's motion to correct erroneous sentence is not limited to sentencing errors that are "facially erroneous." Rather, sound policy and judicial economy favor permitting the State to present claims of illegal sentences on appeal when the issue involves a pure question of law that does not require resort to any evidence outside the appellate record.

Here, D was illegally sentenced to concurrent terms for crimes that were committed while he was on recognizance for other charges. The State raised the issue for the first time in its reply brief. The State's appellate claim of sentence illegality was not waived by its failure to file a motion to correct erroneous sentence in the Tr. Ct. or its failure to otherwise assert the claim within thirty days of the sentencing judgment. As D does not challenge the merits of the State's claim of illegal sentence, Court summarily affirmed the Court of Appeals decision at 893 N.E.2d 1140. Held, transfer granted, judgment affirmed and Hoggatt v. State, 805 N.E.2d 1281 (Ind. Ct. App. 2004), *aff'd on reh'g*, 810 N.E.2d 737 (Ind. Ct. App. 2004), disapproved of to the extent it is inconsistent with this opinion; Boehm and Rucker, JJ., dissenting and setting forth multiple reasons the State should not be able to appeal an erroneous sentence without first raising the issue in the Tr. Ct.

RELATED CASES: Lotaki, 4 N.E.3d 656 (Ind. 2013) (Ind. Code § 35-38-1-15 authorizes State appeals of illegal sentences; while court of appeals correctly noted that statute most commonly cited as authority for State appeals, Ind. Code § 35-48-4-2, does not authorize State appeals of illegal sentences, court nonetheless erred in dismissing appeal because another statute authorized State's appeal).

TITLE: Niece v. State
INDEX NO.: G.1.a.2.
CITE: (2d Dist. 12/14/83), Ind. App., 456 N.E.2d 1081
SUBJECT: Appealable orders - state; erroneous sentence
HOLDING: Tr. Ct. could correct sentencing error even though state filed MCE rather than a motion to correct sentence (required pursuant to Ind. Code 35-4.1-4-17, now Ind. Code 35-38-1-15). Here, D contends state may only appeal matters authorized by Ind. Code 35-38-4-2, which does not include sentencing errors. Court notes D is appellant, not state; state merely filed MCE as procedural device for obtaining correction of erroneous sentence. Indiana courts do not exalt form over substance. See Palmer, 386 N.E.2d 946 (Tr. Ct. held statute re suspended sentences unconstitutional; state filed MCE; held, MCE was improper procedure; Ind. S. Ct. treated MCE as writ of mandate & reversed Tr. Ct.); Russell, App., 395 N.E.2d 791. Court finds state's MCE complied with statute pertaining to correction of sentence. Evidentiary hearings were held on motion, ineligibility for suspended sentence was proven. Tr. Ct. could consider MCE as motion for correction of sentence. Held, procedure employed was not fatally defective.

TITLE: Smalis v. Pennsylvania

INDEX NO.: G.1.a.2.

CITE: 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986)

SUBJECT: Post-acquittal appeal by state

HOLDING: Tr. Ct.'s decision that state's evidence is insufficient as matter of law to establish D's guilt constitutes acquittal under Double Jeopardy Clause. See, e.g., Sanabria v. U.S. (1978), 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43; U.S. v. Martin Linen Supply Co. (1977), 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642. Acquittals, unlike convictions, terminate initial jeopardy. Justices of Boston Municipal Court v. Lydon (1984), 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311. Whether trial is to jury, or to bench, subjecting D to post-acquittal fact-finding proceedings going to guilt or innocence violates Double Jeopardy Clause. AZ v. Rumsey (1984), 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164. When successful post-acquittal appeal by prosecution would lead to proceedings that violate Double Jeopardy Clause, appeal itself has no proper purpose. Allowing such an appeal would frustrate interest of accused in having end to proceedings against him/her. Here, Tr. Ct. at bench trial sustained D's demurrer at close of state's case, finding that evidence was insufficient to sustain conviction. State appealed. Held, Double Jeopardy Clause bars post-acquittal appeal by prosecution not only when it might result in second trial, but also if reversal would translate into further proceedings of some sort, devoted to resolution of factual issues going to elements of offense. All justices joined opinion.

RELATED CASES: Martinez, 134 S. Ct. 2070 (2014) (where jury empaneled but State presented no evidence, not guilty directed verdict constituted an acquittal and, thus, DJ clause barred retrial).

TITLE: State v. Brunner
INDEX NO.: G.1.a.2.
CITE: (05-26-11), 947 N.E.2d 411 (Ind. 2011)
SUBJECT: State's authority to appeal - D's request for modification
HOLDING: The right of the State to appeal in a criminal matter is statutory, and the State cannot appeal unless given that statutory authorization by the legislature. However, Court can carve out minor exceptions to the precedent of legislature-authorized appeals for State criminal appeals. See, e.g., Hardley v. State, 905 N.E.2d 399, 403 (Ind. 2009).

Here, nine years after conviction, Tr. Ct. modified D's class D felony to a misdemeanor, over the prosecutor's objection. The State appealed. Although there is no statutory authority for the State to appeal a modification of conviction, the legislature did not provide Tr. Ct. the statutory authority to make this modification. Thus because Tr. Ct. lacked authority to modify and because this is a pure question of law that does not require evidence outside the record, the State has the limited availability to appeal a Tr. Ct.'s modification of conviction under these particular circumstances.

Court also noted that D's pro se request for modification to a misdemeanor was not a petition for post-conviction relief. The post-conviction rules do not apply to evidence of a person's reformed character. Held, transfer granted, judgment reversed and remanded with instructions to reinstate original judgment of conviction, and Court of Appeals' Opinion at 931 N.E.2d 903 vacated.

TITLE: State v. Campos
INDEX NO.: G.1.a.2.
CITE: (1st Dist., 4-18-06), Ind. App., 845 N.E.2d 1074
SUBJECT: State cannot appeal dismissal of single count of information
HOLDING: Ct. held that State's appeal of dismissal of Class C felony neglect of a dependent while two misdemeanors remained should be dismissed. Tr. Ct. had accepted dismissal was appropriate as a matter of law because D himself was a minor & had not been emancipated. State sought an interlocutory appeal, which the Ct. App. denied. Ct. found that State attempted to circumvent that decision by appealing under Ind. Code 35-38-4-2(1), which allows the State to take an appeal "from an order granting a motion to dismiss an indictment or information." However, Ind. Code 35-38-4-2(1) does not provide for an appeal where only a single count of an information has been denied. See State v. Evansville & T.H.R. Co., 107 Ind. 581, 8 N.E. 619 (1886) (motion to dismiss an information to authorize an appeal by the State "must be a judgment which finally disposes of the whole case, & not merely a ruling"). Held, appeal dismissed; Sullivan, J. dissenting, believed Ct. erred in rejecting the interlocutory appeal from the dismissal of the C felony because that issue was not thereafter available for review unless the State dismissed the misdemeanor charges.

TITLE: State v. Coleman
INDEX NO.: G.1.a.2.
CITE: (07-30-12), 971 N.E.2d 209 (Ind. Ct. App. 2012)
SUBJECT: State's authority to appeal does not extend to evidentiary rulings
HOLDING: The State did not have statutory authorization to appeal a Tr. Ct.'s refusal to find a State's witness unavailable so as to permit the State to enter her deposition testimony into evidence. Appeals to the supreme court or to the court of appeals, if the court rules so provide, may be taken by the State from an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution. Ind. Code 35-38-4-2(5).

Here, when the victim did not show for either the first or second day of trial, the State asked Tr. Ct. to find the victim unavailable so the State could admit her deposition testimony. Tr. Ct. declined to do so, and the State moved to dismiss the case. Even if the effect of Tr. Ct.'s refusal to find the victim unavailable was to preclude further prosecution, the evidentiary ruling was not an order granting a motion to suppress evidence as required by the clear language of the statute. Because the statute does not authorize the State to appeal any adverse evidentiary ruling that deals a fatal blow to its case, the State does not have the authority here to appeal. Held, appeal dismissed.

TITLE: State v. Harner
INDEX NO.: G.1.a.2.
CITE: (7/18/83), Ind., 450 N.E.2d 1005
SUBJECT: Appealable orders - state; denial of lesser included instructions
HOLDING: Refusal to give instructions on lesser included offenses is not appropriate issue for reserved question of law. Ind. Code 35-1-47-2(4) governs appeal by state of reserved question of law. Court does not review questions of fact where finding is for D. (Citations omitted.) Refusal to give lesser included instruction is factual question. Here, record shows D argued self-defense. Tr. Ct. determines appropriate instructions on lesser included offenses after considering specific facts of case. Law does not authorize appellate court to review facts & pronounce opinion on them. Held, appeal dismissed.

TITLE: State v. Holtsclaw
INDEX NO.: G.1.a.2.
CITE: (11/5/2012), 977 N.E.2d 348 (Ind. S. Ct. 2012)
SUBJECT: State's deadline for appeal after denial of MCE
HOLDING: Indiana Appellate Rule 9, which tolls the thirty-day dealine for filing notice of appeal when a party files a motion to correct error, applies to the State in a criminal case. D was charged with OWI, and the Tr. Ct. granted his motion to suppress his breath test results. The State filed a motion to correct error, which was denied. Three days later, they filed a notice of appeal. D argued that the appeal was untimely and not authorized by statute, pointing to Ind. Code 35-38-4-2, which allows State to appeal in a criminal case only in certain circumstances. Two of those circumstances are the granting of a motion to suppress if it precludes further prosecution, or an order granting a motion to correct errors. D argued that the state missed the thirty day deadline to appeal the suppression order, and that it was not permitted to appeal the denial of a motion to correct errors. The Court of Appeals agreed and dismissed the state's appeal. The Supreme Court reverses, reasoning that its rules of procedure prevail over statutes such as Ind. Code 35-38-4-2. Appellate Rule 9 provides that the thirty-day deadline to file a notice of appeal is tolled "if any party files a timely motion to correct error." The state is a party, and it filed a motion to correct errors. Thus, its appeal is timely. Remanded to the Court of Appeals to consider the merits.

TITLE: State v. I.T.
INDEX NO.: G.1.a.2.
CITE: (3/21/2014), 4 N.E.3d 1139 (Ind. 2014)
SUBJECT: State may appeal Tr. Ct.'s withdrawal approval of filing of delinquency petition
HOLDING: The State could appeal the Tr. Ct.'s decision to withdraw approval of delinquency petition because the withdrawal was based on what was, in essence, I.T.'s successful motion to suppress, though styled a "motion to dismiss."

As a condition of probation for B felony child molesting if committed by an adult, I.T. submitted to court ordered treatment, which included polygraph examinations. During one exam, I.T. admitted he molested two other children. The Tr. Ct. authorized the State's delinquency petition. Citing the Juvenile Mental Health Statute (JMHS), Ind. Code § 31-32-2-2.5(b), I.T. argued his polygraph statements were inadmissible and thus urged Tr. Ct. to dismiss the case. Tr. Ct. agreed the JMHS barred use of I.T.'s statements, and because there was no other evidence to establish probable cause, it granted I.T.'s motion to dismiss. In granting the motion to dismiss, Tr. Ct. impliedly found the "ultimate effect [of suppressing the statements] . . . is to preclude further prosecution, an enumerated basis for the State to appeal [under Ind. Code § 35-38-4-2(5)], even in juvenile matters." State v. C.D., 947 N.E.2d 1018, 1021 (Ind. Ct. App. 2011). Thus, the State had statutory authority to appeal. Held, transfer granted, Court of Appeals opinion vacated, and State's appeal allowed to proceed.

TITLE: State v. Moore
INDEX NO.: G.1.a.2.
CITE: (2d Dist. 4/25/90), Ind. App., 553 N.E.2d 199
SUBJECT: Dismissal on merits - bar to refiling
HOLDING: Tr. Ct.'s granting of D's motion for dismissal due to lack of specificity barred state from simply re-filing same information. D was charged with false informing & assisting a criminal, & filed motion to make more specific, which was granted. State did not amend Count II, & Tr. Ct. granted D's motion to dismiss. State then re-filed same indictment & probable cause affidavit as to Count II. Tr. Ct. rejected affidavit on double jeopardy grounds, citing previous dismissal on merits. State then filed information in new action based on same probable cause affidavit. D again moved to dismiss, & Tr. Ct. dismissed, again citing double jeopardy bar. State now appeals Tr. Ct.'s dismissal of second action. State contends it may always refile charges absent showing of prejudice to D's substantial rights. State cites Dennis, App., 412 N.E.2d 303, which relied on Ind. Code 35-3.1-1-4 (now Ind. Code 35-34-1-4), which provides that dismissal does not, of itself, bar subsequent prosecution. However, Dennis did not involve dismissal based on merits of charge. Here, original charge was dismissed for lack of specificity. Neither Dennis nor Ind. Code 35-34-1-4 allow state to continue filing charges already judicially determined to be defective. State also contends that Tr. Ct. erred because jeopardy had not yet attached. State is attempting to collaterally attack Tr. Ct.'s determination. Where, as here, state elects to stand on charges as filed, time for filing appeal begins to run from time charges are dismissed, whether that ruling is characterized as final judgment or not. State v. Flater 244 N.E.2d 223. State failed to file timely appeal, & dismissal became law of case. Held, dismissal affirmed. Sullivan, J., CONCURS IN RESULT.

TITLE: State v. Overmyer
INDEX NO.: G.1.a.2.
CITE: (5th Dist.; 5-14-99), Ind. App., 712 N.E.2d 506
SUBJECT: Appeals of final judgment by State - no review of question of fact
HOLDING: Purpose of statute permitting appeals on questions reserved by State is to obtain opinions of law which shall declare rule for guidance of lower Cts. on questions likely to arise again in criminal prosecutions. When presented with such appeals, this Ct. will not review questions of fact where finding is for D. Walker, App., 582 N.E.2d 871. Here, State was appealing acquittal as reserved question of law, raising one issue of whether Tr. Ct. erred in determining that person has reasonable expectation of privacy in jail visitation area. To determine whether person has reasonable expectation of privacy, Ct. must inquire whether D has exhibited actual, subjective expectation of privacy &, whether expectation is one which society would recognize as reasonable. Katz v. U.S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Because determination of whether D had actual, subjective expectation of privacy would require consideration of facts specific to case, such determination was inappropriate on appeal as reserved question of law. Held, appeal dismissed; Baker, J., dissenting on basis that second part of Katz test which requires Ct. to consider whether society would recognize expectation of privacy as reasonable was dispositive to issue & appropriate as reserved question of law.

RELATED CASES: Luna, 932 N.E.2d 210 (Ind. Ct. App. 2010) (Ct. declined to address merits because State's reserved question of law required factual determinations, which are not appropriate for such questions).

TITLE: State v. Parrott
INDEX NO.: G.1.a.2.
CITE: (2/6/2017), 69 N.E.3d 535 (Ind. Ct. App. 2017)
SUBJECT: State not required to dismiss charges before filing notice of appeal
HOLDING: The State is not required to dismiss charges before appealing from an unfavorable suppression order. Ind. Code § 35-38-4-2, which addresses State's appeals, does not require dismissal as a precondition to appeal. If the ultimate effect of an order granting a motion to suppress is to preclude further prosecution of one or more counts of an information or indictment, the State may appeal that order as a final judgment. Held, Defendant's motion to dismiss appeal denied.

TITLE: State v. Williams
INDEX NO.: G.1.a.2.
CITE: (3d Dist. 2/23/83), Ind. App., 445 N.E.2d 582
SUBJECT: Appealable orders by state; grant of D's suppression motion
HOLDING: Where a Tr. Ct.'s order granting D's motion to suppress all evidence & items seized precludes the state from proving allegations in charging information, the order is tantamount to dismissal & is appealable pursuant to Ind. Code 35 1 47 2(5). Here, D was charged with assisting a criminal (her car provided transportation & storage space for stolen merchandise). D's motion to suppress evidence (stolen goods) seized from her car was granted. State appealed order granting suppression motion. D moved to dismiss appeal, contending that order did not have ultimate effect of precluding further prosecution, as required by statute. Court finds order effectively prevented state from connecting D to stolen items & other persons to her car, thus precluding proof of allegations in charging information. Held, motion to dismiss appeal denied. CONCURRENCE by Garrard notes that state's assertion that ultimate effect of suppression order is to prevent further prosecution should constitute a judicial admission; thus, if state loses appeal, it is estopped from further prosecution in the cause.

RELATED CASES: Brown, 70 N.E.3d 331 (Ind. 2017) (although D did not file motion to suppress and instead objected to evidence introduced at trial, Tr. Ct.'s suppression order precluded further prosecution thus State could bring this appeal pursuant to I.C. 35-38-4-2(5)); I.T., 4 N.E.3d 1139 (Ind. 2013) (although a juvenile court's discretionary decision to disapprove a delinquency petition is not within any of the statutory grounds for the State to appeal under Ind. Code 35-38-4-2, State may appeal a juvenile court order that suppresses evidence, if doing so terminates the proceeding); Holtsclaw, 977 N.E.2d 348 (Ind. 2012) (State's filing of motion to correct errors from Tr. Ct.'s order granting a motion to suppress tolled the time period in which the State had to file a notice of appeal under Appellate Rule 9; thus, State's notice of appeal filed a few days after the motion to correct errors was denied was timely); Hunter, App., 904 N.E.2d 371 (disagreeing with Price (below), Ct. held that 30-day limitations period governing State's appeal from granting D's motion to suppress begins to run from date of order, not from date State determines that order was fatal to prosecution of case); Price, App., 724 N.E.2d 670 (State can choose to file praecipe 30 days after motion to suppress was granted or 30 days after motion to dismiss is granted after losing motion to suppress); Aynes, App., 715 N.E.2d 945 (by initiating appeal from motion to suppress, State necessarily represents to courts that it cannot prosecute D without suppressed evidence; if State loses appeal, further prosecution is barred); Albright, App., 622 N.E.2d 995 (State's assertion that Tr. Ct.'s suppression of breathalyzer results would preclude further prosecution, without any supporting argument, would not be second-guessed by Ct., but because condition is necessary to allow State to appeal, affirmance of Tr. Ct.'s decision would estop State from further prosecution).

TITLE: Whitener v. State
INDEX NO.: G.1.a.2.
CITE: (2/14/2013), 982 N.E.2d 439 (Ind. Ct. App. 2013)
SUBJECT: State appeals - cross appeal is untimely at time of D's belated appeal
HOLDING: Court of Appeals dismissed the State's appeal as untimely where the State waited until D's belated appeal in order to challenge the Tr. Ct.'s denial of its motion to correct errors. Generally, the State has thirty days after a final judgment specified in Ind. Code 35-38-4-2 or after the denial of a motion to correct errors to file a notice of appeal. However, a State challenge to an illegal sentence when the issue is a pure question of law that does not resort to any evidence outside the appellate record need not be raised within thirty days of a final judgment. Hardley v. State, 905 N.E.2d 399 (Ind. 2009). Here, the Tr. Ct. vacated D's conviction for class B felony rape due to double jeopardy concerns. The State timely filed a motion to correct errors which the Tr. Ct. denied. Neither D nor the State filed a timely notice of appeal. Rather, two years later, D was granted permission to file a belated appeal. The State cross-appealed on the double jeopardy issue. As the State's cross appeal is more than thirty days after the denial of the motion to correct errors, the State's appeal is untimely. Moreover, the Hardley exception in which the State can challenge an illegal sentence at any time does not apply. Double jeopardy is not a sentencing issue, and even if it were, a double jeopardy violation is not an illegal sentence. Held, State's claim that court erred in merging Count II into Count I based upon double jeopardy principles is dismissed.

G. APPEAL

G.1. Appealable orders

G.1.b. Interlocutory appeals (AR 4(B))

TITLE: Gibson v. State
INDEX NO.: G.1.b.
CITE: (4th Dist., 11-08-06), Ind. App., 856 N.E.2d 142
SUBJECT: Eight-year sentence for OWI causing death reversed under amended sentencing schem
HOLDING: D committed OWI causing death after the new "advisory" sentencing statutes took effect, but the continued validity or relevance of well-established case law developed under Indiana's old "presumptive" sentencing scheme is unclear. Until Indiana S.Ct. issues an opinion in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted, Ct. will assume that it is necessary to assess the accuracy of a Tr. Ct.'s sentencing statement if, as here, Tr. Ct. issued one, according to standards developed under the "presumptive" sentencing system, while keeping in mind that Tr. Ct. had "discretion" to impose any sentence within the statutory range for Class C felonies "regardless of the presence of absence of aggravating or mitigating circumstances." *See* Ind. Code 35-38-1-7.1(d). Ct. will assess Tr. Ct.'s recognition or non-recognition of aggravators & mitigators as an initial guide to determining whether the sentence imposed was inappropriate under Indiana Appellate Rule 7(B).

Here, Ct. found several errors in Tr. Ct.'s written & oral sentencing statements. There was no evidence to support finding that D was on probation when he committed the current offense, & the "need of correctional & rehabilitative treatment" aggravator was inapplicable. D's 1996 conviction for possession of marijuana was entitled to at most very minimal aggravating weight. D's history of speeding tickets & two failed attempts to address his driving behavior did not dissuade him from driving recklessly again, & thus constituted a valid & significant aggravator in this case. However, Tr. Ct. erred in failing to mention D's guilty plea without benefit of a plea bargain, which was a substantial mitigating circumstance. Maximum sentence permitted by law was inappropriate under Rule 7(B). Held, reversed & remanded with instructions that D's sentence be reduced to six years.

TITLE: Moyer v. State

INDEX NO.: G.1.b.

CITE: (9/11/2017), 83 N.E.3d 136 (Ind. Ct. App. 2017)

SUBJECT: Appellate review focuses on aggregate sentence rather than length of sentence on individual count

HOLDING: In Webb v. State, 941 N.E.2d 1082 (Ind. Ct. App. 2011), Court held that a D may not limit appellate review of his sentence by merely challenging an individual sentence within a single order that includes multiple sentences. Here, facing charges under three separate causes, D entered a single plea agreement to three felonies and a habitual offender enhancement in exchange for dismissal of the other charges pending against him. In a consolidated appeal from his aggregate 20-year sentence, D challenged only the portion of his sentence that was imposed under one of the three cases. But because D pled guilty pursuant to a single plea agreement that covered three separate causes against him, Court held it must review his aggregate sentence in its entirety. Reasoning in Webb and Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008) extends to circumstances such as these where a D pleads guilty via a single plea agreement to offenses charged under separate cause numbers. Held, judgment affirmed and remanded in part on other grounds.

G. APPEAL

G.1. Appealable orders

G.1.b.1. By D

TITLE: Avery v. State
INDEX NO.: G.1.b.1.
CITE: (12/21/88), Ind., 531 N.E.2d 1168
SUBJECT: Effect of interlocutory appeal by D - law of case
HOLDING: Upon reversal & remand, allowing D post-conviction relief to withdraw this guilty plea to murder & allowing D interlocutory appeal on admissibility of his confession, Ct. App. found confession admissible in unpublished opinion. D was then convicted of murder & D appealed final judgment. D claimed that his arrest & incarceration were illegal, & therefore, his confession made during that period should have been suppressed. Ct. held that because during interlocutory appeal, Ct. App. had previously determined that confession was admissible & S. Ct. denied review of that decision, admissibility of D's confession was law of case & not again reviewable on direct appeal. Held, conviction affirmed; DeBruler, J., concurring.

RELATED CASES: Lewis, 543 N.E.2d 1116 (doctrine of "law of the case" stems from proposition that appellate court's determination of legal issue is binding in subsequent appeals given same case & substantially same facts, & is based upon sound policy that when issue is once litigated & decided, that should be end of matter); Callis, 684 N.E.2d 233 ("law of the case" designates doctrine that appellate court's determination on legal issue is binding on both Tr. Ct. on remand & appellate court on subsequent appeal given same case & substantially same facts).

TITLE: Dingman v. State
INDEX NO.: G.1.b.1.
CITE: (3rd Dist., 11-12-92), Ind. App., 602 N.E.2d 184
SUBJECT: Procedure for interlocutory appeal
HOLDING: Although denial of motion to suppress may be proper subject for interlocutory appeal under App. R. 4(B)(6) if properly certified by Tr. Ct. & accepted by reviewing Ct., there is no provision in appellate rules for Tr. Cts. themselves to certify questions of law to App. Cts., & therefore D's petition for interlocutory appeal was dismissed. D was arrested for being habitual traffic offender when computer check at roadblock revealed his driving status. He filed motion to suppress which was denied & in response to D's request for interlocutory appeal, Tr. Ct. entered order which read in part: "Now certifies that the following issue shall be considered for interlocutory appeal: Whether the roadblock at issue in the case at Bar complied with the holding of State v. Garcia (1986), Ind., 500 N.E.2d 158. The Court further finds that this Order involves a substantial question of law & the early determination of which will promote a more orderly disposition of this case." Ct. App. found order in instant case did not comply with App. R. 4(B)(6) because Tr. Ct. did not properly certify its order, but rather attempted to certify specific question to App. Ct. Within rules of appellate procedure, only provision for certification of specific question is found in App. R. 15(0), which allows federal Cts. to certify state law questions to Ind. S. Ct. Although dismissing appeal on this ground, Ct. specifically rejected State's argument that motions to suppress cannot be subject of interlocutory appeals. While Ds may not have interlocutory appeal of those orders as of right, they are permitted to petition for such appeal if Tr. Ct. properly certifies order denying motion. Held, interlocutory appeal dismissed, Staton, J., dissenting.

TITLE: Harrell v. State
INDEX NO.: G.1.b.1.
CITE: (1st Dist., 6-2-93), Ind. App., 614 N.E.2d 959
SUBJECT: Interlocutory appeal - generally not permitted
HOLDING: Despite acknowledging that delay occasioned by interlocutory appeal increases delay of speedy trial, appellate Ct. accepted interlocutory appeal of speedy trial claim. Interlocutory appeals of denials of pretrial motions are not generally permitted, especially on motions to dismiss information on speedy trial grounds because interlocutory appeals necessarily interrupts pretrial proceedings so that speedy trial is even further delayed. Interlocutory appeal may be taken under circumstances which show that appellant would suffer substantial expense, damage, or injury if order below is erroneous & determination thereof is withheld until after judgment. App. R. 4(B)(6)(a). Here, D showed that delay prior to trial was extraordinarily long, State was not reasonably diligent in bringing D to trial, D asserted his right to speedy trial & defense was demonstrably prejudiced by delay. Thus, denial of speedy trial motion created potential harm that was substantial & approached blatant violation of basic principles which would render D's trial unfair. Held, Tr. Ct.'s denial of motion to dismiss based on speedy trial violation reversed; Baker, J., dissenting on basis that appellate Ct. should not have accepted interlocutory appeal to hear speedy trial claim.

RELATED CASES: Smith, 506 N.E.2d 31 (motions to suppress are generally not appealable pre-trial); Green, 469 N.E.2d 1169 (motions in limine are not appealable on interlocutory or direct appeal); but see Martakis, App., 450 N.E.2d 128 (interlocutory appeal is available to challenge denial of motion to dismiss on double jeopardy grounds); Mahrdt, App., 629 N.E.2d 244 (interlocutory appeal holding appellant prejudiced by State's failure to comply with discovery order which warranted suppression of evidence); Hogan, 582 N.E.2d 824 (although order to compel production of documents during discovery is not appealable as right under App. R. 4(B)(1), it is appealable at Ct.'s discretion under App. R. 4(B)(6)).

TITLE: Matter of A.Q.
INDEX NO.: G.1.b.1
CITE: (6/18/2018), (Ind. Ct. App. 2018)
SUBJECT: CHINS order changing permanency plan is generally premature for interlocutory review
HOLDING: In a CHINS case, a Tr. Ct.'s order that changes a permanency plan from reunification to termination is generally premature for interlocutory review. The change does not prejudice the parents because they are still receiving services, and more importantly, they still have a separate termination hearing, and the evidentiary burden on DCS to prove that termination is appropriate is higher than what DCS is required to prove in order to change the permanency plan from reunification to termination. See *In re* K.F., 797 N.E.2d 310, 315 (Ind. Ct. App. 2003).

Even so, the Court reviewed the case on the merits for five reasons: 1) DCS did not respond to the parents' motion to certify the Tr. Ct.'s order; 2) DCS did not respond to the parents' motion asking the Court to accept an interlocutory appeal; 3) the Court's motions panel accepted jurisdiction over the case; 4) the case was fully briefed; and 5) DCS did not raise its argument that the appeal was premature until it filed its brief. Held, case reviewed on the merits and judgment affirmed.

TITLE: Means v. State

INDEX NO.: G.1.b.1.

CITE: (7/27/2022), Ind. Ct. App., 193 N.E.3d 432

SUBJECT: Interlocutory appeal of ruling on motion in limine granted by motions panel dismissed by writing panel as a preliminary ruling and therefore not ripe for review.

HOLDING: A day care center noted bruising on a child and as a result a child abuse report was made and DCS became involved in the case and filed a CHINS petition. After a hearing, the CHINS court issued an Order finding that it had not been proven by a preponderance of the evidence that the child was CHINS, specifically noting that although the child had bruising and excessive force had been used on the child, DCS failed to investigate the daycare staff as possible perpetrators. The following month, the State charged Defendant with level 5 battery resulting in bodily injury to the child based on the same injuries. The State filed a motion in limine asking that the CHINS Order be excluded from the criminal trial. The Defendant argued the CHINS Order should be admitted because it showed someone else could have caused the injuries to the child. The trial court granted the State's motion in limine, stating that the CHINS Order could not be admitted into evidence because the Order finding that someone at the daycare likely battered the child was a legal conclusion that invaded the province of the jury. At Defendant's request, the trial court certified the Order on the Motion in Limine for interlocutory appeal. The motions panel of the Court of Appeals accepted jurisdiction of the interlocutory appeal, but the writing panel dismissed the appeal. The writing panel found the request to review the trial court's ruling on the State's motion in limine that the CHINS Order could not be admitted as evidence at the trial was a preliminary determination that was not ripe for review.

TITLE: Morgan v. State
INDEX NO.: G.1.b.1.
CITE: (2d Dist. 2/24/83), Ind. App., 445 N.E.2d 585
SUBJECT: Interlocutory appeal - D; certification; procedure
HOLDING: Tr. Ct.'s refusal to certify hypnosis issue for interlocutory appeal pursuant to AR 4(B)(5)(b) was not error where D was able to present issue on appeal from conviction & was not noticeably harmed. Certification is a matter of grace with the Tr. Ct. Here, D's motion to suppress the testimony of 2 state's witnesses who had been hypnotized by police was denied. Tr. Ct. refused to certify issue for interlocutory appeal. D's trial occurred prior to Strong, 435 N.E.2d 969 (evidence derived from witnesses while in hypnotic trance is inherently unreliable, lacks probative value & should be excluded). Ct. notes that Nichols, 412 N.E.2d 756 (state appealed correctness of Tr. Ct.'s ruling suppressing D's confession; held ruling was not subject to interlocutory appeal) is equally applicable to interlocutory appeals by D. Held, no error in refusal to certify issue.

RELATED CASES: Littleton, 954 N.E.2d 1070 (Ind. Ct. App. 2011) (where Tr. Ct. revisited prior order in its order which was certified for interlocutory appeal, it was within the court of appeals' jurisdiction over the interlocutory appeal to review the prior order as well as the certified order); T.B., App., 895 N.E.2d 321 (juvenile court orders releasing documents to newspapers were not final appealable orders until all the requests for access were resolved; because Bailey filed notice of appeal after every order, including the final order, issues regarding earlier orders that should have been raised via an interlocutory appeal, could be addressed as part of the appeal from the final order); Hill, 592 N.E.2d 1229 (although Art. 1, §§ 16 & 17 of Ind. Const. provides that Ds have constitutional right to be let to bail that is not excessive & Tr. Ct.'s denial of bail was erroneous, issue must be raised through interlocutory appeal, & is moot after trial); Avery, 484 N.E.2d 575 (Crim L 1129(1); Tr. Ct. erred in denying joint petition of D & state to amend interlocutory appeal; in interest of judicial efficiency, Ind. S. Ct. on transfer finds court of appeals should have granted petition & proceeded to decide interlocutory appeal on its merits; held, remanded to allow amendment). Soward, App., 606 N.E.2d 885 (Interlocutory appeal of juvenile waiver decision allowed, although not mandatory. See card at U.2.b.2.)

TITLE: Pipkin v. State
INDEX NO.: G.1.b.1.
CITE: (2/20/2013), 982 N.E.2d 1085 (Ind. Ct. App. 2013)
SUBJECT: Interlocutory appeal - failure to timely request certification
HOLDING: Court of Appeals sua sponte determined that it lacked jurisdiction to hear this interlocutory appeal. A party seeking discretionary interloctuory review must seek certification of the appealed order within thirty days of the trial court's entry of the order, or the trial court must enter a finding that good cause was shown for the delay in seeking certification. Ind. Appellate Rule 14(B). Failure to timely perfect an appeal deprives the appellate court of jurisidiction. Here, on September 8, 2011, the trial court denied D's first motion to dismiss his failure to register as a sex offender charged base on ex post facto grounds. On April 25, 2012, the trial court denied D's second motion to dismiss based on Criminal Rule 4. On May 3, 2012, D certification of the order denying the first motion to dismiss, and the trial court granted certification. However, the trial court did not make a finding regarding good cause for the belated certification which was required because over thirty days had passed since the denial of the first motion to dismiss. As such, D's appeal was not properly perfected. Thus, the court lacks jurisdiction. Held, appeal dismissed.

G. APPEAL

G.1. Appealable orders

G.1.b.2. By State

TITLE: State v. Fahringer
INDEX NO.: G.1.b.2.
CITE: (09-12-19), Ind. Ct. App., 132 N.E.3d 480
SUBJECT: State's interlocutory appeal dismissed for failure to initiate timely appeal
HOLDING: After granting Defendant's motion to suppress, the trial court found "good cause" to belatedly certify the issue for interlocutory appeal because the State orally indicated it intended to request an interlocutory appeal. The trial court also found the State had subsequently filed a timely motion to reconsider and filed its request for certification within thirty days of the denial of that motion. The Court of Appeals held the trial court abused its discretion in certifying the State's belated request because the State's oral notification to the trial court of its intent to pursue an interlocutory appeal did not constitute good cause and the State's Motion to Reconsider did not toll the time for the State to initiate its appeal. The State did not present any extraordinarily compelling reason to disregard its failure to pursue timely certification of the trial court's suppression order and dismissed the appeal for procedural default.

TITLE: State v. Foy
INDEX NO.: G.1.b.2.
CITE: (5th Dist., 03-19-07), Ind. App., 862 N.E.2d 1219
SUBJECT: Belated motion to certify interlocutory appeal - good cause
HOLDING: In murder prosecution, Tr. Ct. did not abuse its discretion when it found good cause to permit State's belated motion requesting permission to certify an interlocutory appeal. Pursuant to Indiana Appellate Rule 14(B)(1)(a), a party generally must bring a motion requesting certification of an interlocutory order within thirty days of the date of the order unless, for good cause, Tr. Ct. permits a belated motion. Court has not previously defined "good cause" within meaning of App.R. 14(B). Here, Tr. Ct. granted D's suppression motion on January 27. On March 2, four days late, State filed a belated motion requesting permission to certify an interlocutory appeal. In its order granting State's motion, Tr. Ct. found that State's failure to timely file the appropriate motion was not based upon a disregarding of the time limit involved, but rather a mistake in calculation of the time available to file the certification motion. Under these facts, Court could not say that Tr. Ct. abused its discretion in finding "good cause" to permit State's belated motion. Held, judgment affirmed in part, reversed in part, & remanded.

TITLE: State v. Leslie
INDEX NO.: G.1.b.2.
CITE: (7/7/80), 406 N.E.2d 1194 Ind. App.
SUBJECT: Interlocutory appeals -- by State; not permitted on pretrial rulings
HOLDING: Tr. Ct. granted D's pretrial motion to suppress certain evidence & motion for order in limine. State then initiated proceeding as interlocutory appeal pursuant to Indiana Rules of Procedure, Appellate Rule 4(B)(5). Ct. held that right of State to appeal in criminal case is statutory & limited to those instances provided by Ind. Code 35-1-47-2. Right of State to appeal "is in contravention of common law principles & will, therefore, by strictly construed." Holland, 403 N.E.2d 832. Statute provides in part that appeals to S.Ct. may be taken by State upon question reserved by State, which historically has required that D have been acquitted upon finding of not guilty as precondition to its invocation. Sierp, 292 N.E.2d 245. Therefore, statutory authorization for State to appeal in criminal cases does not permit interlocutory appeal by State from adverse ruling upon pretrial motion to suppress evidence or motion in limine. Held, appeal dismissed.

RELATED CASES: Lovett, 943 N.E.2d 409 (Ind. Ct. App. 2011) (although State interlocutory appeal from order on state's motion in limine was permitted, the State failed to prove that it would be able to lay the proper relevancy and hearsay foundation to make its proposed evidence admissible); McMillan, 409 N.E.2d 612 (rule providing for appeals from interlocutory orders in certain cases does not authorize State to appeal interlocutory orders in criminal proceedings); but see Owings card at G.1.b.2.

TITLE: State v. Owings
INDEX NO.: G.1.b.2.
CITE: (5th Dist., 10-15-92), Ind. App., 600 N.E.2d 568, aff'd by 622 N.E.2d 948
SUBJECT: Interlocutory appeal by State - circumstances under which permitted
HOLDING: Because Tr. Ct.'s suppression of unavailable witness' statement effectively undercut State's case, State was permitted to take interlocutory appeal of Tr. Ct.'s ruling. State may appeal from order granting motion to suppress evidence, if order effectively terminates further prosection. Ind. Code § 35-38-4-2. Here, D was charged with dealing in cocaine & trafficking with inmate, her son. In deposition taken by State, witness testified that he helped D's son regurgitate two balloons full of cocaine which inmate's mother, D, gave him to swallow. However, prior to trial, witness committed suicide. Because State could not successfully prosecute D without witness' deposition, State could appeal Tr. Ct.'s grant of D's motion to suppress deposition. Held, grant of motion to suppress reversed.

RELATED CASES: Peters, App., 637 N.E.2d 145 (order granting motion to suppress is appealable if it effectively precludes State from prosecuting D); McLaughlin, App., 471 N.E.2d 1125, overruled on other grounds by Garcia, 500 N.E.2d 158 (order suppressing D's breathalyser test results & all other evidence obtained after initial stop of automobile was tantamount to dismissal).

G. APPEAL

G.1. Appealable orders

G.1.c. Appellate review of sentence (AR 17)

TITLE: Abbott v. State
INDEX NO.: G.1.c.
CITE: (02-22-12), 961 N.E.2d 1016 (Ind. 2012)
SUBJECT: Maximum sentence for Class B felony possession of cocaine inappropriate
HOLDING: Maximum 20-year sentence for possession of less than three grams of cocaine within a thousand feet of a school was inappropriate in light of nature of the offense. D was the passenger in a car that was pulled over for a "window tint" violation. The car was stopped near a private school. D had rolling papers, a plastic bag with 26 smaller baggies, and a plastic baggie taped under his scrotum that had 1.15 grams of cocaine and 5.17 grams of marijuana. At trial, there was no mention of the statutory mitigating factor that D's possession of cocaine within 1,000 feet of school property was at the request of the police officer who stopped him. D represented himself on transfer and likewise made no argument concerning Ind. Code 35-48-4-16(c).

If not for being stopped by the officer near the school, then D would have been charged with Class D felony possession of cocaine, which carries a maximum penalty of three years. These circumstances "weigh heavily" in assessing the appropriateness of his sentence. Despite D's extensive criminal history, which does not necessarily justify a revision of his sentence, the nature of D's offense renders his twenty-year maximum sentence inappropriate under Appellate Rule 7(B). Majority decided to revise D's sentence to twelve years. Held, transfer granted, Court of Appeals' opinion at 950 N.E.2d 357 vacated, sentence revised to twelve years. David, J., joined by Dickson, J., dissented to note that Tr. Ct. "adequately justified the sentence imposed" and that D "[c]learly...has not reformed his criminal behavior despite his numerous prior contacts with the criminal justice system."

RELATED CASES: Walker, 968 N.E.2d 1292 (Ind. 2012) (in determining whether a sentence is appropriate, Ct. considers that but for officer's choice of location of stopping a D's car within 1000 feet of family housing complex, he would have only been guilty of a class D felony rather than B felony and would have received no more than maximum three-year sentence for possession of less than three grams of cocaine).

TITLE: Alvarez v. State
INDEX NO.: G.1.c.
CITE: (2/26/2013), 983 N.E.2d 626 (Ind. Ct. App. 2013)
SUBJECT: Consecutive sentences for dealing in cocaine inappropriate
HOLDING: Where, as here, a D is convicted of multiple acts of dealing in narcotics arising from sting operations contained in the same investigation, maximum and consecutive sentences are not appropriate for each act. See Beno v. State, 581 N.E.2d 922 (Ind. 1991). D erroneously received consecutive sentences for two counts of dealing in cocaine based on almost identical police-sponsored buys two days apart. Held, remanded to revise 40-year consecutive sentence to concurrent sentence totaling 20 years.

TITLE: Anderson v. State
INDEX NO.: G.1.c.
CITE: (6/21/2013), 989 N.E.2d 823 (Ind. Ct. App. 2013)
SUBJECT: 3-year sentence for criminal mischief & animal cruelty affirmed
HOLDING: D and her roommate abandoned 85 cats in a home they rented with inadequate nourishment, resulting in $45,000 damage to the property. She also caused $13,000 damage to the home where she lived with 23 cats. D pled guilty to two counts of Class D felony criminal mischief and five counts of Class A misdemeanor animal cruelty. She was sentenced to three years for two counts of Class D felony criminal mischief and five counts of Class misdemeanor animal cruelty.

On appeal, Court rejected D's claim that her sentence was inappropriate in light of her character and offenses. D was aware of the dilapidated state of the property she abandoned, as she went there every few days to feed the cats. Urine had soaked into the floors and walls of the abandoned property and caused it to be condemned and slated for demolition. D kept upwards of 37 dead cats in her refrigerators and freezers. As a consequence of her actions, another 103 cats had to be euthanized. D's conduct far exceeded the necessary showing under animal cruelty and criminal mischief statutes and permitted an enhanced sentence. As to D's character, she knew the state of affairs in the two properties and ignored the problem. Despite her education and occupation in mental health profession, D exhibited a lack of concern for the well-being of the cats. Nor did she exhibit concern for the welfare of her neighbors when she permitted the abandoned dwelling to become an enviromental hazard. Held, judgment affirmed.

TITLE: Anthony v. State
INDEX NO.: G.1.c.
CITE: (7/12/2016), 56 N.E.3d 705 (Ind. Ct. App. 2015)
SUBJECT: 298-year sentence not inappropriate
HOLDING: D's 298-year sentence was not inappropriate. The nature of the offense was brutal. While armed, D was one of six men who broke into a home and victimized the residents. D shot a victim twice. He sexually assaulted another victim by attempting anal intercourse, and he forced her to perform fellatio on him. He took her to a bank at gunpoint and forced to get $800 for him out of the ATM. His accomplices stole several items. They also raped a third victim twice, first in a bathroom and later in a den. D's character is not good. He has a substantial criminal record, including two convictions for murder and one for armed robbery. D has two pending cases; in one he faces forty counts, including burglary, robbery, and criminal confinement. His risk of recidivism is high. However, the Court did reduce D's sentence by thirty years on different grounds; it reduced one burglary conviction from an A felony to a B felony because both burglary convictions were enhanced based on the same injury. Held, judgment affirmed in part and reversed in part.

RELATED CASES: Hunter, 60 N.E.3d 284 (Ind. Ct. App. 2015) (20-year sentence for B felony possession of a firearm by a serious felon was not inappropriate).

TITLE: Asher v. State
INDEX NO.: G.1.c.
CITE: (5th Dist., 6-25-03), Ind. App., 790 N.E.2d 567
SUBJECT: Inappropriate maximum sentence - child seduction; improper aggravators/mitigators
HOLDING: D's three-year sentence for Class D felony child seduction conviction was inappropriate where Tr. Ct. relied on improper aggravators & did not consider mitigator that D had no prior criminal history. Tr. Ct. improperly considered circumstances of crime as aggravator, as it did not point to any specific circumstances that would indicate crime was committed in particularly egregious manner. Fact that D was in position of trust with victim should not have been considered as it is element of crime of child seduction. Tr. Ct.'s determination that D had no respect for law was improper as well. Tr. Ct. based that determination on fact that D lied about how much money he had at bond reduction hearing & that he had violated no contact order when he met with ex-wife. However, D's mistake about how much money he had is not proof that D attempted to mislead Ct. & violation of contact order was done on advice of counsel to contact soon-to-be ex-wife to execute quitclaim deed in accordance with dissolution settlement. In addition to considering improper aggravators, Tr. Ct. also failed to consider as mitigator fact that D had no criminal history, which shows that D is not worst offender making him deserving of maximum sentence. Held, conviction affirmed on other grounds & remanded to reduce sentence to one year.

RELATED CASES: Hayes, 906 N.E.2d 819 (nature of Class B felony promoting prostitution offense did not warrant maximum, enhanced sentence because D's "promotion" of prostitution was highly attenuated and criminal history was not significant in relation to this offense); Mishler, App., 894 N.E.2d 1095 (50-year aggregate sentence for two class A felony child molesting convictions was inappropriate in light of nature of offenses & D's character, which State conceded at oral argument was not among worst); Payton, App., 818 N.E.2d 493 (aggregate 39-year sentence for child molesting/habitual was not appropriate, thus Ct. reduced sentence to 25 years; D's act of posing as a police officer & patting down four clothed juveniles with additional attention given to their private, sexual areas "while egregious, [was] by far not the worst we have reviewed").

TITLE: Benitez v. State

INDEX NO.: G.1.c.

CITE: (11/23/2022), Ind. Ct. App., 199 N.E.3d 811

SUBJECT: Appellate rule 7(B) review is not available to challenge appropriateness of order that Defendant serve previously suspended sentence following termination from drug court

HOLDING: Defendant pleaded guilty to possession of methamphetamine, a level 6 felony. As part of his sentence the trial court stayed 547 days on condition that he successfully complete a drug court program. Defendant committed several violation of the rules he was expected to follow as a participant in the drug court program and the State filed a petition to terminate his participation in the program. At the hearing to determine if he had violated the conditions of the drug court program, Defendant offered explanations which the trial court considered and rejected in terminating him from the program. On direct appeal, Defendant argued the trial court abused his discretion in terminating him from the diversion program but the Court of Appeals found the trial court had considered his testimony but did not abuse its discretion in terminating his participation in drug court. Defendant also argued the imposition of the previous sentence was inappropriate under Indiana Appellate Rule 7(B) review. The Court of Appeals held that participation in a drug program is akin to probation and a trial court's actions as to the appropriateness of a sentence in a post-sentence probation violation proceeding is not a criminal sentence contemplated by Indiana Appellate Rule 7(B) review and therefore that rule is not available to challenge appropriateness of the order that Defendant serve his previously suspended sentence following termination from drug court.

TITLE: Biel v. State
INDEX NO.: G.1.c.
CITE: (1st Dist., 11-21-00), Ind. App., 738 N.E.2d 337
SUBJECT: Presumptive sentence for voluntary manslaughter manifestly unreasonable
HOLDING: In light of D's severe, longstanding mental illness, lack of any criminal history, & absence of any aggravating circumstances, presumptive thirty-year sentence for voluntary manslaughter was manifestly unreasonable. Evidence showed that four teenage boys entered D's makeshift dwelling, threw bricks & boards at him, & refused to leave when asked to do so. Only then did D depart, return with gun, & shoot at boys. Totality of circumstances surrounding shootings, along with evaluation of character of D, called for considerable mitigation of D's sentence. Tr. Ct.'s failure to assign any mitigating weight to D's complete lack of criminal record & his severe & longstanding mental illness resulted in manifestly unreasonable sentence. Held, remanded to Tr. Ct. with instructions to impose minimum sentence of twenty years for voluntary manslaughter, to be served concurrently with two years for criminal recklessness; Robertson, S.J., concurring in result.

RELATED CASES: Koch, 952 N.E.2d 359 (Ind. Ct. App. 2011) (although D refused to allow his attorney to pursue the insanity defense or argue his mental illness at sentencing, evidence that D was acting under a delusion when committed the crime was clear from the record; his aggravated sentence for robbery and confinement was inappropriate, where even the probation officer had recommended concurrent, advisory sentences); Lopez, App., 869 N.E.2d 1254 (mitigating weight of D's mental illness & lack of criminal history served only to offset the significant aggravating weight of the grievous nature & circumstances of the crime).

TITLE: Brewer v. State
INDEX NO.: G.1.c.
CITE: (3-3-95), Ind., 646 N.E.2d 1382
SUBJECT: Maximum sentence manifestly unreasonable
HOLDING: In murder prosecution, Tr. Ct.'s imposition of 60-year sentence was manifestly unreasonable. Tr. Ct. gave insufficient weight to fact that D voluntarily surrendered himself to police 14 years after crime & provided full confession. Because of this major mitigating factor, maximum sentence was unreasonable considering character of offender. Held, conviction affirmed, sentence vacated, & remanded to Tr. Ct. for imposition of 50-year sentence.

RELATED CASES: Lander, 762 N.E.2d 1208 (consecutive sentences were manifestly unreasonable in light of D's youthful age & lack of prior criminal convictions); Borton, App., 759 N.E.2d 641 (Juvenile D's 55-year sentence was manifestly unreasonable where juvenile adjudications used as aggravators would have constituted non-violent misdemeanor offenses if committed by adult); Cherrone, 726 N.E.2d 251 (maximum consecutive sentences for 16-year-old D who lacked significant history of criminal activity was manifestly unreasonable); Trowbridge, 717 N.E.2d 138; Carter, 711 N.E.2d 835 (although crime of 14-year-old D may warrant maximum sentence, maximum in this case was manifestly unreasonable); Archer, 689 N.E.2d 678 (sentence reduced where Tr. Ct. failed to give weight to D's mental illness); Mayberry, 670 N.E.2d 1262 (60-year sentence for murder manifestly unreasonable because aggravators did not substantially outweigh mitigators; Tr. Ct. abused discretion in refusing to find mental illness as significant mitigating factor; held, remanded for imposition of 40-year term); Willoughby, 660 N.E.2d 570 (enhanced sentences for murder & conspiracy to commit murder excessive given facts of case; held, aggregate sentence reduced from 100 to 70 years); Widener, 659 N.E.2d 529 (70-year sentence for felony murder & conspiracy to commit robbery manifestly unreasonable where D had no significant history of prior criminal involvement, showed willingness to accept responsibility for his actions, & conspiracy was initiated & formulated primarily by Co-Ds; Ct. remanded for imposition of 50-year sentence on murder charge concurrent with 10-year sentence on conspiracy charge); Walton, 650 N.E.2d 1134 (120-year sentence for murder of adoptive parents manifestly unreasonable where 16-year-old D was mentally ill, & lacked history of criminal or delinquent acts at time of offense; held, remanded for imposition of 2 consecutive 40-year sentences; Dickson, J., dissenting).

TITLE: Brooks v. State
INDEX NO.: G.1.c.
CITE: (10-08-10), 934 N.E.2d 1234 (Ind. Ct. App. 2010)
SUBJECT: Waiver into adult court and advisory sentence for 14-year-old was appropriate
HOLDING: Tr. Ct. did not abuse its discretion by waiving 14-year-old D into adult court, and the resulting advisory sentence of fifty-five years was appropriate for Felony Murder. Although the expected practice is for the juvenile court to make specific findings to support its conclusion of waiver to adult court, lack of such findings does not invalidate the order if the record contains sufficient facts to find the waiver is appropriate. Here, D shot the victim at close range and stole his wallet, watch, and bracelet. The juvenile court failed to explain why it was not in the best interests of D and the community for the D to remain within the juvenile system. But, a probation officer explained that if D stayed within the juvenile system, he would be released at age 21 and there is a good chance he would re-offend. The probation officer also opined D was beyond rehabilitation in the juvenile system. Because the record shows that the ability of the juvenile system to rehabilitate D is questionable, and the risk to the community of leaving him in the juvenile system is unquestioned, juvenile court did not abuse its discretion by waiving jurisdiction over D.

Although D had a poor upbringing, not everyone who grows up in such an unfortunate environment channels his anger into robbery and murder. D's positive behavior while detained in Boys Town illustrates he can make good choices, at least when it suits his purposes. D is not a little boy who can be trusted to mend his erring ways; he is a hardened individual who, in the midst of committing a series of crimes, robbed and murdered a random victim. Thus, his fifty-five-year sentence was appropriate. Held, judgment affirmed.

TITLE: Brown v. State
INDEX NO: G.1.c.
CITE: (6/2/2014), 10 N.E.3d 1 (Ind. 2014)
SUBJECT: Appellate Review of Sentence - AR 7(B)
HOLDING: Sentence of 150 years for juvenile who was convicted of two counts of murder as an accomplice and one count of robbery was inappropriate. Sixteen-year-old D and two young co-Ds robbed a suspected drug dealer and his girlfriend in their home and shot them both to death. D did not kill either victim. D waived jury, and Tr. Ct. entered convictions on the two murders and the robbery, and sentenced D to maximum terms on all counts, run consecutively, totalling 150 years. Tr. Ct. did not abuse its discretion in imposing this sentence, but Supreme Court reviews the sentence for appropriateness under App. R. 7(B). Looking at the nature of the offense, Court notes that D was convicted as an accomplice, and quotes Graham v. Florida, 560 U.S. 48, 69 (2010):"[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Court further finds that the murders were senseless and reprehensible, but not particularly heinous. Looking at the character of the offender, Court notes D's lengthy history of juvenile adjudications, but notes that only one appears to be for a violent crime -- a battery. D also had a history of alcohol and marijuana use since the age of 10, and Court cited Chief Justice Robert's concurring opinioin in Graham regarding the mitigating nature of a childhood that led to early drug and alcohol use. Also mitigating was the fact that the D gave police a statement detailing the events of the crime. Finally and most significant, D was only sixteen years old. The Court notes that the U.S. Supreme Court cases prohibiting death sentences and mandatory life without parole sentences for those under 18 identify three ways in which juveniles are different from adults. First, they have a "lack of maturity and an underdeveloped sense of responsibility," [citation omitted], based in part on the fact that important areas of their brains are not yet fully developed. Second, they are more susceptible to negative pressure from others and have less ability to "extricate themselves from horrific, crime-producing settings." [citations omitted]. Third, their character is not as well-formed, and bad acts are less likely to be based on "irretriveable depravity." [citations omitted]. Here, D was not sentenced to life without parole, but a sentence of 150 years similarly "forswears altogether the rehabilitative ideal." Alabama v. Miller, 132 S.Ct. 2455, 2465 (2012)(*quoting* Graham, 460 U.s. at 74). Court reduces D's sentence to sixty years for each murder, run concurrently, and 20 years for robbery, run consecutively, for a total of 80 years.

RELATED CASES: Sharp, 16 N.E.3d 470 (Ind. Ct. App. 2014) (18-year-old D met "the particularly heavy burden" in persuading Ct. that his advisory sentence for felony murder was inappropriate); Fuller, 9 N.E.3d 653 (Ind. 2014) (15-year-old Co-D's sentence of 150 years was likewise inappropriate; because Co-D shot one of the victims, Court imposes the maximum sentence for each murder, run concurrently, and 20 years for the robbery, run concurrently, for a total of 85 years).

TITLE: Buchanan v. State

INDEX NO.: G.1.c.

CITE: (9-4-98), Ind., 699 N.E.2d 655

SUBJECT: Maximum enhancement of sentence manifestly unreasonable - absence of physical injury

HOLDING: Although sentencing Ct. appropriately engaged in balancing process of weighing aggravating factors against mitigating factors, Ct. found that fully enhanced, consecutive sentence of 100 years for kidnapping, robbery, & habitual offender convictions was excessive. In considering nature & circumstances of crime, Tr. Ct. noted that D kidnapped young woman who was smaller, alone & more vulnerable & that D hijacked victim's car & belongings & locked her in trunk of car & drove her around for almost 24 hours. Ct. noted that crime was one in which no physical injury was suffered by victim & in which property loss sustained was minimal. Absence of physical injury does not mean that Tr. Ct. should not impose enhanced sentence. However, maximum enhancement permitted by law should be reserved for very worst offenses & offenders. Bacher, 686 N.E.2d 791. While consideration of nature of crime supported enhancement of sentences, imposition of consecutive sentences in this case was excessive. Held, convictions affirmed; kidnapping & robbery sentences revised to run concurrently for total sentence of eighty years.

RELATED CASES: Pagan, App., 809 N.E.2d 915 (20-year sentence for robbery was inappropriate in light of D's relative youth & non-violent juvenile history; reversed to total term of 15 years, with 4 years suspended); Brown, App., 760 N.E.2d 243 (when deciding whether case is among very worst offenses & D among very worst offenders, Tr. Ct. should concentrate less on comparing facts of certain case to others, whether real or hypothetical, & more on focusing on nature, extent, & depravity of offense for which D is being sentenced, & what it reveals about his character); Peckinpaugh, App., 743 N.E.2d 1238 (Ct. remanded with instructions to enter presumptive sentence for burglary); Love, App., 741 N.E.2d 789 (19-year-old D's maximum sentence for possession of cocaine with intent to deliver manifestly unreasonable; rehabilitation should be primary consideration of sentencing court); Redmon, App., 734 N.E.2d 1088 (21-year sentence for 15 year-old D was manifestly unreasonable in light of D's youth & nature of his offenses); Evans, 725 N.E.2d 850 (maximum sentence allowed by law for dealing cocaine was clearly, plainly, & obviously unreasonable in this case).

TITLE: Caraway v. State
INDEX NO.: G.1.c.
CITE: (10/31/2012), 977 N.E.2d 469 (Ind. Ct. App. 2012)
SUBJECT: Maximum sentence for murder not inappropriate
HOLDING: In Caraway v. State, 959 N.E.2d 847 (Ind. Ct. App. 2011), Court reversed and remanded D's 65-year sentence for murdering his wife because Tr. Ct. did not acknowledge his guilty plea as a mitigator. On remand, Tr. Ct. again sentenced D to sixty-five years, finding his drunken state at the time of the shooting and his position of trust outweigh that he pleaded guilty and other mitigators. Court of appeals affirmed, concluding D failed to show that his sentence is an outlier and inappropriate under Appellate Rule 7(B) given the nature of the offense or his character. After drinking all day and ingesting Valium, D shot his wife several times in the abdomen, once in the face, and once in the arm, continuing to shoot her even after she had collapsed from the initial shots. After the shooting he put the gun in his wife's hand to make it look like the wounds were self-inflicted.

With respect to D's character, Court rejected argument that his remorse, his guilty plea, and his addiction to alcohol require revision of his sentence. D received a small benefit from the plea (i.e., dismissal of Class D felony altering scene of death charge), delayed entering his guilty plea, and his decision to plead guilty was likely a pragmatic one, given the weight of evidence against him. Wells v. State, 836 N.E.2d 475 (Ind. Ct. App. 2005). D had a thirty-year history of drinking and offenses but there was no evidence he ever sought treatment. Held, judgment affirmed.

RELATED CASES: Schooler, 2018 Ind. App. LEXIS 102 (Ind. Ct. App. 2018) (67-year aggregate sentence for murder and neglect (Level 6) of boyfriend's 3-year-old son was not inappropriate where D, the boy's primary caregiver, pounded his head into a hard object, causing bleeding of the brain and swelling "that squeezed brain matter into areas of the head not meant for brain matter"; D's bad character was evinced by blaming the death on the "demonstrably innocent" biological mother).

TITLE: Cardwell v. State

INDEX NO.: G.1.c.

CITE: 895 N.E.2d 1219, Ind. (11/12/2008)

SUBJECT: Inappropriate sentence- comparison between co-Ds' sentences; broad discretion to appellate courts

HOLDING: D's thirty-four-year sentence for two neglect of a dependent convictions was inappropriate. Appellate courts are to review and revise if a sentence is determined to be "inappropriate in light of the nature of the offense and the character of the offender," a standard leaving much to the unconstrained judgment of the appellate court. Because the number of counts that can be charged and proved is virtually entirely at the prosecutor's discretion, appellate review should focus on the forest - the aggregate sentence -rather than the trees- consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Here, while D was angry with his girlfriend's three-year-old daughter for spilling spaghetti, he took her to the bathroom to clean her up. When he placed the child's hands under water, she jerked away and complained that the water was hot. When D saw her hands were hot and pink, he placed them in cold water and wrapped them in aloe gel. When D picked up the child's mother from work, he told her what happened and said they needed to take the child to the hospital. Instead, the mother took the child home and gave her more aloe and Tylenol. Eventually, when the burns began to blister and skin peeled off, D and mother took the child to the hospital at which D took responsibility and expressed deep remorse. D was convicted on two class B felony neglect charges for putting the child's hands under hot water and for delaying medical attention. The mother was charged with class B felony neglect for delaying medical treatment but was convicted of class D felony neglect and received a one and one-half year- sentence. D had three prior misdemeanor convictions, but immediately applied aloe and bandages to the burns, explained the injuries to the mother, was forthright with the detective and accepted responsibility. The child had no permanent injuries. Moreover, D's behavior in delaying seeking medical attention was even less culpable than that of the co-D, mother. Yet, the disparity between D's thirty-four-year sentence and the co-D's one and one-half- year sentence is stark. Thus, Court revised D's sentence to consecutive terms of nine and eight years for aggregate sentence of seventeen years. Held, transfer granted, Court of Appeals' memorandum opinion summarily affirmed on other issues, judgment affirmed in part and reversed in part. Dickson, J., dissenting on basis that Court should decline to revise Tr. Ct.'s judgment in light of the significant differences in charges filed against the two co-Ds, the refusal of co-D's jury to find her guilty of Class B felony neglect and Tr. Ct.'s extensive explanation of his reasons for D's sentence.

NOTE: This case provides a thorough analysis of the appellate court's discretion in revising sentences post-Anglemyer.

RELATED CASES: Dean, 137 S. Ct. 1170 (2017) (similar to Cardwell's emphasis on length of the aggregate sentence, district court had authority to consider the length of the firearm-related enhancement already imposed when sentencing D for his underlying robbery convictions.), Parks, 22 N.E.3d 552 (Ind. 2014) (pursuant to Appellate Rule 7(B), Court revised and lowered D's sentence for dealing methamphetamine from forty years to thirty years); Clark, (Ind. Ct. App. 2014) (D's 45-year sentence was not inappropriate, where Co-D planned the crime and struck blows that caused serious bodily injury yet received the same sentence, because D's culpability was substantially the same as the Co-D's).

TITLE: Chelf v. State
INDEX NO.: G.1.c.
CITE: (4th Dist. 11/30/88), Ind. App., 530 N.E.2d 1201
SUBJECT: Appellate review of sentence - sentence held manifestly unreasonable
HOLDING: D's sentence was manifestly unreasonable in light of nature of offense & character of offender. D pled guilty to 6 counts of forgery, involving checks totaling $2,197. She was sentenced to 5 years on each count, to run consecutively, for total of 30 years. D was partner in trucking business, & both she & business were agents of 2d trucking company, which was victim of forgeries. D, who had no prior offenses, admitted to all 6 counts & explained that, while her actions were not excused, they resulted from financial difficulty in her own business. D denied that others were involved in scheme. At sentencing, Tr. Ct. told D that complexity of scheme convinced him others were involved. He told her he was giving her some time in prison to decide "whether or not your life is worth your silence with them." Court of Appeals reviews sentence to determine whether it was manifestly unreasonable, so that no reasonable person could find it appropriate to particular offense & offender. Walker 527 N.E.2d 706. D was 52-year-old first offender. Total amount of forged checks was $2,197. 30-year sentence is more appropriate to violent offender. Cf. Cunningham, App., 469 N.E.2d 1. Court of Appeals revises sentence, weighing aggravating & mitigating factors, & determines that presumptive 5-year sentences, to run concurrently, are appropriate. Held, remanded for imposition of revised sentence.

RELATED CASES: Serban, 959 N.E.2d 390 (Ind. Ct. App. 2012) (Ct. affirmed 11-year sentence for corrupt business influence and theft where D, an attorney, stole $283,000 from many clients over 3 years, which not only victimized those individuals who had placed their trust in him, but also degraded the legal profession); Kemp, App., 887 N.E.2d 102 (32-year sentence for four counts of forgery, four counts of theft and one count of corrupt business influence was inappropriate in light of nature of offenses and D's character).

TITLE: Childress & Carroll v. State

INDEX NO.: G.1.c.

CITE: (06-14-06), Ind., 848 N.E.2d 1073

SUBJECT: Appellate Review of Sentence -- ability to appeal sentence imposed pursuant to plea agreement

HOLDING: D may, on appeal, challenge the appropriateness of a sentence imposed under the terms of a plea agreement where the Tr. Ct. exercises discretion in imposing the sentence. Even where a plea agreement sets forth a sentencing cap or a sentencing range, the Ct. must still exercises some discretion in determining the sentence it will impose. "The S. Ct. shall have, in all appeals of criminal cases, the power to . . . review & revise the sentence imposed." Ind. Const. Art. VII, Section 4. Likewise, the Constitution authorizes the Ct. App. to review sentences to the extent provided by the S. Ct. rules. Ind. Const. Art VII. Section 6. Indiana Appellate Rule 7(B) serves as a vehicle through which the appellate Ct's. implement this constitutional grant of authority. To say a D acquiesced in his or her sentence or has implicitly agreed that the sentence is appropriate undermines the scope of authority set forth in Article VII, Section 4 of the Indiana Constitution. The Ct. expressly disapproved of language stating otherwise within Gist v. State, 804 N.E.2d 1204 (Ind. Ct. App. 2004); Mann v. State, 742 N.E.2d 1025 (Ind. Ct. App. 2001); Bennett v. State, 813 N.E.2d 335 (Ind. Ct. App. 2004); Wilkie v. State, 813 N.E.2d 794 (Ind. Ct. App. 2004); Mast v. State, 824 N.E.2d 429 (Ind. Ct. App. 2005); Eaton v. State, 825 N.E.2d 1287 (Ind. Ct .App. 2005); Reyes v. State, 828 N.E.2d 420 (Ind. Ct. App. 2005); & Gornick v. State, 832 N.E.2d 1031 (Ind. Ct. App. 2005).

Here, Carroll pled guilty to multiple charges with a provision that the maximum possible sentence that could be imposed was twelve (12) years executed. The judge sentenced Carroll to the presumptive terms for his crimes, which resulted in an eleven & one- half- year sentence. Considering Carroll's prior criminal history & the fact that he was on bond when the crimes occurred, the presumptive sentence was appropriate.

Childress pled guilty to a Class B felony with a provision that he would be sentenced to six (6) years in DOC, but the parties could argue how much of the six (6) years should be executed. The Tr. Ct. sentenced Childress to six years executed. The Ct. App.' opinion that Childress' sentence was appropriate is summarily affirmed. Held, judgment affirmed; Dickson, J., concurring.

RELATED CASES: Miles, 889 N.E.2d 295 (D's arguments at sentencing hearing, requesting Tr. Ct. to impose no more than a 65-year sentence, does not equate to "invited error" or acquiescence in a 65-year sentence such that D is precluded from asking appellate Ct. to review his sentence); Hole, 851 N.E.2d 302 (except for the location where his sentence is to be served, which D did not challenge, his sentence was not available for Rule 7(B) review); Weiss, 848 N.E.2d 1070 (40-year sentence for methamphetamine & firearm offenses & habitual enhancement was appropriate).

TITLE: Collins v. State
INDEX NO.: G.1.c.
CITE: (11-9-04), Ind., 817 N.E.2d 230
SUBJECT: Must raise "open plea" sentencing claims on direct appeal; availability of belated appeal
HOLDING: The proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to request permission to file a belated notice of appeal under Post-Conviction Rule 2. In so holding, Ct. followed Taylor v. State, 780 N.E.2d 430 (Ind. Ct. App. 2003), & resolved conflict in Ct. App. as to whether open plea sentences can be challenged in post-conviction proceedings. An issue known & available but not raised on direct appeal may not be raised in post-conviction proceedings. Bunch v. State, 778 N.E.2d 1285 (Ind. 2002).

Here, D was advised he was waiving his right to appeal without being further advised that he could still appeal only his sentence. However, fact that Tr. Ct. at a guilty plea hearing does not advise the D in an open plea situation that he or she has the right to appeal the sentence to be imposed does not warrant an exception to the rule that sentencing claims must be raised on direct appeal. This is because P-C. R. 2 will generally be available to an individual in this situation. P-C. R. 2 permits an individual to request permission to file a belated notice of appeal where the failure to file a timely notice of appeal is not the fault of the individual; & the individual is diligent in requesting permission to file a belated notice of appeal. Post-conviction Ct. should have dismissed petition for PCR for lack of jurisdiction without prejudice to any right D may have to file belated notice of appeal. Held, transfer granted, Ct. App.' opinion at 800 N.E.2d 609 vacated & remanded to dismiss PCR petition without prejudice.

RELATED CASES: Comer, 936 N.E. 2d 1266 (Ind. Ct. App. 2010) (where plea included a condition that D serve his probation before his executed sentence and if he successfully completed probation, the executed time would be modified to suspended time, court lacked jurisdiction to review the sentence when D violated probation and was ordered to serve the entire sentence executed; the sentence was set by the plea); Olvera, App., 899 N.E.2d 708 (post-conviction Ct. erred in granting D's motion during PCR hearing to amend his P-C.R. 1 petition to include a sentencing challenge; Collins required dismissal of sentencing claim without prejudice for lack of jurisdiction); Walton, App., 866 N.E.2d 820 (although sentencing claims are raised through appeal, issues attacking a conviction after a plea, such as the voluntariness of the plea, are to be raised via PC-R1); Baysinger, App., 835 N.E.2d 223 (Tr. Ct. improperly denied D's petition to file a belated notice of appeal, which was based on premise that neither Tr. Ct. nor defense counsel informed him of his right to appeal sixty-five-year sentence imposed after he pled guilty to murder in an "open plea"); Brewer, App., 830 N.E.2d 115 (D's claim was for post-conviction relief, rather than direct review of discretionary sentence imposed under an open plea); Meadows, App., 823 N.E.2d 739 (D's challenge to his consecutive sentences was waived due to procedural default because he did not file a direct appeal, but filed a petition for post-conviction relief; Ct. remanded with instructions to enter order dismissing PCR petition without prejudice); Gutermuth, 817 N.E.2d 233.

TITLE: Combs v. State
INDEX NO.: G.1.c.
CITE: (5th Dist., 08-04-06), Ind. App., 851 N.E.2d 1053
SUBJECT: Blakely applies to considerations by appellate Ct.'s. as to appropriateness of sentence
HOLDING: When considering whether a D's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B), the appellate ct. should not consider factors which violate Blakely v. Washington, 124 S. Ct. 2531 (2004). Appellate Ct.'s. have the constitutional authority to revise a sentence if, after consideration of the Tr. Ct.'s decision, the ct. concludes the sentence is inappropriate in light of the nature of the offense & character of the offender. Here, after finding two aggravators & no mitigators, Tr. Ct. sentenced D to six years with two years suspended for a Class C felony possession of methamphetamine conviction. The aggravator that D tested positive twice while out on bond violated Blakely because D contested the test results & the State never proved beyond a reasonable doubt the positive test results. The fact that the D had a prior misdemeanor conviction for possession of marijuana eleven years ago was not sufficiently significant to justify the enhanced sentence. When considering the eleven-year-old prior misdemeanor & the extremely small amount of methamphetamine found on the D, the Tr. Ct. held that the six-year sentence was inappropriate. Held, judgment affirmed in part & reversed in part, & remanded with instructions to enter the presumptive sentence of four years; Vaidik, J., dissenting on basis that prior misdemeanor conviction was sufficient to support enhanced sentence because it was also a drug offense & that, if a D's sentence is statutorily proper, appellate Ct.'s. can consider all factors, including those that violate Blakely, in determining whether a sentence is appropriate under Appellate Rule 7(B) because there is no danger that the D's sentence will be increased.

Note: Tr. Ct. also held that chief of fire department's call that someone in a suspicious car may be stealing gas from the fire department was sufficient to stop a car in the area fitting the description.

TITLE: Connor v. State
INDEX NO.: G.1.c.
CITE: (8/2/2016), 58 N.E.3d 215 (Ind. Ct. App. 2015)
SUBJECT: Appropriateness review - D need not prove both prongs of Appellate Rule 7(B)
HOLDING: Indiana Appellate Rule 7(B) requires only that the appellate court "consider" the nature of the offense and the offender's character, not that the D necessarily prove both of those prongs. Court can review and revise sentence on appeal when D argues that his sentence is inappropriate under either the nature of the offense or his character. In practice, Court often exercises its review and revise power where only one of the prongs weighs heavily in favor of either affirming or revising the sentence. Thus, D did not waive appellate review of his sentence under Rule 7(B) by urging Court to give more weight to the nature of his character than to the circumstances of his crime.

Here, 17 year-old D pleaded guilty to criminal deviate conduct related to repeated sexual conduct with his 16-year-old sister over a two-year period against her will. State dismissed a Level 3 felony rape charge involving a second victim in exchange for D's guilty plea to the Class B felony criminal deviate conduct charge. D spent the first three years of his life in Russia, where he was unable to speak and severely malnourished until he was placed into an orphanage. D was adopted at age four, has been diagnosed with reactive attachment and bipolar disorders and attempted suicide several times. He has not been consistent in taking prescribed medication or attending therapy.

Given the serious nature of his offense and the fact that he has not yet demonstrated a commitment to helping himself overcome the difficult circumstances of his birth, Court could not say that D's 14-year sentence is inappropriate. Held, judgment affirmed; Najam, J., concurring in result, believes majority's interpretation is contrary to how Indiana's appellate courts have consistently understood and applied Rule 7(B). And, for Court to address both parts of Rule 7(B) in the absence of an appellant's own cogent argument, it will have to become an advocate for the appellant, which is not its role.

RELATED CASES: Davis, 173 N.E.3d 700 (Ind. Ct. App. 07/15/21) (revision of a sentence under Ind. App.R. 7(B) requires D to demonstrate the inappropriateness of his sentence in light of both the nature of the offenses and his character; failure to address both prongs results in waiver of the appropriateness issue); (Denham, 142 N.E.3d 514 (Ind. Ct. App.) (asking for appellate review of a trial court's sentence under Indiana App. R. 7(B) only as to the character of the offender and not also the nature of the offense will not result in waiver of review on direct appeal), Moon v. State, 110 N.E.3d 1156 (Ind. Ct. App. 2018) (Rule 7(B) required D to demonstrate inappropriateness of sentence in light of both the nature of the offenses and his character). Reis, 88 N.E.3d 1099 (Ind. Ct. App. 2017) (following Connor and holding that an offender does not have to prove his sentence is inappropriate under Appellate Rule 7(B) as it relates both to his character and the nature of his offense, but rather that an appellate court has to consider both of those factors).

TITLE: Cox v. State
INDEX NO.: G.1.c.
CITE: (3rd Dist., 7-30-03), 792 N.E.2d 878 (Ind. App.)
SUBJECT: Maximum sentence for theft inappropriate
HOLDING: D's three-year maximum possible sentence he received for theft was inappropriate, where sole aggravating factor was invalid & there were two valid mitigating factors. "Lesser sentence would depreciate seriousness of crime" aggravator was inapplicable in this case, as it is relevant only to support refusal to impose less than presumptive sentence. As mitigating circumstances, Tr. Ct. cited D's lack of criminal history & fact that he pled guilty. D was sentenced to three-year term of imprisonment, with two years suspended. On appeal, Ct. reversed & held that one-year sentence with six months suspended to probation was appropriate in light of nature of offense & character of offender. In so holding, Ct. declined to follow Beck v. State, 790 N.E.2d 520 (Ind. Ct. App. 2003), which recognized a distinction between maximum punishment & maximum sentences. Ct.'s review of D's sentence for theft was not altered by fact that two years of sentence was suspended. Held, judgment reversed & remanded for correction of sentence; Sullivan, J., concurring.

See also: Nelson v. State, App., 792 N.E.2d 588 (90-year sentence for conspiracy/dealing in cocaine & habitual offender finding was inappropriate where D sold less than one gram to undercover officer, was not armed at time, was cooperative with police during arrest, & extensive criminal history did not include crimes of violence as adult; held, sentence modified to sixty years).

TITLE: Creech v. State
INDEX NO.: G.1.c.
CITE: (05-21-08), 887 N.E.2d 73 (Ind. 2008)
SUBJECT: D may waive right to appeal sentence as part of plea agreement
HOLDING: Through a plea agreement, D can waive his right to appeal a discretionary sentencing decision, as long as the waiver is knowing and voluntary. *Citing* United States v. Hare, 269 F.3d 859 (7th Cir. 2001), Court noted that a D's waiver of appellate rights can be a substantial benefit to both the D and society. Here, D knowingly and voluntarily waived his right to appeal, despite judge's statements at close of sentencing hearing that he retained the right to appeal. These statements had no effect on D's guilty plea and are not grounds for allowing D to circumvent the express terms of his plea agreement. D did not claim that language of plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it. Held, transfer granted, judgment affirmed.

Note: Court reaffirmed case law invalidating provisions in plea agreements that waive post-conviction rights. See Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991).

RELATED CASES: Wihebrink, 181 N.E.3d 448 (Ind. Ct. App. 2022) (an appeal waiver, despite a challenge to aggravators or mitigators found by Tr. Ct. at the time of sentencing, is enforceable because such a challenge is not one of illegality) (questioning validity of appeal waivers, which are prospective in nature, and propriety of Court's prior decisions holding that a defendant's assent to the express waiver language in a written plea agreement indicates she knowingly and voluntarily waives her right to appeal the sentence); Nolan,177N.E.3d 881 (Ind. Ct. App. 2021) (a defendant waives his/her right to appeal a restitution order after signing a plea agreement leaving all terms of the sentence to the trial court's discretion);Merriweather, 151 N.E.3d 1281 (Ind. Ct. App. 8/21/2020) (as in Bonilla, below, Ct, found no waiver of right to appeal sentence despite waiver in plea agreement, where Tr. Ct. told D he had right to appeal his sentence and neither defense nor prosecutor objected); McHenry, 152 N.E.3d 41 (Ind. Ct. App. 2020) (Defendant can appeal "open plea" where plea agreement leaves sentencing discretion to trial court even if plea agreement wrongly states that plea is not an open plea and appeal is waived), Johnson, 145 N.E.3d 785 (Ind. 2020) (a general waiver of a right to appeal a sentence in plea agreement, when contained in the same sentence as an unenforceable waiver of post-conviction relief, is insufficiently explicit to establish a knowing and voluntary waiver of the right to appeal a sentence); Idaho v. Garza, 139 S. Ct. 738 (2019) (defense lawyer's refusal to file requested appeal constitutes ineffective assistance, despite D's appeal waiver; see full review, this section); Archer, 81 N.E.3d 212 (Ind. 2017) (D did not waive her right to appeal amount of restitution order where amount was left blank in plea agreement and agreement did not set forth how restitution was to be determined), Starcher, 66 N.E.3d 621 (Ind. Ct. App. 2017) (As in Creech, D had already made an enforceable waiver of his right to appeal sentence by the time trial judge at sentencing told D he would have the right to appeal; thus Court dismissed the appeal at the State's request); Williams, 51 N.E.3d 1205 (Ind. Ct. App. 2016) (Court resolved ambiguity in whether plea deal was open or closed in favor of D and thus allowed direct appellate review of her sentence); Melching, 16 N.E.3d 1015 (Ind. Ct. App. 2014) (State was not estopped from enforcing provision in plea agreement in which D waived right to appeal sentence even though State failed to object when, at end of sentencing hearing, Tr. Ct. erroneously advised D that he had right to appeal his sentence; see full review, this section); Hawkins, 990 N.E.2d 508 (Ind. Ct. App. 2013) (knowing and voluntary waiver found where plea agreement explicitly stated that D was waiving his right to appeal appropriateness of sentence and Tr. Ct. read that provision at guilty plea hearing and asked if D understood it; distinguishing Ricci and Bonilla (below), Ct. held that Tr. Ct.'s advisements to D were neither conflicting nor ambiguous); Westlake, 987 N.E.2d 170 (Ind. Ct. App. 2013) (because D's plea agreement did not specifically refer to abuse of discretion arguments or include a catch-all that prohibited sentencing appeals, D's waiver of his right to challenge his sentence under Appellate Rule

7(B) did not foreclose his argument that the Tr. Ct. abused its discretion by failing to consider a mitigator); Brown, 970 N.E.2d 791 (Ind. Ct. App. 2012); Bowling, 960 N.E.2d 837 (Ind. Ct. App. 2012) (no error in denying a belated direct appeal to D who, along with written plea agreement, signed a written advisement and waiver of rights that contained the language "by pleading guilty you have agreed to waive your right to appeal your sentence so long as the Judge sentences you within the terms of your plea agreement"); Buchanan, 956 N.E.2d 124 (Ind. Ct. App. 2011) (when D agreed in his plea agreement that he will be credit restricted felon, he did not waive his ability to challenge calculation of his credit time); Holloway, 950 N.E.2d 803 (Ind. Ct. App. 2011) (Ricci and Bonilla (below) apply where, despite waiver in plea agreement, Tr. Ct. told D he had right to appeal his sentence and neither defense nor prosecutor objected); Ivy, 947 N.E.2d 496 (Ind. Ct. App. 2011) (erroneous advisement that D could modify the last two years of his sentence to a work release program was of no consequence because D received benefit of his bargain prior to sentencing hearing and D did not make any claim that language of plea agreement was confusing or misunderstood); Akens, 929 N.E.2d 265 (Ind. Ct. App. 2010) (as in Creech, Tr. Ct.'s misstatement that D could appeal his sentence was made after it had accepted the plea agreement and entered D's sentence; thus, D already had received the benefit of his bargain prior to Tr. Ct.'s misstatement); Abrajan, App., 917 N.E.2d 709 (Ind. Ct. App. 2009) (where D's plea agreement waives the right to appeal his sentence, Ct. will not enforce the waiver if Tr. Ct. advised D about his right to appeal during both the plea and sentencing hearings where neither the prosecutor nor defense counsel alerted Tr. Ct. to the error); Bonilla, 907 N.E.2d 586 (Ind. Ct. App. 2009) (D did not waive his right to appeal his sentence because Tr. Ct. made confusing remarks at guilty plea hearing indicating that D "may" have waived right to appeal and then advised D of rights to appeal and to attorney); Holsclaw, App., 907 N.E.2d 1086 (D waived right to appeal appropriateness of sentence through language in guilty plea); House, 901 N.E.2d 598 (Ind. Ct. App. 2009) (D can waive statutory right to earn credit time during any incarceration due to his participation in drug court); Ricci, App., 894 N.E.2d 1089 (distinguishing Creech, Ct. noted that Tr. Ct. here clearly and unambiguously stated at plea hearing that D had not surrendered the right to appeal his sentence; purported waiver in plea agreement is a nullity); Brattain, App., 891 N.E.2d 1055 (Tr. Ct. is not required to engage in colloquy with D re: intention to waive appellate rights; moreover, appointment of appellate counsel does not invalidate waiver provision).

TITLE: Cardwell v. State
INDEX NO.: G.1.c.
CITE: (11-12-08), Ind., 895 N.E.2d 1219
SUBJECT: Inappropriate sentence- comparison between co-Ds' sentences; broad discretion to appellate courts
HOLDING: D's thirty-four-year sentence for two neglect of a dependent convictions was inappropriate. Appellate courts are to review and revise if a sentence is determined to be "inappropriate in light of the nature of the offense and the character of the offender," a standard leaving much to the unconstrained judgment of the appellate court. Because the number of counts that can be charged and proved is virtually entirely at the prosecutor's discretion, appellate review should focus on the forest - the aggregate sentence -rather than the trees- consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Here, while D was angry with his girlfriend's three-year-old daughter for spilling spaghetti, he took her to the bathroom to clean her up. When he placed the child's hands under water, she jerked away and complained that the water was hot. When D saw her hands were hot and pink, he placed them in cold water and wrapped them in aloe gel. When D picked up the child's mother from work, he told her what happened and said they needed to take the child to the hospital. Instead, the mother took the child home and gave her more aloe and Tylenol. Eventually, when the burns began to blister and skin peeled off, D and mother took the child to the hospital at which D took responsibility and expressed deep remorse. D was convicted on two class B felony neglect charges for putting the child's hands under hot water and for delaying medical attention. The mother was charged with class B felony neglect for delaying medical treatment but was convicted of class D felony neglect and received a one and one-half year- sentence. D had three prior misdemeanor convictions, but immediately applied aloe and bandages to the burns, explained the injuries to the mother, was forthright with the detective and accepted responsibility. The child had no permanent injuries. Moreover, D's behavior in delaying seeking medical attention was even less culpable than that of the co-D, mother. Yet, the disparity between D's thirty-four-year sentence and the co-D's one and one-half- year sentence is stark. Thus, Court revised D's sentence to consecutive terms of nine and eight years for aggregate sentence of seventeen years. Held, transfer granted, Court of Appeals' memorandum opinion summarily affirmed on other issues, judgment affirmed in part and reversed in part. Dickson, J., dissenting on basis that Court should decline to revise Tr. Ct.'s judgment in light of the significant differences in charges filed against the two co-Ds, the refusal of co-D's jury to find her guilty of Class B felony neglect and Tr. Ct.'s extensive explanation of his reasons for D's sentence.

NOTE: This case provides a thorough analysis of the appellate court's discretion in revising sentences post-Anglemyer.

RELATED CASES: Dean, 137 S. Ct. 1170 (2017)(similar to Cardwell's emphasis on length of the aggregate sentence, district court had authority to consider the length of the firearm-related enhancement already imposed when sentencing D for his underlying robbery convictions.), Parks, 22 N.E.3d 552 (Ind. 2014) (pursuant to Appellate Rule 7(B), Court revised and lowered D's sentence for dealing methamphetamine from forty years to thirty years); Clark, (Ind. Ct. App. 2014) (D's 45-year sentence was not inappropriate, where Co-D planned the crime and struck blows that caused serious bodily injury yet received the same sentence, because D's culpability was substantially the same as the Co-D's).

TITLE: Davidson v. State
INDEX NO.: G.1.c.
CITE: (05-25-10), Ind., 926 N.E.2d 1023
SUBJECT: Appropriateness review - distinction between executed & suspended sentences
HOLDING: Indiana Appellate Rule 7 allows reviewing courts to consider the totality of sentencing order, including whether part of a sentence is suspended, in deciding whether a sentence is appropriate. Reviewing courts may also consider whether sentence includes probation, home detention, placement in community services program, and whether multiple sentences are concurrent or consecutive. Thus, in deciding whether D's 545-day sentence was appropriate, Court of Appeals did not err by considering that Tr. Ct. suspended 365 days of D's sentence. However, consideration of factors beyond length of aggregate sentence does not prevent reviewing courts from concluding a sentence is inappropriate due to its overall length. Court disapproved contrary views in Eaton v. State, 825 N.E.2d 1287, 1290-91 (Ind. Ct. App. 2005), Pagan v. State, 809 N.E.2d 915, 926 (Ind. Ct. App. 2004), and Cox v. State, 792 N.E.2d 898, 904 (Ind. Ct. App. 2003). Held, transfer granted, Court of Appeals holding that Appellate Rule 7 sentence review allows consideration of time suspended affirmed.

RELATED CASES: Sharp, 970 N.E.2d 647 (Ind. 2012) (evaluation of a D's sentence may include consideration of the D's status as a credit-restricted felon because this penal consequence was within the contemplation of the Tr. Ct. when it was determining the D's sentence).

TITLE: Davis v. State

INDEX NO.: G.1.c.

CITE: (5th Dist.; 08-11-06), Ind. App., 851 N.E.2d 1264

SUBJECT: Inappropriate sentence- reducing sentence & ordering placement in community corrections program

HOLDING: After concluding that Tr. Ct. erred in enhancing D's sentence based on prior conviction for operating while intoxicated, Ct. App. reduced sentence to presumptive & ordered D to serve sentence in community corrections. A fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence. Here, D's convictions for operating while intoxicated were elevated from class D felonies to class C felonies because she had a 2003 conviction for operating while intoxicated. At sentencing, the Tr. Ct. stated it enhanced D's sentence because she was at risk to reoffend "because of her past history of having an operating conviction." This was improper double enhancement.

Where an invalidated aggravator cannot be supported by any fact, revision of the sentence by the appellate ct. is the most obvious & efficient solution. Neff v. State, 849 N.E.2d 556 (Ind. 2006). Here, the eight-year sentence, with two years suspended, imposed by Tr. Ct. cannot be supported by any facts because the only aggravator found was improper & in light of D's character, Ct. found this case to be an appropriate one for exercising its discretion to revise the sentence. Held, judgment reversed & remanded with instructions to revise D's sentence to four years with the time remaining on her sentence to be served through Community Corrections.

RELATED CASES: Pedraza, 887 N.E.2d 77 (double enhancement is not per se improper.

TITLE: Day v. State
INDEX NO.: G.1.c.
CITE: (5th Dist., 12-30-08), Ind. App., 898 N.E.2d 471
SUBJECT: 17-year sentence for promoting prostitution affirmed
HOLDING: In opinion affirming D's sentence for Class B felony promoting prostitution, Court found "nothing inappropriate about a seventeen-year sentence for a woman who accepted cash in exchange for allowing multiple men to molest her twelve-year old daughter." D did not provide transcript of guilty plea hearing, and her argument "and entire brief is devoid of any mention of the facts underlying her conviction," which impaired Court's review of nature of offense under Indiana Appellate Rule 7(B). Neither does D's character suggest the sentence is inappropriate. D would blame these acts on her "poverty, mental illnesses, personality disorders, and alcoholism," but D's abuse of her daughter reflects a pattern of behavior, not a mere misstep by a woman with otherwise good character. Held, judgment affirmed.

TITLE: Dean v. United States
INDEX NO.: G.1.c.
CITE: (4/3/2017), 137 S. Ct. 1170 (2017)
SUBJECT: District court may consider length of mandatory enhancement when sentencing on underlying conviction
HOLDING: When sentencing Defendant for his underlying robbery convictions, it was within the district court's discretion to consider the length of the firearm-related enhancement already imposed by operation of law.

Defendant and his brother robbed two drug dealers about two weeks apart. During each robbery, Defendant's brother threatened the victim with a semi-automatic rifle and later used the rifle to club the victim's head. Under 18 U.S.C. § 924(c), the use of the firearm required a mandatory-minimum 30-year sentence enhancement. At the sentencing hearing, Defendant argued that when determining his sentences for the underlying robberies, the district court should consider his lengthy sentence enhancement and impose concurrent one-day sentences for those counts. However, the district court said it was required to disregard Defendant's mandatory-minimum enhancement. The Eighth Circuit affirmed.

However, nothing in 18 U.S.C. § 924(c) supports this view. "The statute simply requires any mandatory minimum under §924(c) to be imposed 'in addition to' the sentence for the predicate offense, and to run consecutively to that sentence. Nothing in those requirements prevents a sentencing court from considering a mandatory minimum under §924(c) when calculating an appropriate sentence for the predicate offense." Thus, the statute's language does not support the Government's claim about Congress's purported intent to prevent district courts from bottoming out sentences whenever they think a mandatory minimum under the statute is punishment enough. Held, cert. granted, Eighth Circuit judgment reversed, and matter remanded for further proceedings. Roberts, C.J., for the unanimous Court.

Note: In Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008), the Indiana Supreme Court said that the length of the aggregate sentence is a significant factor in sentence review under Appellate Rule 7(B). While Dean did not expressly refer to aggregate sentences, it arguably embraced the Cardwell rationale in giving district courts latitude to consider the length of a mandatory-minimum enhancement when imposing sentences for underlying convictions.

RELATED CASES: Cardwell, Ind., 895 N.E.2d 1219 (similar to Cardwell's emphasis on length of the aggregate sentence, district court had authority to consider the length of the firearm-related enhancement already imposed when sentencing D for his underlying robbery convictions); Parks, 22 N.E.3d 552 (Ind. 2014) (pursuant to Appellate Rule 7(B), Court revised and lowered D's sentence for dealing methamphetamine from forty years to thirty years); Clark, (Ind. Ct. App. 2014) (D's 45-year sentence was not inappropriate, where Co-D planned the crime and struck blows that caused serious bodily injury yet received the same sentence, because D's culpability was substantially the same as the Co-D's).

TITLE: Dillon v. United States

INDEX NO.: G.1.c.

CITE: (06-17-10), U.S., 560 U.S. 817, 130 S. Ct. 2683, 177 L. Ed. 2d 271

SUBJECT: Judge's authority to deviate from Federal Sentencing Guidelines does not apply in sentence reduction proceedings

HOLDING: U.S. Sentencing Guidelines are binding in hearings under 18 U.S.C. § 3582(c)(2), which permits courts to reduce the prison term of a D sentenced under a guidelines range that was retroactively amended by the U.S. Sentencing Commission (U.S.S.C.). In 2008, the U.S.S.C. retroactively lowered the sentencing range for crack cocaine offenses. In a companion policy statement, the Commission indicated that a revised sentence should not include any downward departure that was not imposed as a part of the original sentence. In 1993, Dillon was given the lowest possible sentence under the then-applicable guidelines but was refused a downward departure. Dillon sought to take advantage of the retroactive amendments to the guidelines with respect to his offense of conviction as provided by § 3582(c)(2), and also argued for a downward departure claiming that Booker's constitutional holding rendering the guidelines as advisory only should be applied to his case. See United States v. Booker, 543 U.S. 220 (2005). Court noted the essential difference between sentencing proceedings and sentencing modification proceedings and held that Booker applies only to the former because modification proceedings are not constitutionally compelled. Section 3582(c)(2) embodies a narrow exception to the general rule that a prison sentence under the guidelines may not later be modified. The U.S.S.C. prohibition of downward departures not recognized at the time of original sentencing is controlling. Held, Third Circuit Court of Appeals' opinion at 572 F.3d 146 affirmed. Stevens, J., DISSENTING, believes that the Commission's now mandatory policy statement at § 1B1.10 "is unfaithful to Booker. It is also on dubious constitutional footing, as it permits the Commission to exercise a barely constrained form of lawmaking authority. And it is manifestly unjust."

TITLE: Duncan v. State
INDEX NO.: G.1.c.
CITE: (11-21-06), Ind., 857 N.E.2d 955
SUBJECT: Reduction to minimum sentence- conduct fell on fringes of constituting felony murder
HOLDING: D's enhanced sentence for felony murder was inappropriate where D's conduct, only by a series of stretches, falls under the felony murder statute. The Ct. may revise a sentence authorized by statute if, after due consideration of the Tr. Ct.'s decision, the Ct. finds that the sentence is inappropriate in light of the nature of the offense & the character of the offender. Ind. App. R. 7(B). Here, when D, who was living with her son, his fiancée, her grandson & the fiancée's son, was home alone with the children, she gave the fiancée's two-year-old son one-fourth of one of her methadone pills. D had a prescription for the pills as a painkiller for her back. The two-year-old boy died. D was convicted of felony murder, reckless homicide, dealing in a scheduled II controlled substance & neglect of a dependent. The reckless homicide, dealing & neglect convictions merged into the felony murder count. D was sentenced to an enhanced sentence of sixty-two years. Although D had prior substance abuse misdemeanor convictions, they were not sufficient to enhance her sentence. D's actions were irresponsible & reprehensible but fall far short of the conduct displayed by the vast majority of felony murders. There is no evidence suggesting any intent to harm the child. Held, transfer granted, judgment reversed in part & sentence revised to minimum sentence of forty-five years; Dickson, J., dissenting without opinion.

RELATED CASES: Reid, 876 N.E.2d 1114 (given that no one was injured, both potential victims pleaded for leniency, & D had a history of mental health problems, & may not have had ability to orchestrate conspiracy, it is inappropriate to order twenty-two-year old D to serve fifty years for conspiracy to commit murder).

TITLE: Eckelbarger v. State

INDEX NO.: G.1.c.

CITE: (12/10/2015), 46 N.E.3d 1267 Ind. Ct. App. 2015)

SUBJECT: 32-year sentence affirmed for dealing in methamphetamine resulting from sting operation

HOLDING: D's 32-year sentence for three counts of Class B felony dealing in methamphetamine and one Class D felony possession of precursors was not inappropriate. D manufactured methamphetamine for confidential informant after she provided him with pseudoephedrine in order to set him up for two controlled buys. D was a Marine veteran honorably discharged after four years in Vietnam and later became seriously drug addicted. His statement in PSI that he "did his part to keep his friends' habits going" gives credence to Tr. Ct.'s statement that D was "a factor in the explosion and epidemic" of methamphetamine cases in Wells County. The nature of the offense and particularly the character of the offender demonstrates quite clearly that D has no regard for the laws of this state and has disdain for legal authority. Held, judgment affirmed; Riley, J., dissenting, believes the State was seeking to "pile on" charges and resulting sentences, as in Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008), and would order terms to be concurrent, resulting in 16-year aggregate sentence, with four years suspended.

TITLE: Edmonds v. State
INDEX NO.: G.1.c.
CITE: (5th Dist., 01-18-06), Ind. App., 840 N.E.2d 456
SUBJECT: Consecutive sentences inappropriate
HOLDING: Tr. Ct. abused its discretion when it found D's criminal history to be an aggravating circumstance, thus consecutive sentences for class B felony robbery & class B felony criminal confinement convictions was inappropriate. As a juvenile, D was charged with disorderly conduct & intimidation, but record was unclear as to whether she was adjudicated on one or both of these charges. D also had one adult conviction for disorderly conduct. Record did not contain any evidence that her prior disorderly conduct conviction & juvenile charge were related in any way to present offenses. Thus, D's criminal history was not a significant aggravating circumstance. Court also held that undue hardship on D's dependents was not a significant hardship, where D had custody of two of her three children, & they had been in care of her mother while D was in jail pending outcome of this case. Held, judgment affirmed in part, reversed in part to order sentences of ten years for robbery & ten years of criminal confinement to be served concurrently.

TITLE: Eiler v. State
INDEX NO.: G.1.c.
CITE: (12-22-10), Ind. Ct. App., 938 N.E.2d 1235
SUBJECT: Appellate review of sentence - inappropriate sentence for dealing
HOLDING: D's twenty-two-year sentence with four years suspended for Class A felony dealing in cocaine is inappropriate. The Court of Appeals may revise a sentence authorized by statute if, after due consideration of the Tr. Ct.'s decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

Here, D pled guilty to one count of Class A felony cocaine dealing based on eight grams of cocaine found in his barn. The State dismissed fourteen other counts based on the cocaine and marijuana also found. The plea capped the executed sentence at twenty-two years. At sentencing, D, who was sixty-years-old-admitted smoking marijuana for thirty-five years and using cocaine for about six months. He admitted selling cocaine to two guys with whom he used cocaine and to one guy who begged him. He claimed he quit using cocaine and marijuana after his arrest because it was going to kill him. D's criminal history was limited to a 1982 misdemeanor conviction for marijuana. D had supported his wife and son by working for Amtrak for twenty-five years. Although the sentence was within the capped range pursuant to the plea agreement, the sentence of twenty-two years with four years suspended was inappropriate, particularly in light of such factors as D's age, his minimal criminal history, his ability to maintain a job for the past twenty-five years, his taking responsibility for his actions, and that he was the family's main financial provider, as well as the fact that he sold cocaine only to the same people with whom he used and that he did not profit financially from doing so. Moreover, Tr. Ct. did not provide a sentencing statement explaining the sentence. Although the Court could remand for resentencing with instructions to enter a sentencing statement, the Court chose to exercise its discretion to revise the sentence to twenty-two years with ten years suspended, maintaining Tr. Ct.'s recommendation it be served at a minimum security facility or on work release. Held, judgment reversed; Riley, J., agreeing that the twenty-two-year sentence was inappropriate but dissenting on basis that the case should be remanded for the Tr. Ct. to enter a sentencing statement supporting an appropriate sentence.

RELATED CASES: Schaaf, 54 N.E.3d 1041 (Ind. Ct. App. 2016) (D's forty-year sentence for two counts of dealing heroin was inappropriate, even though he had a significant criminal history, because his offenses were relatively minor; sentence reduced to thirty years); Norris, 27 N.E.3d 333 (Ind. Ct. App. 2015) (due to the relatively innocuous nature of D's offense - selling 10 hydrocodone pills for $6/each to a CI, D's maximum twenty-year sentence was revised to twelve years with four years suspended to probation; D did have a criminal history of misdemeanors and Class D felonies and was on probation at the time of the offense).

TITLE: Eisert v. State
INDEX NO.: G.1.c.
CITE: (5/25/2018), 102 N.E.3d 330 (Ind. Ct. App. 2018)
SUBJECT: Maximum six-year sentence for stalking and invasion of privacy not inappropriate
HOLDING: Six-year sentence for stalking and invasion of privacy was not inappropriate considering D's character and offenses, despite lack of physical harm to complaining witness (C.W.), his estranged wife. These crimes can be accomplished by telephone calls, emails, letters, or rung doorbells. Instead of contacting C.W. by one of those comparatively less-invasive forms, D, who had repeatedly threatened to batter and kill C.W., climbed onto the roof of her house, broke through a window into the attic, and cut his way from the attic into the living quarters of the house. He then grabbed C.W. and attempted to place her in a car so that he could take her to "talk to Jesus" before being foiled by arrival of other people. While D does not have a long history of criminal convictions, the fact he repeatedly violated pre-trial release and court orders when committing multiple invasions of privacy in a two-month period does not suggest he is a person who respects the law or the court's authority. Court rejected D's suggestion that his drug use was the root of his problem, and his consistent attendance at Bible study, AA and NA while incarcerated does not so rehabilitate his character that Court can say a six-year sentence is inappropriate. Held, judgment affirmed.

TITLE: Faith v. State
INDEX NO.: G.1.c.
CITE: (9/6/2019), 131 N.E.3d 158 (Ind. 2019)
SUBJECT: Trial court may impose consecutive advisory sentences in a case involving multiple acts of child molestation against a single victim
HOLDING: Per Curiam. After being charged with 36 counts of Class A felony child molesting, Defendant pleaded guilty to three Class A felony counts, resulting in an executed sentence of 90 years, with 20 years suspended. Court of Appeals revised Defendant's sentence to concurrent terms of 30 years-- the advisory sentence for a single Class A felony conviction.

On transfer, Supreme Court found a 30-year aggregate sentence to be "wholly inadequate under the circumstances." Defendant *cited* Monroe v. State, 886 N.E.2d 578 (Ind. 2008) and Harris v. State, 897 N.E.2d 927 (Ind. 2008), to support his claim that consecutive sentences are inappropriate in cases involving multiple acts of molestation against a single victim. But both cases involved the revision of *enhanced*, not advisory sentences to be served concurrently instead of consecutively. Accordingly, Court revised Defendant's sentences to the original consecutive 30-year terms, with 30 years suspended, for an executed sentence of 60 years. Slaughter, J., dissenting, disagrees with court of appeals' reduction of Defendant's sentence but does not believe it warrants transfer. On the merits, Justice Slaughter would affirm the sentence imposed by the trial court, as it was not unlawful. "In my view, that is where our sentencing review should begin and end. Once we conclude a challenged sentence was legal, I would stop there and not expend our limited resources substituting our collective view of what sentence is appropriate for that of the trial judge."

TITLE: Farris v. State
INDEX NO.: G.1.c.
CITE: (3rd Dist., 5-8-03), Ind. App., 787 N.E.2d 979
SUBJECT: Maximum sentence for forgery affirmed
HOLDING: Tr. Ct. appropriately sentenced D to maximum sentence of eight years for forgery as Class C felony. In support of its sentence, Tr. Ct. articulated following valid aggravating factors: 1) D's extensive criminal history; 2) D was on probation at time of instant offense; & 3) severe effect of this offense on victim. D assumed another person's identity & committed at least thirty-nine offenses under his name across country. D accumulated eighteen misdemeanor convictions & fourteen felony convictions & also had several pending charges & probation violation on his record. D failed to demonstrate that imposition of enhanced sentence would create an undue hardship to his five children, & Tr. Ct. was not required to find D's plea of guilty mitigating. Further, Tr. Ct. properly rejected D's argument that his series of offenses in victim's name across country constituted an episode of criminal conduct under Ind. Code 35-50-1-2. Ct. found that D's character & nature of crime of forgery are "heinous," & that enhanced sentence was clearly supported. Held, judgment affirmed.

RELATED CASES: Reeves, 953 N.E.2d 665 (Ind. Ct. App. 2011) (notwithstanding some redeeming aspects of D's character, the very egregious nature of his crimes, reckless disregard for bondholders' money and negative aspects of his character justified 54-year aggregate sentence for nine counts of securities fraud); Spitler, 908 N.E.2d 694 (Ind. Ct. App. 2009) (nature of D's offense in aiding escape was so unique & egregious as to substantially outweigh the positive aspects of his character; maximum 8-year sentence affirmed); Williams, App., 861 N.E.2d 714 (in affirming D's maximum 3-year sentence for torturing a vertebrate animal, Ct. noted "[t]he anger & rage necessary to stab a household pet to death are not character traits indicative of someone deserving less than a maximum sentence"); Hedger, App., 824 N.E.2d 417 (Ct. did not find three-year sentence for cruelty to animal inappropriate considering D's criminal history & fact that D stabbed & cut the throat of his three-year-old son's dog in front of the child); Gray, App., 790 N.E.2d 174 (D's sentence to ten & one half years with three years suspended for home improvement fraud was not inappropriate in light of nature of offense & character of offender).

TITLE: Fointno v. State
INDEX NO.: G.1.c.
CITE: (1/6/86), Ind., 487 N.E.2d 140
SUBJECT: Appellate review of sentence - sentence held manifestly unreasonable (MU)
HOLDING: Tr. Ct. erred in sentencing D to 104 years for rape, 3 counts of CDC, 2 counts of confinement & 1 count of robbery & intimidation. Here, D had no prior record & had served as Anderson fireman for 10 years. Ct. discusses Ind. Const. Art 1, Sections 16 & 18, Ind. Code 35-38-1-7(a), ARSR 1 & 2 & case law from Ind. & other jurisdictions. Ct. finds underlying concern in state Bill of Rights is that criminal justice system must afford opportunity for rehabilitation where reasonably possible. See also Shippen, 477 N.E.2d 903 ("if Tr. Ct. enhances punishment or orders consecutive sentences, record must demonstrate determination was based upon ... relation of sentence imposed to objectives which will be served by that sentence"). Ct. finds no consideration of mitigating evidence presented. Ct. finds no brutalization accompanying assault & notes "a rational sentencing scheme should punish more severely those who brutalize victims of their crimes." Ct. finds in light of enhancements imposed on rape & CDC counts & provision for consecutive sentences (40 + 40), 80 years is enough. Held, remanded with instructions to modify sentencing order to require sentences for robbery (10 years), confinement (10 years on each of 2 counts) & intimidation (4 years) be served concurrently with one another & with 80-year sentence. Givan & Pivarnik, JJ., dissenting.

RELATED CASES: Barany, Ind., 658 N.E.2d 60 (overwhelming evidence of D's mental illness at time of offense justified reduction of murder sentence from 60 years to presumptive 40-year sentence); Scheckel, 655 N.E.2d 506 (maximum sentence for murder was MU given evidence presented at trial & sentencing); Hardebeck, App., 656 N.E.2d 486 (240-year sentence for multiple killings not MU); Hunter, App., 656 N.E.2d 875 (although 120-year sentence for 5 counts of class B felony robbery & one count of class B felony confinement appeared to be MU, res judicata barred consideration of issue for PCR); Walton, 650 N.E.2d 1134 (120-year sentence for murder of adoptive parents was manifestly unreasonable in light of D, who was 16 years old, mentally ill, & lacking history of criminal or delinquent acts at time of offense; held, remanded for imposition of 2 consecutive 40-year sentences; Dickson, J., dissenting). Hill, 499 N.E.2d 1103 (50-year sentence was MU given D was not armed, was 18, had no adult felony convictions & circumstances of offense); Kubiak, App., 508 N.E.2d 559 (Ct. reads Fointno as imposing an 80-year maximum sentence for such offenses, with consideration given to D's criminal record & injuries to victim); Cunningham, App., 469 N.E.2d 1 (sentence was MU in view of nature of offenses & character of D; Ct. revises sentence to concurrent terms); Sullivan, 540 N.E.2d 1242 (60 + 50-year concurrent sentence found reasonable for 16-year-old, functioning at mental age of 12, convicted of murder & child molesting; DeBruler, J., DISSENTS).

TITLE: Fonner v. State
INDEX NO.: G.1.c.
CITE: (5th Dist., 11-05-07), 876 N.E.2d 340 (Ind. Ct. App. 2007)
SUBJECT: Appropriateness of placement in DOC under Appellate Rule 7(B)
HOLDING: The location where a sentence is to be served is an appropriate focus for application of Court's review & revise authority under Indiana Appellate Rule 7(B). Biddinger v. State, 868 N.E.2d 407 (Ind. 2007). As a practical matter, Tr. Ct.'s, know the feasibility of alternative placements in particular counties or communities. Additionally, question under Rule 7(B) is not whether another sentence is more appropriate; rather, question is whether sentence imposed is inappropriate. A D challenging placement of a sentence must convince appellate court that the given placement itself is inappropriate.

Here, D who was convicted of operating while suspended for life asked Tr. Ct. to place him on supervised day reporting. Tr. Ct. denied the request, citing D's continuous record of vehicle-related misdemeanor & felony convictions over a fourteen-year period & failure of previous community corrections placement. D failed to carry his burden of persuading Court that location of his sentence is inappropriate based upon his character & nature of offense he committed. Held, judgment affirmed.

RELATED CASES: Schumann, 900 N.E.2d 495 (Ind. Ct. App. 2009) (D's sentence to DOC is not inappropriate simply because the parties agreed and intended him to serve a portion of his sentence with the DMH, which he is not doing so; validity of D's plea may be problematic, but that is a PCR issue); King, App., 894 N.E.2d 265 (D failed to persuade Ct. that placement in DOC was inappropriate, because he presented no evidence at sentencing specifying what type of mental health treatment he allegedly needs).

TITLE: Fox v. State
INDEX NO.: G.1.c.
CITE: (1st Dist., 11-16-09), 916 N.E.2d 708 (Ind. App. 2009)
SUBJECT: Appellate sentencing review of refusal to order alternative misdemeanor sentencing
HOLDING: Tr. Ct. did not abuse its discretion by overlooking two mitigators when refusing to order alternative misdemeanor sentence. Nor did Tr. Ct.'s refusal result in an inappropriate sentence. Statute regarding alternative misdemeanor sentencing, Ind. Code § 35-50-2-7(b), requires a court to explain why it grants misdemeanor sentencing, but does not require it to explain why misdemeanor sentencing is not granted. Neither is Tr. Ct. required to find or balance aggravating or mitigating factors when deciding whether to grant a D's request for leniency. Moreover, this Court is not convinced that an appropriateness analysis applies to Tr. Ct.'s rejection of a request of alternative misdemeanor sentencing, as the focus of an appropriateness analysis is whether the sentence is of an inappropriate length.

Here, D, a nurse, pled guilty to Class D felony possession of a controlled substance and Class A misdemeanor possession of marijuana. D requested alternative misdemeanor sentencing due to his remorse and the harmful impact of a felony conviction on D's family and employers. D would have his nursing license suspended. Tr. Ct. was within its discretion to reject D's request because D knew of these consequences when he decided to commit the crimes. Regardless, D failed to provide a transcript of the guilty plea hearing or the pre-sentence report on appeal, and thus failed to provide an adequate record for review of an appropriateness claim. Held, judgment affirmed.

TITLE: Francis v. State
INDEX NO.: G.1.c.
CITE: (11-9-04), Ind., 817 N.E.2d 235
SUBJECT: Failure to consider D's guilty plea as mitigating factor - inappropriate sentence
HOLDING: In child molesting prosecution, D's maximum 50-year sentence was inappropriate where Tr. Ct. erroneously failed to find his guilty plea to be a mitigating circumstance. A D who pleads guilty deserves to have mitigating weight extended to guilty plea in return, as it demonstrates acceptance of responsibility for the crime & extends a benefit to the State & to victim or victim's family by avoiding a full-blown trial. Scheckel v. State, 655 N.E.2d 506 (Ind. 1995). Although young age of victim & D's minimal criminal history were aggravating circumstances entitled to weight "in the low to medium range," fact that D pled guilty at an early stage of proceedings, demonstrated remorse, & apologized for his actions was a mitigating circumstance entitled to weight "in the high range." Held, transfer granted, memorandum decision of Ct. App.' vacated; 50-year sentence reversed & remanded with instructions to impose a sentence of 30 years.

RELATED CASES: Hope, App., 834 N.E.2d 713 (Tr. Ct. did not give proper weight to D's accepting responsibility through guilty plea, which was entitled to substantial weight & was bolstered by acknowledgment that thefts were related to his drug addiction; Ct. rejected State's argument that D waited several months prior to pleading & would have been easily convicted had case gone to trial).

TITLE: Frye v. State
INDEX NO.: G.1.c.
CITE: (12-01-05), Ind., 837 N.E.2d 1012
SUBJECT: 40-year sentence for burglary, habitual offender inappropriate
HOLDING: On appeal of D's 40-year sentence for Class B felony burglary & theft, Ct. exercised its authority under Indiana Constitution article VII section 4, to review & revise his sentence. Ct. may do so if after due consideration to Tr. Ct.'s decision, it finds that sentence is inappropriate in light of nature of offense & character of offender. Ind. Appellate Rule 7(B). Here, Tr. Ct. enhanced presumptive sentence for burglary of 10 years by five years to a total of 15 years & then imposed a habitual offender enhancement of 25 years, for a total executed sentence of 40 years. Ct. agreed with D that 40 years is inappropriate in light of nature of offense & character of offender. As to nature of offense, there was no violence & there was marginal pecuniary loss, totaling approximately $395. D committed burglary & theft without being armed & while victim was away from her home. These facts together decreased likelihood of violence. As to character of offender, despite D's extensive criminal history, Ct. did not believe his record demonstrates that a sentence of 40 years is warranted in this case. Burglary conviction that in part supports enhancement occurred more than 20 years ago. D's record indicates that his last conviction for a violent offense occurred in 1999 for battery, he has struggled with alcoholism, & many of his convictions have been alcohol related. Ct. could not conclude that D's transgressions even when aggregated demonstrate a character of such recalcitrance or depravity to justify a sentence of 40 years. Held, transfer granted, sentence reversed & remanded with instructions to sentence D to 10 years for burglary, enhanced by 15 years for being a habitual offender; Dickson, J., dissenting.

RELATED CASES: Gleason, 966 N.E.2d 702 (Ind. Ct. App. 2012) (aggregate 11-year sentence for battery, criminal recklessness and failure to stop after accident that resulted in injury was inappropriate and should be revised to 6 years; while aggravating weight of D's criminal history justifies imposition of consecutive sentences, Ct. did not find it sufficiently aggravating to justify 11-year executed term); Carpenter, 950 N.E.2d 719 (Ind. 2011) (40-year sentence for possession of firearm by an SVF and being and habitual offender was inappropriate in light of adverse character of D and un-aggravated nature of offense as a whole; Ct. reduced sentence to 20 years); Knight, 930 N.E.2d 20 (Ind. 2010) (considering 17-year-old D’s young age and Co-D’s 36-year sentence, Ct. revised 70-year aggregate sentence for burglary, robbery and confinement convictions to 40 years); Hollin, 877 N.E.2d 462 (despite 18-year-old's "numerous transgressions" 40-year sentence for conspiracy to commit burglary/habitual inappropriate; Ct. reduced to aggregate 20-year sentence); Feeney, App., 874 N.E.2d 382 (40 year sentence for multiple burglary convictions inappropriate given D's young age & lack of criminal history).

TITLE: Gall v. United States

INDEX NO.: G.1.c.

CITE: 552 U.S., 128 S. Ct. 586, 169 L.Ed.2d 445 (2007)

SUBJECT: Probation not "unreasonable" under Booker for D who withdrew from conspiracy

HOLDING: Majority reversed Eighth Circuit Court of Appeals' decision that found the district court erred in sentencing D to 36 months' probation after he pleaded guilty to his involvement in an enterprise to distribute ecstasy and other drugs while in college. The enterprise was ongoing when D was asked to join, but D withdrew from the conspiracy after seven months. He completed college; no longer sold or used drugs; and worked steadily after graduation. Law enforcement approached him about the conspiracy more than a year after his withdrawal and he pleaded guilty three and a half years after his involvement. A presentence report recommended a sentence of 30 to 37 months in prison, but the district court found probation reflected the seriousness of the crime and imprisonment was unnecessary because D's voluntary withdrawal from the conspiracy and post-offense conduct showed that he would not return to criminal behavior and was not a danger to society. Majority found that Eighth Circuit used an improper standard of review rather than a deferential abuse of discretion standard. Because the sentencing guidelines are now advisory since United States v. Booker, 543 U.S. 220 (2005), appellate review of sentencing decisions is limited to determining whether they are "reasonable." An appellate court may take the degree of variance from the Guidelines into account and consider the extent of a deviation from the Guidelines, but it may not require "extraordinary" circumstances or employ a rigid mathematical formula using a departure's percentage as the standard for determining the strength of the justification required for a specific sentence. The Guidelines are the starting point but are not the only consideration in federal sentencing, as a judge should consider all of 18 U.S.C. § 3353(a)'s factors to determine whether they support either party's sentencing proposal. On abuse of discretion review, the Eighth Circuit failed to give due deference to the district court's reasoned and reasonable sentencing decision. Scalia, J., and Souter, J., joined the majority opinion but also filed concurrences; Thomas, J., and Alito, J., filed dissenting opinions.

TITLE: Gervasio v. State
INDEX NO.: G.1.c.
CITE: (3rd Dist., 10-09-07), Ind. App. 874 N.E.2d 1003
SUBJECT: 28-year sentence for drug offenses upheld
HOLDING: D's aggregate sentence of twenty-eight years for his conviction of three Class A felonies & two Class B felonies for drug offenses was not inappropriate. Each of sentences D received was less than advisory sentence, & offenses involved sale of very large quantities of drugs. D had no criminal history & is a hard worker with a steady work history. At sentencing, Tr. Ct. also noted that D had accepted responsibility for his actions by pleading guilty & that he had expressed remorse for his conduct. However, Ct. could not ignore that D "is an illegal alien providing translating services for a drug dealer who does not speak English." Held, judgment affirmed.

RELATED CASES: Hale, App., 875 N.E.2d 438 (50 year sentence for dealing in cocaine as Class A felony was not inappropriate, given D's extensive criminal history & fact that he "promptly returned to a life of drug dealing" just sixty-one days after being placed on parole for dealing in cocaine); Vazquez, App., 839 N.E.2d 1229 (maximum sentence for conspiracy to commit dealing in cocaine was not inappropriate where D was involved in a large-scale drug operation & D's character is that of a serial criminal whose frequent contacts with the criminal justice system have not caused him to reform but rather escalate the nature of his offenses).

TITLE: Greenlaw v. United States
INDEX NO.: G.1.c.
CITE: 554 U.S. 128 S. Ct. 2559, 171 L.Ed.2d 399, LEXIS 5259 (2008)
SUBJECT: *Sue sponte* increase of sentence inappropriate pursuant to cross-appeal rule
HOLDING: Majority held absent a government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Petitioner's sentence. The district court made an error in calculating Petitioner's sentence imposing a 10-year sentence on a count that carried a 25-year mandatory minimum term, which the government objected to at the time. Petitioner appealed his total sentence, but the government did not address the error by the district court in its appeal. The Eighth Circuit, on its own, increased Petitioner's sentence by 15 years. Majority noted, in both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, *i.e.*, the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. The Court has called the rule "inveterate and certain" and has in no case ordered an exception to it, with no exception being warranted here. The Eighth Circuit held that the plain-error rule, Fed. Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*, but nothing in the text or the history of the rule or in the Court's decisions suggests that the plain-error rule was meant to override the cross-appeal requirement. Breyer, J., filed a concurring opinion. Alito, J., filed a dissenting opinion, in which Stevens, J., joined, and in which Breyer, J., joined as specific parts.

TITLE: Gregory v. State
INDEX NO.: G.1.c.
CITE: (12-14-94), Ind., 644 N.E.2d 543
SUBJECT: Consecutive sentences manifestly unreasonable - multiple buys in single sting
HOLDING: 120-year sentence for four drug crimes arising out of single sting operation was manifestly unreasonable. After remand, Tr. Ct. again imposed four 30-year sentences for delivery of cocaine, all to be served consecutively. Tr. Ct. based enhancement on D's previous violation of probation & prior criminal history, noting that D needed to be incarcerated & that reduced or concurrent sentences would depreciate seriousness of crimes. Ct. App. again remanded, finding Tr. Ct. did not adequately present specific & individualized sentencing statement. S. Ct. disagreed & found that sentencing statement was adequate to justify enhancement. Nevertheless, Ct. found that consecutive sentences in this case were manifestly unreasonable & imposed its own concurrent sentence pursuant to Ind. Const. Art VII § 4. As in Beno v. State, Ind., 581 N.E.2d 922, D sold same drug to same informant on several occasions over short period of time. Although police may find it necessary to conduct series of drug buys, Tr. Ct. should be leery of sentencing D to consecutive terms for each count. Held, transfer granted & opinion of Ct. App. vacated; cause remanded with instructions to resentence D to one enhanced term of 50 years & three presumptive 30-year terms for other counts to run concurrently.

RELATED CASES: Eckelbarger, 51 N.E.3d 169 (Ind. 2016) (where State initiated identical controlled buys that led to discovery of drugs at D's house, trial court should have ordered D to serve set of sentences related to drugs found at his home concurrently to sentences arising from the controlled buys because the second set of sentences was a direct result of facts related to first set of sentences); Rios, 930 N.E.2d 664 (Ind. Ct. App. 2010) (consecutive sentences for two counts of dealing in a look-alike substance was inappropriate where both convictions were based upon virtually identical drug deals arranged and coordinated by police; the buys occurred at the same meeting place within a seven-day period, using the same informant)l Williams, App., 891 N.E.2d 621 (Gregory applies equally to convictions arising from evidence gathered as a direct result of State-sponsored criminal activity; thus Tr. Ct. erred in ordering consecutive sentences where State sponsored two controlled drug buys from same informant, then seized additional cocaine and marijuana from D's home pursuant to search warrant within 24 hours of second transaction); Hendrickson, App., 690 N.E.2d 765 (it is manifestly unreasonable to impose maximum & consecutive sentences for simultaneous drug convictions stemming from series of controlled buys during sting operation, even where convictions involved different types of drugs; (but see Howard at E.11.c; Hopkins, App., 668 N.E.2d 686 (following Gregory); Robertson, App., 650 N.E.2d 1177 (consecutive sentences unreasonable where charges were based on 3 separate police controlled buys of cocaine over 4-month period in 3 different locations, initiated by same confidential informant & police officer).

TITLE: Griffin v. State
INDEX NO.: G.1.c.
CITE: (03-21-12), 963 N.E.2d 685 (Ind. Ct. App. 2012)
SUBJECT: Advisory sentence for murder inappropriate
HOLDING: 55-year advisory sentence for murder was inappropriate under Indiana Appellate Rule 7(B). Nature of crime was particularly brutal in that victim was stabbed twenty-one times with a double-bladed knife and his throat was slashed. However, Court could not ignore the pervasive evidence that the homicide was in response to a premeditated sexual assault. Although jury's rejection of sudden heat was sustainable on appeal, Court would be "less than diligent in our assessment of the nature of the offense if we ignored" evidence that the murder victim had sexually assaulted D days earlier. As to character of offender, D served in Marine Corps and was honorably discharged after receiving a Purple Heart and had no prior criminal history. In light of tragic circumstances surrounding the offense and character of offender as he conducted himself prior to the instant aberration, Court concluded that a 45-year sentence was appropriate. Held, judgment affirmed in part, reversed in part and remanded.

TITLE: Harris v. State
INDEX NO.: G.1.c.
CITE: Ind., 897 N.E.2d 927 (Ind. 2008)
SUBJECT: Maximum, consecutive sentence for two counts of child molesting inappropriate
HOLDING: In sentencing D to consecutive 50-year terms for two counts of Class A felony child molesting, Tr. Ct. did not explain why the aggravating circumstances warranted consecutive sentences as opposed to enhanced concurrent sentences. Thus, Tr. Ct. fell short of the requirement that it explain its reasons for selecting the sentence it imposed. See Lander v. State, 762 N.E.2d 1208 (Ind. 2002).

Rather than remanding for new sentencing order, Court exercised its authority to review and revise D's sentence under App. R. 7(B). Court found ongoing nature of D's crimes coupled with his position of trust with victim was sufficiently aggravating to justify enhanced sentences. Regarding character of offender, Court noted that the two counts of molestation were identical and involved same child. Though D's criminal history involving theft and driving offenses "is not inconsequential," Court concluded that his convictions are not significant aggravators in relation to a Class A felony. Ruiz v. State, 818 N.E.2d 927 (Ind. 2004). Court found aggravating circumstances sufficient to warrant imposing enhanced sentences for child molesting. However, Court did not find the aggravating circumstances sufficient to justify imposing consecutive sentences totaling 100 years. Held, transfer granted, memorandum Court of Appeals' opinion summarily affirmed as to other issues, remanded with instructions to revise sentence to 50 years for each count of child molesting to be served concurrently; Boehm, J. concurring in result.

RELATED CASES: Carter, 31 N.E.3d 17 (Ind. Ct. App. 2015) (98-year executed sentence for three Class A and two Class C felony child molesting convictions was “out of range of appropriate results,” even where D occupied a position of trust with C.W. and his offenses were "undeniably serious"; held, reversed and remanded for an aggregate sentence of 68 years).

TITLE: Hildebrandt v. State

INDEX NO.: G.1.c.

CITE: (1st Dist., 6-7-02), Ind. App., 770 N.E.2d 355

SUBJECT: Twenty-four-year sentence for two counts of sexual misconduct with minor not manifestly unreasonable

HOLDING: D's twenty-four-year executed sentence for two counts of sexual misconduct with minor was not manifestly unreasonable in light of nature of offense & character of offender. D's crimes involved two different 14-year-old victims on two separate occasions more than one week apart. Tr. Ct. found no mitigating circumstances & following uncontested aggravators: 1) D's prior criminal history, consisting of four misdemeanor convictions; 2) D is expected to commit other crimes in future; 3) D was contemptuous of Ct. with regard to pretrial community work program; 4) D's history of substance abuse; 5) troubling nature & circumstances of crime other than seriousness of crimes themselves; 6) D committed two separate crimes on two separate occasions; & 7) D's profound lack of character because of his disregard for his own family & interests of victims in this case. Distinguishing Walker v. State, 747 N.E.2d 536 (Ind. 2001), Ct. concluded that neither of D's consecutive 12-year sentences were manifestly unreasonable under Appellate Rule 7(B). Appellate review for determining whether to sentence concurrently or consecutively or to suspend on probation must focus on character of offender under Appellate Rule 7(B), as more broadly defined by aggregate conduct of multiple convictions at issue. Given maximum possible aggregate sentence of forty years for his convictions, nature of these offenses & character of offender, D's two consecutive twelve-year terms, with likely twelve years served, was not manifestly unreasonable. Held, judgment affirmed.

RELATED CASES: Shaw, App., 771 N.E.2d 85 (D's fifty-year sentence for attempted murder was not manifestly unreasonable, even though she had no previous criminal record other than traffic related matters & despite fact she pled guilty); King, App., 769 N.E.2d 239 (D's three-year executed sentence for theft conviction was not manifestly unreasonable in light of nature of offense & character of offender).

TITLE: Horton v. State
INDEX NO.: G.1.c.
CITE: (06-28-11), 949 N.E.2d 346 (Ind. 2011)
SUBJECT: 324-year sentence for child molesting reduced to 110 years
HOLDING: Maximum, consecutive 324-year sentence for nine counts of child molesting was inappropriate under Ind. App. R 7(B) in light of nature of offense and character of offender. D's convictions stemmed from his repeated, daily abuse of his girlfriend's seven-year old daughter in her bedroom while her mother slept. Court agreed that enhanced sentence for one Class A felony was warranted because of the abuse of trust caused by the molestations, as well as the nature and frequency of the acts. The absence of any other adult criminal history coupled with the fact that D's only juvenile adjudication was for truancy warrants credit as a mitigating circumstance. *Citing* Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008), Court fully enhanced one Class A felony to 50 years. Particular acts that the victim was subjected to and required to perform warrants an additional term of 30 years. Finally, D's causing victim to contract herpes warrants a second additional term of 30 years. The remaining three Class A felony counts and three Class C felony counts should be served concurrent with each other, resulting in an aggregate term of 110 years. Held, transfer granted, Court of Appeals' opinion at 936 N.E.2d 1277 on this issue vacated but summarily affirmed with respect to admissibility of evidence issue.

RELATED CASES: Corbally, 5 N.E.3d 463 (Ind. Ct. App. 2014) (D's 270-year sentence for single episode of sexual violence inappropriate; Ct. reduced to 165 years); Pierce, 949 N.E.2d 349 (Ind. 2011) (in 3-2 opinion, Court reduced D's 124-year sentence for four counts of child molesting involving one victim, enhanced by 10 years for repeat sexual offender adjudication, to 80 years; David, J., joined by Dickson, J, dissenting, believes that "this opinion blurs the guidance in Cardwell and is more akin to second guessing by this court").

TITLE: Hubbert v. State
INDEX NO.: G.1.c.
CITE: (3/5/21), Ind. Ct. App., 163 N.E.3d 958
SUBJECT: 18-year executed sentence for dealing methamphetamine inappropriate
HOLDING: 18-year executed sentence for dealing in methamphetamine was inappropriate in light of nature of offense and character of the offender. After being charged in connection with three controlled buys, Defendant agreed to plead guilty to Level 2 felony dealing in meth in exchange for dismissal of two other charges against him in the instant case as well as charges filed in a separate cause. At his sentencing hearing, Defendant testified that he got into dealing to support his habit and that he was visually impaired. He requested that a portion of sentence by assigned to community corrections or another addiction treatment program. In a presentence investigation report, the local probation department likewise recommended community corrections and substance abuse treatment. The prosecutor, however, said Defendant's visual impairment should not be a "get out of jail free card" and urged the trial court to impose a fully executed sentence. Agreeing with the prosecutor, the trial court sentenced Defendant to 18 years executed in the Indiana Department of Correction. The court recognized Defendant's visual impairment as a "significant" mitigator but identified multiple aggravators, including his prior criminal history and his previous unsuccessful stints on probation and in treatment.

The Court of Appeals agreed with Defendant and ordered all but four years of the sentence be served on probation with substance-abuse counseling and placement in community corrections. Regarding the nature of the offense, Court was "obviously troubled" that Defendant conducted a drug deal in a public library, although the amount of methamphetamine sold was only a small amount over what was needed to constitute a Level 2 felony. But as to Defendant's character, the record supports his contention that his addiction is the underlying source of his criminal behavior. Defendant is considered at a low risk to reoffend according to the Indiana Risk Assessment System. And although he previously had one opportunity to receive substance-abuse treatment while on probation and failed, Court did not believe one such failure should preclude future opportunities to reform," Vaidik continued. Finally, Court found Defendant's visual impairment to be a "significant" mitigator that substantially affects his opportunities while incarcerated.

TITLE: Huff v. State
INDEX NO.: G.1.c.
CITE: (1st Dist. 1/11/83), Ind. App., 443 N.E.2d 1234
SUBJECT: Appellate review of sentence - fundamental error
HOLDING: Error in sentencing is fundamental & can be raised for first time on appeal. Palmer, 386 N.E.2d 946; Beasley, 370 N.E.2d 360; Kleinrichert, 297 N.E.2d 822. Rule applies to petition on appeal by state. Rogers, 383 N.E.2d 1035. Here, D, convicted of conspiracy to deal in cocaine, contends sentence is suspendible. State responds by arguing for the first time on appeal that Ind. Code 35-50-2-2(4) precludes suspension. Court entertains argument but rejects state's position, finding conspiracy is not specifically excluded from suspendible sentences. Held, no error.

TITLE: Hunter v. State

INDEX NO.: G.1.c.

CITE: (9-26-06), Ind., 854 N.E.2d 342

SUBJECT: Sentence reduced to presumptive- where circumstance approaches element of offense, it is of minimal weight

HOLDING: Maximum sentence for escape conviction was inappropriate. Although appellate courts are reluctant to substitute their judgment for that of the Tr. Ct. in sentencing, appellate court is to review sentences to ensure they are not "inappropriate in light of the nature of the offense & the character of the offender." App. R. 7(B). Here, D did not premeditate his escape. Rather, he inadvertently found himself locked out of the jail & took the opportunity to leave. His escape did not endanger any life or property, & he voluntarily turned himself in two months later. Although D had four prior misdemeanor convictions & one prior felony, being the burglary on which he was serving time when he escaped, this is insufficient to support enhanced sentence. Although some escapes occur before a conviction, a prior conviction approaches an element of the offense of escape & therefore is of minimal weight. Thus, neither the nature of the offense nor the character of the offender support an enhanced sentence. Held, transfer granted, sentence reversed to a term of four years & other issues in Ct. App.' memorandum opinion summarily affirmed.

TITLE: Jackson v. State

INDEX NO.: G.1.c.

CITE: (05291-20), Ind. Ct. App., 145 N.E.3d 783

SUBJECT: Sentence revised downward to 27 years with 7 suspended to probation under Appellate Rule 7(B)

HOLDING: Defendant was convicted and sentenced to 36 years for three counts of Rape as a Level 3 felony. The issues at trial were whether the complaining witness who was "moderately intellectually handicapped" could and did consent to sex. During the sentencing hearing, the prosecutor acknowledged that Defendant, then 52 years old, had led a law-abiding life and recommended that the court impose the advisory sentence of nine years for each of the three counts. The prosecutor also did not object to a split sentence with part of that time served on probation. Pursuant to the authority under Appellate Rule 7(B), the Indiana Supreme Court found that exceeding the 27-year sentence the prosecutor recommended, absent more significant aggravating factors, is inappropriate under the circumstances of this case. Court revised Defendant's sentence from 36 years to 27 years with 7 years suspended to probation. Justice Slaughter dissented, believing transfer should be denied.

TITLE: James v. State
INDEX NO.: G.1.c.
CITE: (1st Dist.; 06-21-07), Ind. App., 868 N.E.2d 543
SUBJECT: Sentencing - maximum, consecutive sentences inappropriate for non-violent 16 yr old
HOLDING: A maximum, consecutive sentence of twenty-eight years for a sixteen- year-old who pled guilty to two Class C felony burglaries & four Class D felonies, including escape, theft & two counts of fraud was inappropriate. The Indiana Constitution provides appellate Ct's, in all criminal cases, the power to review & revise the sentence imposed. Ct. was unable to locate any case where a maximum sentence for a non-violent juvenile offender being charged as an adult was upheld.

Here, D's character is troubling in that his criminal history began two weeks after his ninth birthday, several of the offenses injured the property of individuals & businesses, & thus far, attempts at rehabilitation have been unsuccessful. However, D pled guilty, expressed remorse for his behavior, & suffered from a tough childhood exposing him to harsh circumstances & leaving him with diagnosed psychological issues & a substance abuse addiction. Most significantly, D's offenses were non-violent & committed when he was sixteen-years-old. Thus, the maximum, consecutive sentences were inappropriate. Further, D was improperly ordered to pay restitution for a burglary of which he was never accused. Held, judgment reversed & remanded with instructions to enter the presumptive sentence on all counts & run the sentences concurrently; Robb, J., concurring in part & dissenting in part, on the basis that maximum, consecutive sentences is inappropriate, but, due to D's character as reflected by his criminal history, some enhancement was warranted & at the very least, would affirm the maximum sentences for each Class C felony burglary while agreeing that the sentences should be served concurrently.

RELATED CASES: Coy, 999 N.E.2d 937 (Ind. Ct. App. 2013) (maximum concurrent sentences, totaling eight years, was appropriate for nineteen-year-old with no criminal history whose reckless driving killed his teenage friend); Brooks, 934 N.E.2d 1243 (Ind. Ct. App. 2010) (although D was only 14-years-old at the time of the murder, his advisory 55-year sentence was appropriate; D is not a little boy who can be trusted to mend his erring ways; he is a hardened individual who, in the midst of committing a series of crimes, robbed and murdered a random victim).

TITLE: James v. State
INDEX NO.: G.1.c.
CITE: (11-04-21), Ind. Ct. App 2021, 178 N.E.3d 1236
SUBJECT: Juvenile's nearly maximum adult murder sentence inappropriate
HOLDING: Defendant was convicted of a murder committed when he was 13 years old after a two-day bench trial where he admitted to shooting the victim but invoked self-defense. On appeal, Defendant challenged only his sentence to 63 years of imprisonment. Defendant first challenged the denial of his request for alternative sentencing under I.C. 31-30-4. The Court held that the denial was not an abuse of discretion. The trial court's decision to reject alternative sentencing will be evaluated using the factors to determine whether a child should be waived to adult court in the first place. The ultimate standard imposed is whether the trial court abused its discretion. The trial court found that Defendant's offense was heinous and aggravated, he was beyond the rehabilitation of the juvenile justice system, and that the community's safety and welfare were served by sentencing him as an adult. Refusal to impose alternative sentencing was not an abuse of discretion.

Defendant also challenged the consideration of certain delinquent conduct as aggravating. The trial court discussed an unadjudicated referral, but stated the allegation was not considered as an aggravator in and of itself. The Court held that Defendant offered no reason why the trial court should not be taken at its word, and even if there was error, it was harmless because there were several other aggravating factors that were unchallenged. The Court was confident that the trial court would have imposed the same sentence even had the challenged aggravator been excluded.

Nevertheless, the Court held that Defendant's 63-year-sentence warranted revision using the Court's authority under Appellate Rule 7(B). The main thrust was that a near maximum sentence for an offense committed by a 13-year-old child is inappropriate. The offense was tragic but lacked the type of malice present in other cases which have been deemed the worst offenses and offenders. As for James' character, he "was barely a teenager when he committed the offense," had lost his father to gun violence at a young age and had received an unstable upbringing that had caused him PTSD. Ultimately, the Court found the sentencing analysis and circumstances comparable to Legg v. State, 22 N.E.3d 763 (Ind. Ct. App. 2014), and reduced Defendant's sentence to the same 55 years that Legg had received—the advisory sentence for murder.

TITLE: Johnson v. State
INDEX NO.: G.1.c.
CITE: (2nd Dist., 11-17-05), Ind. App, 837 N.E.2d 209
SUBJECT: 151-year sentence affirmed - jury finding
HOLDING: Total executed sentence of 151 years for criminal deviate conduct and several other convictions related to rape of a woman was not inappropriate in light of nature of D's offenses and his character. Tr. Ct.'s sentencing statement supported imposition of enhanced and consecutive sentences. At sentencing, jury found nature and circumstances of D's crime to be an aggravating factor. In particular, jury found that D had threatened to kill complaining witness (CW), that D raped CW in disregard of risk of transmission of disease, and that D had acted in concert with two other men. In addition, jury found that the negative impact that D's crime would have on CW was an aggravating factor. D's extensive criminal history as an adult and as a juvenile is indicative of his character. Held, judgment affirmed; Sullivan, J., concurring in result to note that Tr. Ct. erroneously considered prior arrests and pending investigations as part of D's criminal record.

RELATED CASES: Whiteside, 76 N.E.3d 844 (Ind. Ct. App. 2017) (after waiving D to adult court, 60-year sentence imposed by Tr. Ct. for attempted rape and two counts of crimial deviate conduct was not not inappropriate under Appellate Rule 7(B), Robinson, 61 N.E.3d 1226 (Ind. Ct. App. 2016) (eight-year sentence, 5 years executed, was not inappropriate where D, a school teacher and coach, was convicted of 5 counts of child seduction, which could have resulted in a 30-year sentence).

TITLE: Johnson v. State

INDEX NO.: G.1.c.

CITE: (05-22-20), Ind. Ct. App, 145 N.E.3d 785

SUBJECT: D did not knowingly waive right to appeal sentence by signing general waiver of right to appeal

HOLDING: Per Curiam. In Creech v. State, 887 N.E.2d 73 (Ind. 2008), and Collins v. State, 817 N.E.2d 230 (Ind. 2004), Indiana Supreme Court held that a defendant who pleads guilty may waive the right to appellate review of his or her sentence only if this waiver is knowing and voluntary. Here, Court reaffirmed the critical role of the trial court in safeguarding the validity of such waivers, holding that trial court erred in denying Defendant's motion to file a belated notice of appeal. Defendant entered into a plea agreement which included a term stating he waived his right to appeal and post-conviction relief. The trial court advised Defendant of the rights he would be giving up by pleading guilty, including his right to appeal his conviction and/or sentence for Level 4 felony dealing in methamphetamine. Defendant filed for permission to file a belated appeal, stating he was only recently made aware of his right to appeal his sentence. Under the circumstances, Court found the general waiver of Defendant's right to appeal in plea agreement, "particularly when contained in the same sentence as an unenforceable waiver of post-conviction relief, insufficiently explicit to establish a knowing and voluntary waiver of Johnson's right to appeal his sentence." Held, transfer granted, remanded with instructions to grant Defendant's motion for permission to file a belated notice of appeal; Slaughter, J., dissenting without a separate opinion, would have expressly adopted the Court of Appeals ruling.

RELATED CASES: Williams, 164 N.E.3d 724, (Ind. 2021) (to constitute a valid waiver of the right to appeal a sentence, the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence).

TITLE: Jordan v. State
INDEX NO.: G.1.c.
CITE: (2nd Dist., 5-9-03), Ind. App., 787 N.E.2d 993
SUBJECT: Character of D - manifestly unreasonable sentence
HOLDING: D's maximum twenty-year sentence for Class B felony dealing in controlled substance was manifestly unreasonable where nature of offense supported enhanced sentence, but character of offender did not. Tr. Ct. violated D's constitutional rights by failing to consider treatment as alternative to incarceration. D expressly invited Ct. to consider fact that he had extensive drug habit at time crime was committed & asked that he receive treatment rather than incarceration. On those facts, it was error for Tr. Ct. to consider D's drug habit as aggravating circumstance without considering alternative drug abuse treatment programs. Tr. Ct. also erred in finding that D was in need of correctional & rehabilitative treatment that could best be provided in penal facility because it failed to provide specific or individualized statement of reason why this was so. Nevertheless, Tr. Ct. did find other valid aggravators that would justify enhanced sentence. However, maximum sentence was extreme given character of D. D was young, had extensive drug habit, prior & present offenses were non-violent, & D had requested drug treatment in lieu of retribution. Maximum sentence should be reserved for very worst offenses & offenders. Brown, App., 760 N.E.2d 243. Therefore, maximum sentence in this case was inappropriate. Held, reversed & remanded to reduce sentence to fifteen years.

RELATED CASES: Calvert, 930 N.E.2d 633 (Ind. Ct. App. 2010) (D's admission that he had a substance abuse problem and therefore used illegally drugs was considered a negative reflection on his character); Field, App., 843 N.E.2d 1008 (despite improper consideration of aggravators, 16-year sentence for one count of conspiracy to commit dealing in a schedule II controlled substance as a Class B felony was not inappropriate); Cott, 829 N.E.2d 520 (maximum sentence for class A felony possession of methamphetamine inappropriate despite D's criminal history); Merlington, 814 N.E.2d 269 (D's 45-year sentence for possession of methamphetamine with intent to deliver was inappropriate in light of nature of this offense & character of this offender); Jones, App., 790 N.E.2d 536 (D's maximum eight-year sentence for possession of methamphetamine conviction was appropriate where Tr. Ct. properly identified & weighed mitigating & aggravating circumstances).

TITLE: Kedrowitz v. State
INDEX NO.: G.1.c.
CITE: (11/28/2022), Ind. Ct. App., 199 N.E.3d 386
SUBJECT: Conviction and 100-year sentence affirmed for 13 year-old waived to adult court and convicted of killing his two younger siblings
HOLDING: Defendant was convicted of murdering his two younger siblings when he was 13 years old, and sentenced to 100 years executed in the DOC. On appeal, he challenged the juvenile court's finding that he was competent, his waiver from juvenile court to adult court, the subject matter jurisdiction of the adult court, the application of the sentencing court's discretion, the appropriateness of his 100-year sentence, and the constitutionality of his sentence under Ind. Const. Art. 1, Sections 16 and 18. The Court of Appeals affirmed on all issues.

As for competency, the juvenile court received conflicting evidence. Drs. Connor and Winsch opined that Defendant was competent to stand trial. Drs. Parker and Cresci opined that he was not competent to stand trial. And, Dr. McIntire, who had evaluated Defendant in a prior CHINS proceeding, found him to be globally incompetent. Where a court receives conflicting evidence regarding competency to stand trial, the court on appeal will reverse only when the lower court's decision is clearly erroneous and unsupported by the facts and circumstances, along with the reasonable inferences. Brewer v. State, 646 N.E.2d 1382, 1385 (Ind. 1995). The Court of Appeals held that the juvenile court weighed the evidence and did not abuse its discretion by choosing to rely on the testimony of Drs. Connor and Winsch.

As for waiver from juvenile court to adult court, Ind. Code 31-30-3-4 controls, and creates a presumption in favor of waiver if the child is charged with murder, there is probable cause, and the child is at least 12 years old. Once the statutory presumption is triggered, the burden is on the juvenile to present evidence that waiver is not in the best interests of the child or of the safety and welfare of the community. The evidence was that Defendant was a "clever, deliberate, and persistent killer who preyed on young and defenseless children who were supposed to be in his care." The juvenile court did not abuse its discretion in finding that potential detention until the age of twenty-one was inadequate to treat a disturbed individual who had allegedly killed two children.

Regarding the subject matter jurisdiction of the juvenile court, the court noted that Neukam v. State, 189 N.E.3d 152 (Ind. 2022), addressed the jurisdictional question over persons who had aged out of juvenile court jurisdiction and did not reach the validity of the waiver statutes. The Court of Appeals relied upon the history of affirmations of cases involving the waiver of juveniles and the extensive provisions in the juvenile code for waiver to hold that the adult court had subject matter jurisdiction, and refused to apply the obiter dictum from the Neukam decision to "essentially nullify almost an entire chapter of the Indiana Code."

Regarding Defendant's argument that the trial court abused its discretion when sentencing him, the Court of Appeals disagreed, finding that all of the aggravators (violation of a position of trust, commission of the crime in the presence of children, lack of remorse, and the nature and circumstances of the crimes demonstrating callousness and premeditation) were valid as a matter of law and supported by the evidence. Further, the trial court did find mitigating Defendant's PTSD, although the Court of Appeals noted that the evidence was debatable, and properly rejected his claim of undue hardship caused by imprisonment because he was doing well in detention already, and at a minimum, would have to serve 45 years executed for his crimes—so the contention was merely that **his sentence**

in addition to that period would be a hardship, for which the Court of Appeals found there to be no evidence.

The Court of Appeals also held that Defendant's sentence was not inappropriate. First, it could have been 130 years instead of the 100 years he received. The nature of the offenses was horrific, and Defendant's character was demonstrated by his act of deliberately killing his two younger siblings, showing no remorse, and lying about it for months.

As for his claim under Indiana Constitution Article 1, Section 16, that provision only applies to the nature of the offense, so his claims that his sentence was disproportionate due to his personal characteristics is not a cognizable claim. And, Article 1, Section 18 does not provide an opportunity for challenging a particular defendant's sentence.

TITLE: Kling v. State
INDEX NO.: G.1.c.
CITE: (11-29-05), Ind., 837 N.E.2d 502
SUBJECT: Belated appeals of sentences following open pleas - responsibilities of State Public Defender & county appellate public defenders
HOLDING: In Collins v. State, 817 N.E.2d 230 (Ind. 2004), Ct. held that an individual who pleads guilty to an offense in an "open plea" & who challenges sentence imposed must do so on direct appeal & not by means of a petition for post-conviction relief. D, represented by State Public Defender, filed Motion for Writ in Aid of Appellate Jurisdiction pursuant to Ind. Appellate Rule 56 to address relative roles & responsibilities of County Appellate Public Defenders & State Public Defender (PD) in handling belated appeals of sentences imposed following open pleas.

Ct. held that when State PD represents a petitioner in a post-conviction proceeding, the State PD, following her review of the record, must consult with her client regarding both issues that may be raised in a post-conviction relief petition & those that may be pursued only through a belated direct appeal. This process should involve some assessment of relative chances for success in each proceeding, including some consideration whether client would likely be able to meet burden of proving lack of fault & diligence under P-C.R. 2(1). After such consultation & evaluation, the client will be in a position to make an informed decision whether to proceed with post-conviction or belated direct appeal.

If a person so advised by State PD decides to seek relief immediately under P-C.R. 2 & dismiss post-conviction proceeding, the State PD should represent the D in filing that P-C.R. 2 petition, at any hearing on that petition, &, if relief is denied, in appeal of that decision. (This responsibility does not obtain where State PD determines that a sentence being challenged has no penal consequences or where a petition is not meritorious.) If trial or appellate Ct. grants permission to file a belated notice of appeal or belated motion to correct error, it would then become duty of Tr. Ct. to appoint a County Appellate PD to perfect the direct appeal or litigate the belated motion to correct errors. Thus, representation from State PD to a County Appellate PD is transferred at point when relief is granted under P-C.R.2. As a general matter, electing to proceed first on a post-conviction relief claim does not preclude a finding of diligence in a later P-C.R. 2 claim. Nor does time spent by State PD investigating a claim count against D when Ct's. consider issue of diligence under P-C.R.2. Held, transfer granted, D's request for writ in aid of appellate jurisdiction denied.

TITLE: Lane v. State

INDEX NO.: G.1.c.

CITE: (5/25/2023), 211 N.E.3d 511 (Ind. Ct. App. 2023)

SUBJECT: Executed sentence of 3,000 days for ten misdemeanor counts revised to concurrent terms for an aggregate 300-day sentence; dissent would have deferred to the trial court and affirmed the sentence

HOLDING: Defendant pled guilty to ten counts of class A misdemeanor invasion of privacy and the trial court sentenced him to consecutive 300-day sentences on each count, to be served in the DOC, for an aggregate executed sentence of 3,000 days. Defendant appealed his sentence under Appellate Rule 7(B), arguing his sentence was "inappropriate in light of the nature of the offense and the character of the offender."

The majority first acknowledged that a review of Defendant's character did not weigh in favor of sentence revision, noting his substantial criminal history included seven prior felonies and that the current crimes were committed while he was incarcerated, which "demonstrates a disdain for authority that reflects poorly on him." But, the Court found that considering the nature of the offenses, the trial court "simply went too far in imposing ten consecutive close-to-maximum 300-day sentences for these class A misdemeanors." Noting that Defendant's offenses were writing letters to his ex-wife ten times in violation of a no-contact order, that the content was nonthreatening and primarily concerned the parties' children, and that his ex-wife replied to many of the letters and did not ask him to stop, the Court was persuaded the lengthy executed sentence was inappropriate.

Judge Kenworthy wrote a lengthy dissent detailing the "relentless criminal conduct" of the Defendant against his ex-wife and noting that he used the prison mail system to commit ten distinct criminal offenses against her while serving sentences for prior offenses against her. The dissent considered the nature of the instant offenses within the context of "the manipulation, intimidation, fear, physical, mental, and emotional abuse" and as a "reinitiating that cycle of domestic violence through his letters" and would instead defer to the trial court and affirm the sentence. Held, remanded.

TITLE: Livingston v. State

INDEX NO.: G.1.c.

CITE: (12/28/2018), 113 N.E.3d 611 (Ind. 2018)

SUBJECT: Sentence reduced and placement to community corrections ordered pursuant to Appellate Rule 7(B)

HOLDING: In a per curiam opinion, the Supreme Court granted transfer and reduced D's sentence of thirty years at the DOC to twenty-three years in community corrections. Tr. Ct. thoughtfully considered the mitigating and aggravating circumstances when imposing sentence, but because D cooperated with the police and pled guilty without a plea agreement and because of her efforts to rehabilitate herself during the pendency of the case, revision to the minimum possible sentence was appropriate in light of her character and nature of the offenses. Slaughter, J., dissenting, believes that transfer should be denied.

RELATED CASES: Shinkle, 129 N.E.3d 212 (Ind. Ct. App. 2019) (distinguishing Hoak, Court noted that D here was not an appropriate candidate for drug treatment program because he sold drugs to a person in the program); Hoak, 113 N.E.3d 1209 (Ind. 2019) (despite D's multiple drug-related contacts with the criminal justice system over many years, she has yet to receive court-ordered substance abuse treatment; thus, Ct. remanded with instructions to determine whether D is eligible for substance abuse treatment in Community Corrections placement and if she is eligible to order half of her sentence to be executed in Community Corrections).

TITLE: Long v. State
INDEX NO.: G.1.c.
CITE: (1st Dist., 05-07-07), Ind. App., 865 N.E.2d 1031
SUBJECT: Maximum sentence for voluntary manslaughter inappropriate
HOLDING: After D pled guilty to Class B felony voluntary manslaughter, Tr. Ct. imposed maximum twenty-year sentence. On appeal, Ct. found that Tr. Ct. abused its discretion in finding four aggravators, specifically that D had a history of violence & that he had knowledge of his problem with violence & did nothing about it. State conceded that aggravators that harm was significant & it was a crime of violence were invalid, as voluntary manslaughter always entails significant harm & violence. Thus, Tr. Ct. balanced three aggravators--D was in a position of care, custody, or control with his younger boyfriend, D did not tell boyfriend's family or police the truth & did not initially call police in a timely manner---against three mitigating circumstances--D's lack of criminal history, acceptance of responsibility for crime by pleading guilty as charged without plea agreement, & D stayed in jail while charge was pending.

Addressing appropriateness of D's sentence, Ct. noted that D's actions were not significantly more heinous than those involved in any voluntary manslaughter case. Although D was, to some extent, in a position of control over the much younger victim, the importance of this fact is questionable considering case involved two competent adults. As to D's character, Ct. could not ignore burst of violence that gave rise to this conviction. However, before this incident, D had never been arrested for, charged with, or convicted of any crime, & he accepted responsibility for his crime by pleading guilty without benefit of a plea agreement. Finally, twenty-three people, including D's ex-boyfriend, wrote letters detailing Ds' positive character attributes. Ct. was not persuaded that D was a person of bad character to extent that would justify maximum sentence. Held, judgment reversed & sentence revised to fifteen years.

TITLE: Marley v. State
INDEX NO: G.1.c.
CITE: (9/11/2014), 17 N.E.3d 335 (Ind. Ct. App. 2014)
SUBJECT: Appellate review of sentence under revised criminal code
HOLDING: D's 12-year sentence for felony dealing in oxycodone was not inappropriate in light of nature of offense and his character. D argued that his sentence is inappropriate in light of the recent changes to the Indiana criminal code that have, under certain circumstances, notably decreased the sentences for drug offenses. However, because of the clear, unambiguous language of the savings clause statutes, Court declined to consider the reduction in penalties for drug dealing offenses effective after July 1, 2014 when addressing the appropriateness of D's sentence. Held, judgment affirmed.

TITLE: Martin v. State
INDEX NO: G.1.c.
CITE: (5th Dist., 3-12-03), 984 N.E.2d 1281
SUBJECT: Maximum sentence for battery causing serious bodily injury - not inappropriate
HOLDING: D's maximum eight-year sentence for battery resulting in serious bodily injury was not inappropriate in light of nature of offense & character of offender. Here, victim instigated fight, & jury found that D used excessive force in defending his father. D beat victim with great force causing severe injuries & ultimately victim's death while D did not appear to have any injuries to himself. As for D's criminal history & character, D had juvenile adjudications for minor in possession of alcohol & theft & one adult conviction for illegal consumption. Moreover, D had two prior arrests, one for battery resulting in bodily injury, which Tr. Ct. found was similar to this case. Additionally, risk that D will commit another crime was high in that he was given several opportunities at rehabilitation before committing instant crime. Held, judgment affirmed; Bailey, J., dissenting on this issue, believed that D should not be placed in category of worst offenders & would reduce sentence to six years.

RELATED CASES: McConniel, 974 N.E.2d 543 (Ind. Ct. App. 2012) (50-year sentence for Class A felony neglect was not inappropriate despite lack of criminal history and D's history as abuse victim where the extreme abuse and neglect of victim was "beyond shocking"); Davis, 971 N.E.2d 719 (Ind. Ct. App. 2012) (affirming 245-year sentence for 4 counts of felony murder for deaths of two mothers and their infants, Ct. Found nature of offense to be “among the most heinous in Indiana’s history;” although D was entitled to mitigating weight because of his horrific childhood, mental illness and brain damage, Tr. Ct. was correct in finding D was someone from whom society should be protected and imposing the sentence it did); Carroll, 922 N.E.2d 755 (Ind. Ct. App. 2010) (although D had no criminal history and expressed regret for the dogs' attacks, seriousness of injuries and D's minimizing of responsibility justified consecutive, maximum terms for two convictions of Class A misdemeanor dog bite resulting in serious bodily injury); Pitts 904 N.E.2d 313 (Ind. Ct. App. 2009) (maximum sentence based on the brutal nature of a murder was appropriate); Kincaid, App., 839 N.E.2d 1201 (Ct. affirmed D's 20-year sentence for aggravated battery for injuring his two-month-old son); Spears, App., 811 N.E.2d 485 (D's maximum three-year sentence for pointing a firearm was not inappropriate); Goodall, App., 809 N.E.2d 484 (four-year habitual offender enhancement of a two-year sentence for resisting arrest was appropriate given the nature of the offense & the character of the offender); Bostick, App., 804 N.E.2d 218 (D's 210-year sentence for murder of her three children was appropriate in light of nature of offense & her character, where D locked her three young children in their bedroom & then deliberately set house on fire; review of sentence is not guided by whether D will live long enough to see her release date); Sipple, App., 788 N.E.2d 473 (maximum sentence for involuntary manslaughter was justified by facts & circumstances of case, which amounted to degree of recklessness beyond that normally associated with crime of involuntary manslaughter).

TITLE: McCain v. State

INDEX NO.: G.1.c.

CITE: (06/30/20), 148 N.E.3d 977 (Ind. 2020)

SUBJECT: Trial court did not impermissibly increase sentence based on disagreement with jury's verdict

HOLDING: Trial court's comments disagreeing with the jury's verdict were insufficient to taint the sentencing decision, and the sentence was not inappropriate given the nature of the crime and defendant's demonstrated character. Defendant was charged with murder, but jury convicted him of manslaughter. At sentencing, the trial court stated the verdict was a "gift" and the evidence was presented "the cleanest cut video I have ever seen of my impression of murder." Court unanimously found that although trial court's comments expressing disagreement with the jury's verdict came very close to unacceptable comment indicating judicial disagreement with the verdict, the record contained sufficient other factors that demonstrate the judge did not enhance the sentence based on that disagreement. Further, Defendant did not receive a maximum sentence, and his 45-year sentence is "substantially lower" than what it would have been for murder. Court denied Defendant relief under Appellate Rule 7(B) given Defendant's extensive criminal history, his Facebook post "showing a desire for a violent conflict" and his "point-blank shooting of a complete stranger in a crowded fast-food restaurant after getting into an argument because someone looked at him sideways.

TITLE: McCullough v. State
INDEX NO.: G.1.c.
CITE: (02-10-09), 900 N.E.2d 745 (Ind. 2009)
SUBJECT: Review of sentences - power to increase sentence
HOLDING: In the exercise of appellate authority to review and revise criminal sentences, Court may decrease or increase a sentence. The State may not initiate a challenge to a sentence imposed by a Tr. Ct., but if a D seeks appellate review and revision of a sentence, State may respond and urge the imposition of a greater sentence without necessity of proceeding by cross-appeal. Art. 7, Sec. 4 of the Ind. Constitution provides in part, "the Supreme Court shall have, in all appeals of criminal cases, the power… to review and revise the sentence imposed." Art. 7, Sec. 6 authorizes the Court of Appeals to "exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide . . . to the extent provided by rule, review and revision of sentences for Ds in all criminal cases." This authority is implemented by Indiana appellate Rule 7(B). The word "revise" is not synonymous with "decrease," but rather refers to any change or alteration. There is no specific prohibition against increasing a sentence on appeal appearing in the text of Section 4. Further, the history of the provision indicating that the framers chose to adopt the language of the 1962 ABA Model Judicial Article intended to emulate the British system, which at that time authorized the increase or decrease of criminal sentences on appeal. Thus, Court has the power to increase a sentence, but because there is no provision of law that authorizes the State to challenge a sentence by cross-appeal under Appellate Rule 7(A), State can only request an increase in sentence when D challenges the severity of his sentence. Held, judgment affirmed in part and vacated in part, as directed by Court of Appeals at 888 N.E.2d 1272, 1282; Boehm, J., concurring on basis that Court's power to revise a sentence is not dependent on whether the D challenges the sentence and that although Court has the power to increase a sentence, they have never exercised it and do not expect to exercise it in the future except in the most unusual case; Rucker, J., concurring with Boehm in Part II.

RELATED CASES: Keith, 200 N.E.3d 986 (Ind. Ct. App. 2022) (sentence that had been reduced after remand was not inappropriate); Wellings, 184 N.E.3d 1236 (Ind. Ct. App. 2022) (while the nature of offense and D's character could justify a more severe sentence, Ct. chose "to defer to the good judgment of the trial judge who was present and considered all the evidence at the sentencing hearing); Holt, 62 N.E.3d 462 (Ind. Ct. App. 2016) (4-year-year sentence imposed after D's guilty plea to two counts of Class C felony child molesting was not inappropriately lenient to warrant increase under Appellate Rule 7(B); Bradford, J., dissenting, would increase D's sentence to eight years for each conviction given young age of victims and nature of his offenses); Kunberger, 46 N.E.3d 966 (Ind. Ct. App. 2015) (dissent called for fully executed sentence because of D's behavior toward victim, combined with his outrageous lack of respect for court's authority and failure to abide by its no-contact order); Kucholick, 977 N.E.2d 351 (Ind. 2012) (Ind. S. Ct. agreed that a modest sentence revision of D's 7-year sentence for Class C criminal recklessness was warranted, but on transfer revised D's sentence again from four years with two years in community corrections/two suspended to four years executed with two years on probation and two years in community corrections for Class C felony criminal recklessness based on D shooting at the house of a person who just obtained a civil judgment against him); Bushhorn, 971 N.E.2d 80 (Ind. 2012) (Supreme Court granted transfer and reinstated Tr. Ct.'s original sentence, reversing Court of Appeals' finding that the sentencing was inappropriately harsh when considering D's character and the nature of the crime); Akard, 937 N.E.2d 811 (Ind. 2010) (Ct. of Appeals erroneously

increased D's sentence from 93 to 118 years, where State did not request a greater sentence at trial and asserted on appeal that 93 years is an appropriate sentence; Ct. noted "these are strong indicators that the Tr. Ct. sentence is not inappropriately lenient"); Moore, 907 N.E.2d 179 (Ind. Ct. App. 2009) (Ct. "might well agree with State" that aggregate 19-year sentence for Class B felony robbery and Class C battery is inappropriately lenient, but will not apply McCullough retroactively "without specific direction from our supreme court allowing us to do so"); Atwood, 905 N.E.2d 479 (Ind. Ct. App. 2009) (because D's brief was filed before McCullough and because Court was unable to say with confidence that D would have raised an issue regarding the appropriateness of his sentence had he known that he may face an increased sentence, Ct. declined State's invitation to revise the sentence upward).

TITLE: McFall v. State
INDEX NO.: G.1.c.
CITE: (2/22/2017), 71 N.E.3d 383 (Ind. Ct. App. 2017)
SUBJECT: Above-advisory sentence for manufacturing methamphetamine inappropriate
HOLDING: Forty-year sentence for Class A felony dealing in methamphetamine within 1000 feet of a youth program center was inappropriate in light of nature of offense and Defendant's character. Defendant manufactured meth in a drug house in which a housemate's children also lived. As for Defendant's character, her limited criminal history reflects that she is not a professional drug dealer or manufacturer but rather an addict who lived at the drug house for easier access to methamphetamine. At age 27, this is her first felony conviction and she expressed remorse at sentencing. Given that this is her first felony conviction and the progress she has made since her arrest to overcome her addiction and get her life in order, Court found above-advisory sentence inappropriate. Held, sentence revised to 30 years, with fourteen years executed and 16 suspended. Of executed time, Defendant must serve ten years in the DOC and four years on home detention.

TITLE: Mechling v. State
INDEX NO: G.1.c.
CITE: (9/16/2014), 16 N.E.3d 1015 (Ind. Ct. App. 2014)
SUBJECT: State not estopped from enforcing sentence waiver in plea agreement
HOLDING: State was not estopped from enforcing provision in plea agreement in which D waived the right to appeal his sentence, even though the State failed to object to Tr. Ct.'s erroneous statement at end of sentencing hearing that D had a right to appeal his sentence.

A D may waive the right to appellate review of his sentence. Creech v. State, 887 N.E.2d 73, 76 (Ind. 2008), and D does not dispute that his waiver was knowing, intelligent, and voluntary.

Estoppel prevents a person who has induced another person to act in a particular way from later adopting an inconsistent position or course of conduct that injures the other person. Town of New Chicago v. City of Lake Station, ex rel. Lake Station Sanitary Dist., 939 N.E.2d 638, 653 (Ind. Ct. App. 2010), trans. denied. Here, D failed to show how he was harmed by the State's failure to object to the Tr. Ct.'s erroneous advisement.

Further, the State's failure to object does not make it fundamentally unfair to enforce D's waiver. "Silence will not form the basis of . . . . estoppel unless the silent party has a duty to speak." Id. Here, the State had no duty to speak because Tr. Ct.'s erroneous advisement had no legal effect on D's plea agreement. "'[S]ubsequent actions by the Tr. Ct. following a D's plea are presumed to have no effect on the plea transaction, even in cases where a D is erroneously advised that he has a right to appeal.' Brattain v. State, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008) (citing Creech, 887 N.E.2d at 77)." Held, judgment affirmed.

TITLE: Mitchell v. State
INDEX NO.: G.1.c.
CITE: (10/16/2012), 976 N.E.2d 771 (Ind. Ct. App. 2012)
SUBJECT: Advisory sentence with 60 days executed for Class D felony theft not inappropriate
HOLDING: Tr. Ct. did not abuse its discretion in sentencing D for Class D felony theft. D argued that Tr. Ct. improperly considered the elements of the offense and fact that he maintained his innocence as aggravating factors. However, Tr. Ct. did not identify any aggravating factors during sentencing. Instead, it imposed the advisory sentence of one and a half years, ordered sixty of those days to be executed, and then explained why it ordered sixty days executed.

Regarding D's appropriateness challenge to his sentence, Court noted that D and his cohorts took a water heater from an apartment complex in defiance of the apartment manager, who indicated that they did not have permission to do so and ordered them to remove it from their truck. As to his character, D argued that he was fifty-eight years old at the time of the offense, had no other criminal history, and is being treated for mental illness. Although Court acknowledged that D's character is not likely that of a hardened criminal, he was not given an enhanced sentence. Instead, Tr. Ct. imposed the advisory sentence with all but sixty days suspended to probation. Held, judgment affirmed.

TITLE: Mullins v. State
INDEX NO.: G.1.c.
CITE: (7/6/2020), 148 N.E.3d 986 (Ind. 2020)
SUBJECT: 24 1/2 year- sentence for drug crimes inappropriate for young defendant with difficult upbringing and limited criminal history
HOLDING: Defendant's 24½-year sentence, based on multiple controlled buys of methamphetamine over a two-week period and the resulting traffic stop, which uncovered additional contraband, was inappropriate.

In Per Curiam opinion, Indiana Supreme Court reduces sentence from 24 1/2 years to 18 years exercising discretion under Indiana Appellate Rule 7(B) review. Court states trial court did not abuse its discretion but considers Defendant's relative youth at 21 years old, limited non-violent criminal history and significant mitigating circumstances stemming from an abusive childhood and untreated mental health issues to warrant a lesser sentence, stating exercising 7(B) discretion "boils down to our collective sense of what is appropriate." Justice Slaughter dissents, believing transfer should be denied.

TITLE: Murray v. State
INDEX NO.: G.1.c.
CITE: (4/6/2017), 74 N.E.3d 242 (Ind. Ct. App. 2017)
SUBJECT: 21-year sentence for child molesting not inappropriate
HOLDING: Aggregate executed 21-year sentence for three counts of Level 4 child molesting was not inappropriate in light of the "abhorrent" nature of the offenses and Defendant's character. Defendant aggressively groomed a twelve-year-old child over the course of a school year. He was her math teacher and a leader at church, abusing those positions of trust to gain access to her and evolve their relationship into a sexual one. The child had been receiving inpatient psychiatric care and was suicidal at the time Defendant was sentenced, yet he continued to call her and explicitly talk about sex more than 50 times over 20 hours, repeatedly violating a no contact order while incarcerated. Defendant has never taken responsibility for his repugnant behavior and actions, and Court declined to find that his character aids his argument. Held, judgment affirmed; Crone, J., concurring to note that had the State asked Court to impose a harsher sentence in its appellate brief, he would have been inclined to grant that request in light of Defendant's egregious betrayals of his positions of trust, his dozens of depraved phone calls to an emotionally vulnerable victim in violation of a no-contact order, and his utter lack of remorse or acceptance of responsibility.

RELATED CASES: Wilmsen, 181 N.E.3d 469 (Ind. Ct. App. 2022) (190-year aggregate sentence not inappropriate for multiple counts of child molesting, sexual misconduct and dissemination in light of "horrific" nature of offenses and no compelling evidence of good character); Kelp, 119 N.E.3d 1071 (Ind. Ct. App. 2019) (although he had no prior criminal history, D's 7-year executed sentence was appropriate given the nature of the offense (the heinous images D possessed) and the character of the offender (D had been collecting these images for five years prior to being arrested)).

TITLE: Neale v. State
INDEX NO.: G.1.c.
CITE: (05-03-05), Ind., 826 N.E.2d 635
SUBJECT: Appellate standard for reviewing sentences
HOLDING: Ind. Appellate Rule 7(B) authorizes an appellate Ct. to revise a sentence if it finds "after due consideration of the Tr. Ct.'s decision" that a sentence is "inappropriate in light of the nature of the offense & the character of the offender." When S. Ct. made change to language of this rule in 2003, it changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. Here, in affirming D's 50-year sentence for child molesting as a Class A felony Ct. App. paraphrased Appellate Rule 7(B) in the negative, stating that the rule does not authorized a sentence to be revised unless it is inappropriate in light of the nature of the offense & character of the offender. On transfer, majority of S. Ct. believe that phrasing of Rule 7(B) in negative suggests a greater degree of restraint on reviewing Ct. than the rule is intended to impose.

In this case, Ct. disagreed with D that Tr. Ct. should have considered absence of physical harm to victim as a mitigating circumstance. However, maximum sentence was inappropriate in light of several mitigating circumstances that were assigned "slight" or "minimal" weight. D's criminal history, while extensive, consisted only of misdemeanors; most of them alcohol related. See Ruiz v. State, 818 N.E.2d 927 (Ind. 2004) (alcohol-related offenses are at best marginally significant as aggravator in considering a sentence for a class B felony). Held, transfer granted, memorandum opinion of Ct. App. vacated; remanded to impose a sentence of 40 years, with 10 years suspended to probation. Dickson, J., dissenting, believes that "due consideration of Tr. Ct.'s decision" required by Indiana Appellate Rule 7(B) should restrain appellate revision of sentences to only rare, exceptional cases, & that this is not such a case.

RELATED CASES: Rutherford, App., 866 N.E.2d 867 (Ct. urged State to discontinue citing earlier cases from Ct. App. stating that its review of sentences under Rule 7(B) is "very deferential" to the Tr. Ct. & that Ct. may exercise its authority to revise sentences "with great restraint.").

TITLE: Newkirk v. State

INDEX NO.: G.1.c.

CITE: (4th Dist., 12-31-08), Ind. App., 54A04-0712-CR-721

SUBJECT: Sentence for multiple counts of operating vehicle with controlled substance causing death/serious bodily injury affirmed

HOLDING: D pled guilty to three counts of Class B felony operating vehicle with controlled substance in blood causing death and two counts of Class D felony operating a vehicle with controlled substance in blood causing serious bodily injury. In light of "horrific" nature of offenses and D's demonstrated likelihood to reoffend, aggregate sentence of fifty-one years: fifteen years executed and thirty-six suspended, with fifteen years on home detention, was not inappropriate.

D was staring forward blankly and ran into line of motorcycles without braking or making any evasive moves. He killed three people, maimed two, and barely missed hitting another. He inflicted intense pain and suffering and did not even assist his victims by calling for help. Tr. Ct. found that D was not remorseful, had not accepted responsibility and that there were no significant mitigators. Distinguishing Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003), Court noted that: 1) there was overwhelming evidence of guilt and D received significant benefit by pleading guilty, thus his plea was pragmatic; 2) D reoffended while out on bond; 3) D has not assisted with further investigation by naming his source of drugs. Court also rejected D's argument that the fifteen-year term of home detention violates Article 1, §§ 16 or 18 of the Ind. Constitution. Held, judgment affirmed.

RELATED CASES: MacFarland, 153 N.E.3d 369 (Ind. Ct. App. 2020) (09/17/2020) (15-year sentence for three counts of resisting law enforcement resulting in death not inappropriate); Evans, 85 N.E.3d 632 (Ind. Ct. App. 2017) (38.5-year sentence for D's convictions for 3 counts of OWI causing death, one count of OWI causing serious bodily injury and one count of Level 6 felony criminal recklessness was not inappropriate), Foutch, 53 N.E.3d 577 (Ind. Ct. App. 2016) (11-year aggregate sentence not inappropriate for an off-duty officer who, while under the influence of controlled substances, traveled 92 mph when he rear-ended a vehicle, killing a husband, severely injuring his wife, and requiring an emergency cesarean section on their unborn child, who survived).

TITLE: Petruso v. State
INDEX NO.: G.1.c.
CITE: (11/12/82), Ind., 441 N.E.2d 446
SUBJECT: Appellate review of sentence - aggravating circumstances
HOLDING: Tr. Ct. may in its discretion increase or decrease sentences after considering aggravating or mitigating circumstances. Jones 422 N.E.2d 1197. Court on appeal may revise sentence only when, in light of character of offender & nature of offense, it is manifestly unreasonable. ARSR 2. Court may not set aside sentence merely because it may appear severe. Here, Tr. Ct. considered PSI & evidence presented at trial. Tr. Ct. specified a number of aggravating circumstances (including D's lengthy criminal history) to support an increased term of imprisonment. Held, no abuse of discretion in aggravating sentences (attempted murder - 39 years; kidnapping 33 years).

RELATED CASES: Newsome, App., 654 N.E.2d 11 (50-year sentence not manifestly unreasonable when considering nature of offense & character of D. Evidence showed that D was ringleader of sophisticated drug-dealing conspiracy & had extensive criminal history).

TITLE: Rita v. United States
INDEX NO.: G.1.c.
CITE: (6/21/2007), U.S., 06B5754,
SUBJECT: Reasonableness presumed under federal sentencing guidelines
HOLDING: Court held that a court of appeals may apply a non-binding presumption of reasonableness to a district court sentence within the federal sentencing guidelines. In 18 U.S.C. § 3553(a), Congress instructed the sentencing judge to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. Even if the presumption increases the likelihood that the judge, not the jury, will find "sentencing facts," it does not violate the Sixth Amendment. Here, the district court properly analyzed the relevant sentencing factors, and given the record, its ultimate sentence of 33 months, the bottom of the guidelines' range, was reasonable. Court rejected Petitioner's claim of unreasonableness as it could not say that his special circumstances - his health, fear of retribution, and military record -were special enough, in light of § 3553(a), to require a sentence lower than the one the Guidelines provide. Souter, J., filed a dissenting opinion, with other justices filing concurrences on different sections.

TITLE: Rodriguez v. State
INDEX NO.: G.1.c.
CITE: (2nd Dist., 4-7-03), Ind. App., 785 N.E.2d 1169
SUBJECT: Maximum sentence for operating while intoxicated (OWI) causing death - inappropriate
HOLDING: After accepting D's guilty plea to OWI causing death, Tr. Ct.'s sentence of eight years was inappropriate. Ind. Appellate Rule 7(B) provides that reviewing Ct. is permitted to revise a sentence if it "is inappropriate in light of the nature of the offense & the character of the offender." When considering appropriateness of sentence for crime committed, Ct's should initially focus upon presumptive sentence. Hildenbrandt, App., 770 N.E.2d 355. Tr. Ct's. may then consider deviation from presumptive sentence based upon a balancing of factors which must be considered pursuant to Ind. Code 35-38-1-7.1(a) together with any discretionary aggravating & mitigating factors found to exist. Id. Here, D pled guilty to offense that specifically takes into account that death occurred as result of OWI. Tr. Ct. erred in considering two of three aggravating factors it relied upon to enhance D's sentence. In addition, Tr. Ct. found following significant mitigating factors: 1) D did not have prior criminal record; 2) he was remorseful for what he did; 3) he took responsibility for his actions by pleading guilty; & 4) he possessed prior stable employment. Furthermore, D entered into a plea agreement with State & Tr. Ct. accepted his guilty plea. D's character does not merit maximum allowable sentence of eight years, as he was not among the very worst offenders. Ind. Code 35-38-1-7.1 appropriately encourages leniency towards Ds who have not previously been through criminal justice system. Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000). Held, sentence reduced from eight years to three & one-half years.

RELATED CASES: Foutch, 53 N.E.3d 577 (Ind. Ct. App. 2016) (11-year aggregate sentence not inappropriate for an off-duty officer who, while under the influence of controlled substances, traveled 92 mph when he rear-ended a vehicle, killing a husband, severely injuring his wife, and requiring an emergency cesarean section on their unborn child, who survived); Newkirk, App., 898 N.E.2d 473 (in light of "horrific" nature of offenses & D's demonstrated likelihood to reoffend, aggregate sentence of 51 years for 3 counts of Class B felony operating vehicle with controlled substance in blood causing death and two counts of Class D felony operating vehicle with controlled substance in blood causing serious bodily injury was not inappropriate); Gillem, App., 829 N.E.2d 598 (28-year sentence for 2 counts of OWI causing death & one count of causing serious bodily injury was not inappropriate given nature of offense, D's several prior convictions & fact he did not seek formal treatment for his use of alcohol); Wolf, App., 793 N.E.2d 328 (maximum sentence for operating vehicle after lifetime suspension was not inappropriate); Bennett, App., 787 N.E.2d 938 (maximum sentence for robbery & elevated sentences for confinement, handgun & receiving stolen property charges was inappropriate).

TITLE: Rose v. State
INDEX NO.: G.1.c.
CITE: (3rd Dist., 6-16-04), Ind. App., 810 N.E.2d 361
SUBJECT: 135-year sentence affirmed – 16-year-old D
HOLDING: On appeal from his 135-year sentence for burglary, robbery, confinement, & criminal deviate conduct, D argued that Tr. Ct. failed to consider fact he was sixteen at time of offense, had a troubled childhood, the crime was a result of circumstances unlikely to reoccur, D acted under strong provocation by Co-D, & D's imprisonment would result in undue hardship to him. D had a "pitiful" childhood & acquired a significant criminal history, thus Tr. Ct. did not abuse its discretion in not considering D's age or troubled childhood as a mitigating circumstance. Although D was not the actual rapist, he participated in sexual humiliation of two women, one of whom was seven months pregnant. Maximum sentence D could have received was 270 years. He did not receive maximum possible sentence for any of his convictions, but rather, half the maximum sentence possible. Nature of D's "heinous" offenses & his character did not lead Ct. to believe his sentence was inappropriate. Held, judgment affirmed.

RELATED CASES: Phelps, 969 N.E.2d 1009 (Ind. Ct. App. 2012) (slightly-enhanced sentence of 35-years with 5 years suspended for attempted murder was not inappropriate in light of the fact 15-year-old D stole the handgun used from his former step-father, entered school property from which he was banned and shot an eighth grader twice in front of other students after a brief verbal altercation; moreover, he displayed the inability to control his anger, abused substances and refused to take advantage of the rehabilitative efforts offered within the school system);Roberson, App., 900 N.E.2d 446 (38-year-sentence for 16-yr-old was appropriate in light of premeditated and brutal nature of crime and D's manipulative & remorseless character, despite significant history of mental illness; Riley, J., dissenting); Day, App., 898 N.E.2d 471 (there was nothing inappropriate about a 17-year-sentence for D who accepted cash in exchange for allowing multiple men to molest her twelve-year old daughter); Dixon, App., 825 N.E.2d 1269 (D's seventy-six & one-half-year sentence for two kidnapping convictions, robbery & resisting law enforcement was appropriate in light of nature of offense & character of offender).

TITLE: Sanquenetti v. State
INDEX NO.: G.1.c.
CITE: (1st Dist., 12-17-09), 917 N.E.2d 1287 (Ind. App. 2009)
SUBJECT: Advisory sentence for nonsupport conviction inappropriate
HOLDING: Advisory sentence of four years for D's class C felony nonsupport of a dependent conviction was inappropriate in light of nature of offense and her character. Regarding nature of offense, Court noted that there is no evidence of hardship or sacrifice suffered by the children or custodial parent. Moreover, Court had "serious concerns that there is no valid basis for Sanquenetti's class C felony conviction." Amount of child support for years 2005 through 2007 should not be included as a basis for D's criminal liability under Ind. Code 35-46-1-5 because that section only imposes criminal liability for children under 18 years of age, and D's children were eighteen years of age or older during this time frame. As to D's character, Court noted that she pled guilty, which reflects favorably on her character. Further, record suggest that her failure to pay child support was not made in callous disregard of her children's needs. Held, reversed and remanded with instructions to revise sentence to two years executed. Vaidik, J., dissenting, notes that "majority appears to be using Sanquenetti's sentencing challenge as a vehicle to correct what it perceives to be an injustice."

RELATED CASES: Sanjari, 942 N.E. 2d 134 (Ind. Ct. App. 2011) summarily aff'd, 961 N.E.2d 1005 (5-year sentence for one count of class C felony nonsupport was not inappropriate where D failed to pay any support at all over a prolonged period of three years and, notwithstanding the absence of a criminal history, D demonstrated a total disregard and disdain for the law).

TITLE: Schaadt v. State
INDEX NO.: G.1.c.
CITE: (4/8/2015), 30 N.E.3d 1 (Ind. Ct. App. 2015)
SUBJECT: Disparity in drug sentence under old and new code does not violate Ind. Constitution
HOLDING: Savings clause of the 2014 criminal code revision does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution. Under revised criminal code, D's dealing in methamphetamine conviction would constitute a Level 5 offense subject to a maximum prison term of six years. D committed his Class A felony dealing in methamphetamine offenses before the criminal code overhaul and received an aggregate 40-year sentence. He argued that the ameliorative sentencing provisions should apply retroactively to Ds who had not yet been convicted and sentenced when the revision took effect on July 1, 2014. But the General Assembly made it "abundantly clear" that the new criminal code was not intended to have any effect on the criminal proceedings for offenses committed prior to its enactment. It is the offender, as a result of the timing of the crime, not the State, who chooses which statute applies, so D's equal privileges and immunities claim fails.

Court also rejected D's appropriateness challenge to his sentence, noting it will not consider the disparity between his sentence and what he would have received under the revised code. Because the Legislature intended the new code to have no effect on those who committed crimes before 7/1/14, "[w]e think this is true with regard to considering the appropriateness of a sentence under Appellate Rule 7(B); we are to proceed as if the new criminal code had not been enacted." Held, judgment affirmed.

TITLE: Schlichter v. State
INDEX NO.: G.1.c.
CITE: (12-18-02), Ind., 779 N.E.2d 1155
SUBJECT: Collateral challenge of sentence on appeal from probation revocation prohibited
HOLDING: D pled guilty to two counts of forgery & one count of theft & received consecutive sentences for two forgery charges. While serving his sentence, D violated his probation. Following revocation of his probation, D appealed, challenging propriety of consecutive sentences. Ct. App. held that imposition of consecutive sentence constituted illegal sentence because two forgery counts constituted one episode of criminal conduct under Ind. Code 35-50-1-2. On transfer, S. Ct. held that D may not collaterally challenge his sentence on appeal from his probation revocation. Instead, D's options were to seek relief either through direct appeal of his sentence or petition for post-conviction relief. Issue of permissibility of D's sentence under consecutive sentencing statute was not before Tr. Ct. in this probation revocation proceeding & he had no basis to raise issue in appeal from his probation revocation. Held, transfer granted, Ct. App. § opinion at 766 N.E.2d 801 vacated, Tr. Ct. affirmed.

RELATED CASES: Stephens, 818 N.E.2d 936 (D is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed).

TITLE: Serino v. State
INDEX NO.: G.1.c.
CITE: (11-19-03), Ind., 798 N.E.2d 852
SUBJECT: Child molesting - multiple counts; inappropriate sentence
HOLDING: Ind. Appellate Rule 7(B) provides that an appellate Ct. "may revise a sentence authorized by statute if, after due consideration of the Tr. Ct.'s decision, the Ct. finds that the sentence is inappropriate in light of the nature of the offense & the character of the offender." This formulation places central focus on role of trial judge, while reserving for appellate Ct. the chance to review matter in a climate more distant from local clamor. In this case, D was convicted of twenty-six counts of child molesting & sexual misconduct with a minor, & Tr. Ct. sentenced him to 385 years in jail, which is outside typical range of sentences imposed for child molesting in any reported Indiana decision. In several factually similar cases, where there was one victim, multiple counts of molestation, & lack of criminal history, the sentences were revised as being manifestly unreasonable. In light of nature of offense & character of offender, Ct. revised D's sentence to three consecutive standard terms or 90 years total. Held, transfer granted, conviction affirmed with direction to rearrange sentence accordingly.

RELATED CASES: Hunt, 30 N.E.3d 18 (Ind. Ct. App. 2015) (compared to sentences for similar offenses, which usually range from 26 to 90 years, D's 120-year aggregate sentence was inappropriate and was reduced to 120 years); Escobedo, 989 N.E.2d 1248 (Ind. 2013) (Ct. disapproved of consideration of a community's outrage in determination or review of a criminal sentence); Merida, 977 N.E.2d 406 (Ind. Ct. App. 2012) (finding D's consecutive, advisory sentences, resulting in 60-year-sentence, was inappropriate when based on two instances of molest of the D's adopted daughter over seven years, and D had no prior criminal history; revised to concurrent sentences; Crone, J., concurring on basis that the advisory sentences should be partially consecutive to one another, for a total of thirty-eight years; if the statutes do not provide for partially consecutive sentences, the legislature should amend the statutes accordingly to provide for this important tool in crafting appropriate sentences); Hamilton, 955 N.E.2d 723 (Ind. 2011) (Ct. reduced 50-year sentence for one Class A felony count of molesting D's 9-year-old step-granddaughter to 35 years); Sanchez, 938 N.E.2d 720 (Ind. 2010) (consecutive sentences for molesting two sisters were inappropriate, where D's acts were isolated incidents and he did not use significant force or hurt the sisters; even though D is an illegal alien, he does not have a significant criminal record); Light, 926 N.E.2d 1122 (Ind. Ct. App. 2010) (D's aggregate sentence of 125 years for three counts of Class A felony child molest is appropriate where she and her boyfriend videotaped themselves having sexual encounters with a six-year-old, a one-year-old and their own two-month-old infant); Laster, App., 918 N.E.2d 428 (D's ninety-six-year sentence revised to thirty-six years for two class A felony child molests and four class C felony child molests; although D occupied a position of trust with the victim and he threatened the child, D's lack of criminal history and steady employment together with the facts that there was one victim and no uncharged sexual misconduct made consecutive sentences inappropriate); Rivers, 915 N.E.2d 141 (considering 60-year executed sentence imposed, the nature of the offenses and D's character, imposing D's class A advisory sentences for child molesting to run consecutively was not warranted); Tyler, 903 N.E.2d 463 (110-year sentence revised to 77.5-year sentence for multiple counts of molestation where D was only 22 years old with no previous sex offense convictions and a very troubled childhood, including being physically and verbally abused, institutionalized and suicidal at age of nine; further, no physical harm to children); Harris, Jr., 897 N.E.2d 927 (maximum, consecutive 100-year sentence for two counts of child molesting was inappropriate;

remanded with instructions to revise sentence to 50 years for each count to be served concurrently); Estes, 827 N.E.2d 27 (267-year sentence for 14 counts of child molesting against 2 victims & one count of intimidation inappropriate); Ruiz, 818 N.E.2d 927 (20-year sentence for class B felony child molesting was inappropriate where 20-year-old D had sexual intercourse with 13-year-old girl, & sole aggravating circumstance was D's four prior alcohol-related misdemeanors, which were at best "marginally significant"); Leffingwell, App., 810 N.E.2d 369 (maximum eight-year sentence for class C felony child molesting was appropriate, where D violated conditions of his bond & violated position of trust he held with his ten-year-old step-daughter). Haddock, App., 800 N.E.2d 242 (D's aggregate sentence of 326 years for multiple counts of child molesting, confinement & vicarious sexual gratification was upheld as appropriate); Cuyler, App., 798 N.E.2d 243 (D's sentence to one year of imprisonment for class A misdemeanor criminal recklessness conviction, to be served consecutively to conviction for class A misdemeanor resisting law enforcement, was not inappropriate despite fact D pled guilty, expressed remorse, & had job; D had criminal history consisting of juvenile referrals, adult felony convictions & probation violations).

TITLE: Smith v. State

INDEX NO.: G.1.c.

CITE: 154 N.E.3d 838 (Ind Ct. App 2020) (08-28-2020)

SUBJECT: Partially executed 365-day sentence inappropriate for 65-year-old Defendant in declining health

HOLDING: Ordering 65-year-old Defendant in poor physical health to serve 180 days of a 365-day sentence for Class A misdemeanor resisting law enforcement was inappropriate based on Defendant's character and the nature of his offense. Defendant's offense was relatively minor on the spectrum of resisting law enforcement in that he led officers on a short foot pursuit, was quickly apprehended and he did not injure anyone or damage any property. His lengthy sentencing testimony included ramblings on aliens, the Bible, Revelations, and other irrelevant and sometimes incoherent thoughts. This evidence led Court to believe Defendant's recent criminal acts are just as much the result of deteriorating mental health as they are of genuine criminal intent. Furthermore, the record does not suggest that Defendant is a person of poor character. His physically disabled wife relies on him as her primary caretaker. And despite Defendant's troubling behavior over the past two years, he was a law-abiding citizen until age sixty-four, when he began committing a series of misdemeanor offenses. For these reasons, a 365-day sentence, with 185 suspended to probation and 180 days to serve consecutive to the 277 days for a probation violation, was inappropriate. Court reversed and remand to the trial court to impose a sentence of 365 days, with 20 days to serve and 345 days suspended to probation. Defendant will be on probation for 345 days and, as already ordered by the trial court, will be required to undergo a mental-health evaluation and follow all recommendations.

TITLE: Spears v. United States

INDEX NO.: G.1.c.

CITE: 129 S. Ct. 840 (U.S. 2009)

SUBJECT: Judges may impose lesser sentences for crack cocaine offenses than sentencing guidelines

HOLDING: Per Curiam. District courts are entitled to reject and vary categorically from the crack-cocaine sentencing guidelines based on a policy disagreement with those guidelines. See Kimbrough v. United States, 128 S. Ct. 558 (2007). Court noted that some lower courts had misinterpreted Kimbrough as holding judges could not depart from sentencing guidelines simply because they disagreed with the 100-to-1 sentencing disparity. Kennedy, J., would have granted petition for *certiorari* and set case for oral argument. Thomas, J., DISSENTS; Roberts, CJ. and Alito, J, DISSENTING. See also: Nelson v. U.S., 129 S. Ct. 890 (2009) (Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable. Sentencing judge erred in applying a presumption of reasonableness to D's Guidelines range).

RELATED CASES: Pepper, 131 S. Ct. 1229 (U.S. 2009) (Post-sentencing good behavior may be considered at federal resentencing); Dillon, 130 S. Ct. 2683 (judge's authority to deviate from federal sentencing guidelines does not apply in sentence reduction proceedings).

TITLE: Starcher v. State
INDEX NO.: G.1.c.
CITE: (12/29/2016), 66 N.E.3d 621 (Ind. Ct. App. 2017)
SUBJECT: Waiver of right to appeal sentence
HOLDING: A defendant can waive the right to appeal a sentence, and the courts will enforce a knowing, voluntary and intelligent waiver of the right to appeal one's sentence when it is a condition of the plea agreement. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). But the Court of Appeals will not enforce a Creech waiver in a plea agreement if the defendant pleaded guilty after the trial judge advised him he would still have the right to appeal his sentence. Ricci v. State, 894 N.E.2d 1089 (Ind. Ct. App. 2008).

Here, the plain terms of Defendant's plea agreement demonstrate that he waived his right to appellate review of his two-year sentence for maintaining a common nuisance and possession of a synthetic drug. The trial judge accepted Defendant's guilty plea and only later, at the sentencing hearing, told Defendant he would have the right to appeal his sentence. Defendant had already made an enforceable waiver of his rights under Appellate Rule 7(B) by that time; thus, the Court of Appeals dismissed the appeal at the State's request. Held, appeal dismissed.

TITLE: State v. Kimbrough
INDEX NO.: G.1.c.
CITE: (12/19/2012), 979 N.E.2d 625 (Ind. 2012)
SUBJECT: Ct. App. Wrongly Reduced Sentence
HOLDING: The Court of Appeals erroneously vacated and reduced Kimbrough's 80-year aggragate sentence for 4 counts of Child Molesting as an A felony and 2 counts as a C felony. Kimbrough was convicted of molesting his two young step-daugthers, and on appeal challenged the sufficiency of the evidence and the Tr. Ct.'s instruction defining the female sex organ, and also argued that the Tr. Ct. abused its discretion in sentencing him to an aggragate term of 80 years. The Court of Appeals affirmed his convictions, but found that the Tr. Ct. abused its discretion in sentencing him to 80 years in light of what it considered a significant mitigating factor -- his lack of prior criminal history. On transfer, the Supreme Court vacates the Court of Appeals decision. In Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), the Supreme Court recognized that under Indiana's new sentencing statute, the Tr. Ct. no longer has any obligation to "weigh" aggravating and mitigating factors against one another when imposing a sentence," and thus "a Tr. Ct. can not now be said to have abused its discretion in failing to 'properly weigh' such factors." The Court of Appeals' reference to the substantial nature of Kimbrough's lack of criminal history suggests that it implicitly found that the Tr. Ct. did not give this factor proper weight in imposing sentence. The Court of Appeals stressed that it was "[f]ocusing on the appropriateness of the sentence and not the weight given to individual aggravating or mitigating factors." The Supreme Court notes that appropriateness has nothing to do with whether a Tr. Ct. abused its discretion in sentencing, and that Kimbrough argued only that the Tr. Ct. abused its discretion and did not seek appropriateness review pursuant to App. Rule 7(B). The judgment of the Tr. Ct. is Affirmed.

TITLE: Stephenson v. State
INDEX NO.: G.1.c.
CITE: (4/23/2015), 29 N.E.3d 111 (Ind. Ct. App. 2015)
SUBJECT: LWOP sentence not inappropriate
HOLDING: D's life-without-parole sentence was not inappropriate under Appellate Rule 7(B). The nature of the crime was brutal and gruesome. D bludgeoned the victim to death, causing blunt force trauma to her head with a cast-iron skillet and a pepper mill. Neither did D's character make his LWOP sentence inappropriate. He was heavily in debt to friends, family, the elderly, and military veterans. He had incurred some of his debt through fraud. He borrowed large sums of money from friends and others by saying he was going to invest it for them, but he often failed to return their investment or repay them. Held, judgment affirmed.

RELATED CASES: Gerber, 167 N.E.3d 792 (Ind. Ct. App. 2021) (two-and-one-half year sentence for domestic battery not inappropriate where D, who had seven prior felony convictions, slapped C.W., held her down and punched her in the head multiple times with a closed fist).

TITLE: Stephenson v. State
INDEX NO.: G.1.c.
CITE: (4/28/2016), 53 N.E.3d 557 (Ind. Ct. App. 2016)
SUBJECT: Maximum sentence for misdemeanor battery affirmed
HOLDING: Tr. Ct. did not abuse its discretion in sentencing D to maximum 180-day sentence for Class B misdemeanor battery conviction. The sentencing statute for Class B misdemeanors does not provide for an advisory sentence, therefore the Tr. Ct. was not required to articulate and balance aggravating and mitigating circumstances before sentencing, nor was the Tr. Ct. required to issue a sentencing statement with a misdemeanor conviction. Morris v. State, 985 N.E.2d 364 (Ind. Ct. App. 2013). Further, in light of D's criminal history, which included two domestic-violence related convictions, his fully executed sentence was not inappropriate in light of the nature of the offense and D's character. Held, judgment affirmed.

TITLE: State v. Stidham
INDEX NO.: G.1.c.
CITE: (11/17/2020), 157 N.E.3d 1185 (Ind.)
SUBJECT: Extraordinary circumstances warranted revision of juvenile's maximum 138-year sentence for murder and other crimes
HOLDING: Doctrine of res judicata did not prohibit Court from reconsidering the appropriateness of Defendant's 138-year sentence for murder committed in 1991 when he was 17 years old. In 1994, a narrow majority of Indiana Supreme Court affirmed the appropriateness of the sentence on appeal and declined to exercise the Court's constitutional authority to review and revise sentences. But the Indiana Supreme Court found two "major shifts in the law" allowed them to revisit their prior decision about the appropriateness of Defendant's sentence. The first shift occurred when the Supreme Court eased the standard under which it could review and revise sentences that were determined to be "manifestly unreasonable." As a result, the Supreme Court revised Appellate Rule 7(B) to allow state courts to revise a sentence if the sentence is "inappropriate in light of the nature of the offense and the character of the offender." The second major shift came when the U.S. Supreme Court began limiting when juveniles could be sentenced to harsher punishments. These two major shifts presented "extraordinary circumstances" warranting reconsideration of Court's prior decision in Defendant's case. Although Defendant's crimes were brutal and horrific, Court acknowledged his abusive childhood and steps toward rehabilitation including completing his high school education and participating in substance abuse counseling. Although maximum possible sentences are generally most appropriate for the worst offenders, Defendant received the maximum possible term-of-years sentence for crimes he committed as a juvenile. As Indiana Supreme Court and U.S. Supreme Court has held before, Defendant's juvenile status weighs against a maximum sentence. Held, transfer granted, Court of Appeals' opinion at 110 N.E. 410 vacated, grant of postconviction relief affirmed, and sentence revised to 88 years. David, J., concurring in result; Slaughter, J., dissenting, noting that the majority based its decision on a claim Defendant did not raise and expressly disavowed at oral argument.

RELATED CASES: Hobbs, 206 N.E.3d 419 (Ind. Ct. App. 2023) (D's situation "simply does not present the same extraordinary circumstances that our supreme court found that justified its revision of Stidham's prior sentence").

TITLE: Threatt v. State
INDEX NO.: G.1.c.
CITE: (6/18/2018), 105 N.E.3d 199 (Ind. Ct. App. 2018)
SUBJECT: 20-year robbery sentence affirmed for drug deal gone bad
HOLDING: D's 20-year sentence for Level 2 felony robbery, with 17 and one-half years executed, was not inappropriate given the nature of the offense and his character. D arranged a drug deal with his childhood friend, but planned with his accomplice to take the marijuana and run without paying for it. The friend resisted and was shot and killed by D's accomplice, who was convicted of voluntary manslaughter and received a thirty-year sentence.

As for D's character, he was employed full time at the time of his arrest and had been for several months. But while claiming to be a law-abiding citizen, D admitted that he used marijuana every day. Further, regardless of who pulled the trigger, the result of D's criminal endeavor to obtain marijuana was the murder of a young father. Even if the shooting was completely unexpected, as D claims, he arranged the deal and, at the very least, set up his friend to be robbed, surely understanding that violence was a possibility in such a drug deal / robbery. Held, judgment affirmed.

TITLE: Vanyo v. State
INDEX NO.: G.1.c.
CITE: (7/7/83), Ind., 450 N.E.2d 524
SUBJECT: Appellate review of sentence - general deterrence
HOLDING: Five-year enhancement of 10-year sentence for dealing in controlled substance was not error where trial judge cited as aggravating circumstances that lesser sentence would depreciate seriousness of offense, D was over 50, held responsible jobs in county, was well known in his area & to give lesser sentence would set bad example for younger people who might be inclined to participate in sale of illegal drugs. Ind. Code 35-4.1-4-7 does not limit matters Tr. Ct. may consider in determining sentence. McManus, 433 N.E.2d 775; Coleman, App., 409 N.E.2d 647. Tr. Ct. has authority to determine weight of aggravating/mitigating circumstances & sentence D accordingly. Dorton, 419 N.E.2d 1289; Dean 398 N.E.2d 1270. Held, no error. DISSENT by DeBruler finds enhancement manifestly unreasonable because it penalizes D for years of decent law-abiding conduct & speculates that presumptive sentence would excite criminal behavior in an amorphous segment of society. DeBruler would remand for imposition of presumptive 10-year sentence.

TITLE: Vance v. State
INDEX NO.: G.1.c.
CITE: (2nd Dist., 01-24-07), Ind. App., 860 N.E.2d 617
SUBJECT: Three consecutive one-year sentences for misdemeanor convictions not inappropriate
HOLDING: Trial Ct. did not abuse its discretion when it imposed consecutive sentences on D's three misdemeanor convictions. Criminal recklessness convictions were based upon collision of vehicles of D & complaining witness (CW). There were three people in CW's vehicle. When a perpetrator commits same offense against multiple victims, enhanced & consecutive sentences "seem necessary to vindicate the fact that there were separate harms & separate acts against more than one person." Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003). Thus, trial Ct. did not err in imposing consecutive sentences on D's misdemeanor convictions. Held, judgment affirmed.

RELATED CASES: Laster, 956 N.E.2d 187 (Ind. Ct. App. 2011) (while 4 separate victims justified consecutive sentences, that does not necessarily mean D should receive quadruple the amount of time that he would receive if there had only been one victim; held, 40-year executed sentence reduced to 32 years executed and 8 suspended); Carroll, 922 N.E.2d 755 (Ind. Ct. App. 2010) (although D had no criminal history and expressed regret for the dogs' attacks, seriousness of injuries and D's minimizing of responsibility justified consecutive, maximum terms for two convictions of Class A misdemeanor dog bite resulting in serious bodily injury); Ricci, App., 894 N.E.2d 1089.

TITLE: Vaughen v. State
INDEX NO.: G.1.c.
CITE: 907 N.E.2d 167 (Ind. Ct. App. 2009)
SUBJECT: 12-year sentence for conspiracy to deal in cocaine not inappropriate
HOLDING: In light of nature of the offense and character of the offender, D failed to convince Court that his 12-year sentence for Class B felony conspiracy to deal in cocaine was inappropriate. D was clearly the ringleader in cocaine dealing operation, using couriers to lessen the time in which the drugs were in his possession. D has never been employed and has four children by three different women. He was on probation at time of current offense because of conviction for possession of marijuana. D failed to explain how his psychiatric disorders of depression, attention deficit hyperactivity disorder and bipolar affect his actions in general or in relation to commission of this crime. Held, judgment affirmed.

See also: Bonilla v. State, 907 N.E.2d 586 (Ind. Ct. App. 2009) (in light of D's illegal entry into this country and his failure to follow the laws once here, advisory sentence for dealing in cocaine was not inappropriate); Flickner v. State, 908 N.E.2d 270 (Ind. Ct. App. 2009) (six-year sentence with two and one-half years suspended to probation for Class C felony nonsupport was not inappropriate in light of D's criminal history and character).

TITLE: Walker v. State
INDEX NO.: G.1.c.
CITE: (5-15-01), Ind., 747 N.E.2d 536
SUBJECT: Enhanced, consecutive sentence for child molesting manifestly unreasonable
HOLDING: D's aggregate sentence of eighty years for twice performing oral sex on child was manifestly unreasonable. Judicial amendments to Indiana Constitution confer distinct responsibility on appellate Ct's. to review & revise the sentence imposed. Ind. Const. art. VII, § 4. Reviewing Ct. will not revise sentence authorized by statute except where such sentence is manifestly unreasonable in light of nature of offense & character of offender. Ind. Appellate Rule 17(B). Here, Tr. Ct. found number of aggravating circumstances, including committing crime while on probation & fleeing jurisdiction. Still, Tr. Ct. did not find history of criminal behavior, & two separate counts of child molestation were identical & involved same child. Additionally, there was no physical injury. While aggravating circumstances warranted enhanced sentence, D's aggregate eighty-year sentence was manifestly unreasonable. Held, transfer granted, sentences ordered to run concurrently for total of forty years; Dickson, J., dissenting.

RELATED CASES: Mastin, 966 N.E.2d 197 (Ind. Ct. App. 2012) (despite D's very minimal criminal history, maximum, consecutive sentences totaling ninety years were appropriate for D who repeatedly molested his granddaughter beginning at age four and gave her painful genital herpes that will never be cured); Smith, 889 N.E.2d 261 (presumptive, consecutive sentences resulting in 120 years for four counts of child molesting was inappropriate; sentence reduced to 60 years); Reyes, 909 N.E.2d 471 (Ind. Ct. App. 2009 (sentence reduced from 110 to 90 years, where unlike Smith, victim was forced to submit to various forms of molestation & psychological abuse took perverse form of D making victim look at graphic pictures of her nude body and molestations); Scott, App., 771 N.E.2d 718 (distinguishing Walker & affirming D's 100-year sentence for molesting two of his children on separate occasions); Buchanan, 767 N.E.2d 967 (Ct. reduced sentence for child molesting conviction from 50 to 40 years); Garner, App., 754 N.E.2d 984, *sum. aff'd* 777 N.E.2d 721 (108-year sentence for two class A & one class C felony child molesting convictions was not manifestly unreasonable); Perry, App., 751 N.E.2d 306 (although 80-year sentence for conspiracy & dealing in cocaine was authorized, it was clearly, plainly, & obviously unreasonable).

TITLE: Wampler v. State
INDEX NO.: G.1.c.
CITE: (1/25/2017), 67 N.E.3d 633 (Ind. 2017)
SUBJECT: Aggregate 33-year sentence for mentally ill Defendant inappropriate
HOLDING: Per Curiam. Pursuant to Court's authority under Appellate Rule 7(B), and on the strength of Judge Mathias's dissent from Court of Appeals' opinion affirming sentence at 57 N.E.3d 884, Court found Defendant's 33-year aggregate sentence for burglary and habitual enhancement inappropriate. Defendant has a history of psychiatric problems and hospitalizations dating back to 1981, when he was in his teens. Over the course of many years, Defendant became obsessed with his former elementary classmate, K.S. One night Defendant entered K.S.'s home through a laundry room window, watched him sleep, took a beer and a photocopied Nelson Mandela quote from N.S.'s refrigerator. Defendant initially was found incompetent to stand trial, received treatment, and was later found competent and convicted. Majority of Court of Appeals affirmed Defendant's sentence, but in dissent, Judge Mathias said that Defendant's serious mental illness should have resulted in civil commitment and treatment rather than incarceration. Court found Mathias' comments "insightful" and agreed to give Defendant sentencing relief. Held, transfer granted, Court of Appeals' opinion vacated, Defendant's sentence revised to concurrent six-year terms on burglarly convictions, and ten years on habitual offender adjudication, for an aggregate sentence of 16 years.

TITLE: Westlake v. State
INDEX NO.: G.1.c.
CITE: (4th Dist., 09-23-08), Ind. App. 893 N.E.2d 769
SUBJECT: 14-year sentence for dealing in cocaine and neglect inappropriate
HOLDING: D's fourteen-year sentence for Class B felony dealing in cocaine and Class C felony neglect of a dependent was inappropriate in light of nature of offense and her character. D had been dealing cocaine, marijuana, and other prescription drugs for several months from a home where she lived with her six-year-old son. When police confronted D, she immediately assisted them in locating all of the drugs in her home. D had a relatively minor criminal history, consisting of three misdemeanors. After she pleaded guilty, Tr. Ct. placed D in its "excellent" pre-conviction release program, where she was diagnosed with and treated for bipolar disorder. D was "incredibly successful" in the program and cooperated with Child Protective Services to such a degree that CHINS case was dismissed. In her pre-sentence report, D was determined to be in the low risk offender group suitable for placement in a halfway house, minimum security, and/or parole. Under these "extremely unusual facts and circumstances," Court found D's sentence inappropriate. Although her offenses were serious, they were not a continuation of a related criminal history and her character is "unusually and extraordinarily mitigating." Held, judgment reversed and remanded with instructions to impose an aggregate term of seven-years imprisonment, with two years suspended, and executed portion of sentence to be served in community corrections program; Brown, J, dissenting.

RELATED CASES: McFall, 71 N.E.3d 383 (Ind. Ct. App. 2017) (40-year sentence for Class A felony dealing in methamphetamine inappropriate given this was D's first felony conviction and progress she has made since her arrest to overcome her addiction).

TITLE: Whiteside v. State

INDEX NO.: G.1.c.

CITE: (6/29/2017), 76 N.E.3d 844 (Ind. 2017)

SUBJECT: 60-year sentence for attempted rape & criminal deviate conduct affirmed after juvenile waived to adult court

HOLDING: Per Curiam. After being waived to adult court, Defendant was convicted of Class B felony attempted rape, two counts of Class B felony criminal deviate conduct, and Class D felony sexual battery. After vacating the sexual battery conviction, Tr. Ct. sentenced Defendant to an aggregate sentence of 60 years. In a 2-1 opinion, Court of Appeals revised Defendant's sentence to an aggregate 30-year term. On transfer, Supreme Court affirmed the 60-year sentence imposed by the Tr. Ct., concluding it was not inappropriate under Appellate Rule 7(B). Held, transfer granted, Court of Appeals' memorandum opinion vacated in part and summarily affirmed in all other respects, judgment affirmed.

RELATED CASES: Johnson, Ind. App, 837 N.E.2d 209 (after waiving D to adult court, 60-year sentence imposed by Tr. Ct. for attempted rape and two counts of crimial deviate conduct was not not inappropriate under Appellate Rule 7(B).); Robinson, 61 N.E.3d 1226 (Ind. Ct. App. 2016) (eight-year sentence, 5 years executed, was not inappropriate where D, a school teacher and coach, was convicted of 5 counts of child seduction, which could have resulted in a 30-year sentence).

TITLE: Wilson v. State

INDEX NO.: G.1.c.

CITE: (6/27/2019), 128 N.E.3d 492 (Ind. Ct. App. 2019)

SUBJECT: Trial and appellate counsel ineffective for failure to challenge juvenile de facto life sentence

HOLDING: Defendant received ineffective assistance of trial counsel when counsel's sentencing argument only took up two out of the 700 pages of the transcript, and there was no evidence admitted regarding Defendant's youth or characteristics, mental health, good character, or prospects of rehabilitation. Attorney presented no evidence on 16 year-old Defendant's behalf, resulting in a sentence of 181 years for murder and other crimes. There is a reasonable probability that, but for counsel's deficient performance, Defendant would have received a lesser sentence.

Court also held that Miller v. Alabama, 132 S.Ct. 2455 (2012), applies to sentences for juveniles that amount to a life sentence, regardless of the label applied by the trial court or the State. A sentencing hearing under Miller requires more than simply acknowledging the defendant's youth. It will likely include expert testimony, which would ideally cover both the attendant characteristics of youth in general and the particular youth and characteristics of the defendant being sentenced. Held, reversed and remanded for new sentencing hearing that complies with Miller.

G. APPEAL

G.1. Appealable orders

G.1.d. Probation/Parole Revocation Appeals

TITLE: Johnston v. State

INDEX NO.: G.1.d.

CITE: (3-8-21), Ind. Ct. App., 164 N.E.3d 817

SUBJECT: New double jeopardy framework does not apply retroactively on PCR; Richardson 'actual evidence' test applied

HOLDING: Petitioner was convicted of four felony counts of stalking and sentenced to an aggregate term of twelve years, with two years suspended. On post-conviction, he claimed he received ineffective assistance of trial and appellate counsel for failure to challenge the multiple stalking convictions. The Court of Appeals found the multiple stalking convictions were permitted under IN Code 35-45-10-1 and were not barred by the continuous crime doctrine. Regarding Defendant's claims his multiple stalking convictions were barred by Indiana's substantive double jeopardy law under either the former *Richardson* test or the analysis announced in Wadle v. State, 151 N.E.3d 227 (Ind. 2020), the Court concluded that only the Richardson actual evidence test is applicable in his case. The Court of Appeals noted that at the time Richardson was decided, it was itself a new methodology for double jeopardy analysis, which our supreme court held was "not available for retroactive application in post-conviction proceedings" *citing* Taylor v. State, 717 N.E.2d 90, 95 (Ind. 1999). Petitioner received the effective assistance of his trial and appellate counsel. Held, affirmed.

TITLE: Neville v. State
INDEX NO.: G.1.d.
CITE: (2nd Dist., 4-20-98), Ind. App., 694 N.E.2d 296
SUBJECT: Belated Appeal - untimely praecipe; probation revocation
HOLDING: Tr. Ct. did not have authority under Post-Conviction Rule 2(1) to grant permission to file belated praecipe for appeal from revocation of probation. Generally, praecipe must be filed within thirty days of appealable order. Ind. App. R. 2(A). However, P-C.R. 2(1) provides method for seeking permission for belated consideration of appeals addressing conviction but does not permit belated consideration of appeals of other post-judgment petitions. Greer, 685 N.E.2d 700. Here, because D was appealing petition for credit time & not his conviction, D's appeal did not fall within exception of P-C.R. 2(1) & thus must have been filed within thirty days. Although D filed his petition twenty-nine days after third probation revocation sentencing, actual denial of credit time on which his petition was based occurred years earlier during sentencing for second probation violation. Because D was not directly appealing his conviction but rather appealing earlier denial of credit time, Appellate Ct. is without subject matter jurisdiction. Held, appeal dismissed; Sullivan, J., concurring.

RELATED CASES: Impson, App., 721 N.E.2d 1275 (D was not permitted to file belated praecipe on probation revocation even when Ct. failed to give timely notice of appellate appointment to counsel & only informed D of appointment).

TITLE: Wilson v. State

INDEX NO.: G.1.d.

CITE: (5/5/80), Ind. App., 403 N.E.2d 1104

SUBJECT: Probation revocation appeals -- must show prejudice from failure to have prerevocation hearing

HOLDING: Due process does not require that probationer benefit from denial of timely prerevocation hearing, but only that no unfairness result therefrom. Accordingly, probationer whose probation has been revoked after properly-conducted revocation hearing is not entitled to have revocation set aside unless it appears that failure to accord him prerevocation hearing resulted in prejudice to him at revocation hearing. Where there has been revocation hearing at which Tr.Ct found that there has been violation, subsequent preliminary hearing is purely supererogatory, & its absence under these circumstances violates no right of probationer. Here, D appealed revocation of his probation, claiming he was denied due process by Tr. Ct.'s failure to hold preliminary hearing. D maintained that in all probation revocation proceedings in which probationer is held in custody, due process demands probable cause preliminary hearing. Ct. held that not only has D failed to demonstrate prejudice, he has not even claimed prejudice. Only contention is that because he was in jail without preliminary hearing, his probation revocation should be reversed. Held, revocation of probation affirmed.

G. APPEAL
G.2. Procedure

TITLE: Fulkrod v. State
INDEX NO.: G.2.
CITE: (4th Dist., 11-2-06), Ind. App., 855 N.E.2d 1064
SUBJECT: Perfecting appeal- appellate Ct. relief from denial of Notice of Appeal; Blakely-retroactivity
HOLDING: Appellate Ct. granted D right to file a belated appeal where Tr. Ct. denied D's Notice of Appeal. D was sentenced in 1994 to forty (40) years for a Class A felony, & appealed the conviction in 1995. On April 7, 2005, D filed a motion to correct erroneous sentence in which he alleged his sentence violated Blakely & which was denied on April 13, 2005. On June 23, 2005, D filed a motion requesting permission to file a belated notice of appeal, which was denied the same day. On July 6, 2005, D filed a Notice of Appeal in an effort to appeal the denial of his motion requesting permission to file a belated appeal & which was denied by the Tr. Ct. stating, "Ct. previously has denied the request." After Tr. Ct. denied a motion to correct error filed by D alleging the erroneous denial of D's Notice of Appeal, D filed a Verified Petition for Permission to File a Belated Appeal with the Ct. App.

Although this motion is generally to be filed in the Tr. Ct., the Ct. App. granted the motion being that the Tr. Ct. denied D his Post-Conviction Rule 2 right to appeal the denial of the permission to file the belated appeal. Because both parties believed, as evidenced through the briefs, the appellate Ct. was going to address the constitutionality of the sentence rather than the propriety of the denial of the permission to file a belated appeal, the appellate Ct. addressed the Blakely issue.

Blakely applies retroactively to all cases on direct review at the time Blakely was announced. Here, in D's 1995 appeal, he challenged his sentence. When his sentence was affirmed in 1995, D's case was no longer on direct review. Thus, Blakely does not apply retroactively to D's sentence. Held, judgment affirmed.

G. APPEAL

G.2. Procedure

G.2.a. Time requirements/advice of rights (CR 11)

TITLE: Baker v. State
INDEX NO.: G.2.a.
CITE: (3d Dist. 3/30/87), Ind. App., 505 N.E.2d 498
SUBJECT: Appeals - timely filing
HOLDING: Incarcerated D's deposit of MCE in institutional mail pouch 4 days before deadline satisfies TR 5(E)(2), even though MCE was not postmarked for 12 days. Seastrom, Inc. et al. v. Amick Constr. Co., Inc., App., 306 N.E.2d 125 (filing is accomplished upon deposit in mail). Furthermore, denial of D's MCE, filed late through no fault of his own, is inconsistent with Childs v. Duckworth (CA7 1983), 705 F.2d 915. Childs imparts duty to ensure that pro se litigant's claims are given fair & meaningful consideration. Held, reversed & remanded.

TITLE: Beaudry v. State
INDEX NO.: G.2.a.
CITE: (2-27-02), Ind. App., 763 N.E.2d 487
SUBJECT: Belated appeal rejected - delay fault of D
HOLDING: Tr. Ct. did not abuse its discretion in denying D's petition to file belated appeal. D pled guilty to criminal confinement in 1990 & was sentenced to two weeks executed, probation, restitution, & fined. In 1992, D filed petition to modify sentence, which was denied & never appealed. Then in 2000, D filed motion to modify judgment of conviction. Specifically, D requested Tr. Ct. to reduce sentence to misdemeanor because felony would adversely affect his ability to obtain pharmacy technician license. However, other than unsupported assertion that he was prejudiced by Tr. Ct.'s advisement that guilty plea would waive right to direct appeal, D presented no evidence that his failure to file timely appeal was due to fault of another, nor did he show that he was diligent in requesting permission to file belated notice of appeal. Further, it is well settled that one of consequences of pleading guilty is that D loses ability to challenge conviction on direct appeal. Collins v. State, 740 N.E.2d 143 (Ind. Ct. App. 2000). Held, judgment denying D's motion to file belated appeal affirmed.

RELATED CASES: Welches, App., 844 N.E.2d 559 (Tr. Ct. erred in denying a petition for leave to file a belated notice of appeal without hearing).

TITLE: Dowell v. State
INDEX NO.: G.2.a.
CITE: (03-10-10), 922 N.E.2d 605 (Ind. 2010)
SUBJECT: Prison mailbox rule adopted - D filed untimely motion to correct error
HOLDING: Under "prison mailbox rule," recognized in Houston v. Lack, 487 U.S. 266 (1988), pro se filings from an incarcerated litigant are deemed filed when they are delivered to prison officials for mailing. Court explicitly adopted prison mailbox rule in Indiana, pro se litigant must still provide reasonable, legitimate, and verifiable documentation supporting his claim that a document was timely submitted to prison officials for mailing.

In this case, State did not take issue with any of D's filings governed by the appellate rules but argued that the appeal should be dismissed because D's motion to correct error was untimely. Indiana Trial Rule 59(C) requires that a motion to correct error be filed within thirty days after entry of final judgment. The gist of Trial Rule 5(F) is that when a party transmits by an independently verifiable means (e.g., registered mail or third-party carrier), the filing is deemed to have occurred upon mailing or deposit. When other means are used, filing occurs on the date the filing is in the hands of the clerk. Indianapolis Mach. Co. v. Bollman, 167 Ind. App. 596, 339 N.E.2d 312 (1976). D used regular mail, perhaps tendering it on the last day. Tr. Ct. thus appropriately date-stamped it on the day when it arrived in the clerk's office, two days after the filing deadline. When a motion to correct error is not timely filed, the right to appeal is not preserved. Held, transfer granted, Court of Appeals' opinion at 908 N.E.2d 643 vacated, appeal dismissed.

RELATED CASES: Lawrence, App., 915 N.E.2d 202 (prison mailbox rule applies to direct appeals).

TITLE: Fulkrod v. State

INDEX NO.: G.2.

CITE: 855 N.E.2d 1064 (Ind. Ct. App. 2006)

SUBJECT: Perfecting appeal- appellate court relief from denial of Notice of Appeal; Blakely-retroactivity

HOLDING: Appellate court granted D right to file a belated appeal where Tr. Ct. denied D's Notice of Appeal. D was sentenced in 1994 to forty (40) years for a Class A felony, and appealed the conviction in 1995. On April 7, 2005, D filed a motion to correct erroneous sentence in which he alleged his sentence violated Blakely and which was denied on April 13, 2005. On June 23, 2005, D filed a motion requesting permission to file a belated notice of appeal, which was denied the same day. On July 6, 2005, D filed a Notice of Appeal in an effort to appeal the denial of his motion requesting permission to file a belated appeal and which was denied by the Tr. Ct. stating, "Court previously has denied the request." After Tr. Ct. denied a motion to correct error filed by D alleging the erroneous denial of D's Notice of Appeal, D filed a Verified Petition for Permission to File a Belated Appeal with the Court of Appeals.

Although this motion is generally to be filed in the Tr. Ct., the Court of Appeals granted the motion being that the Tr. Ct. denied D his Post-Conviction Rule 2 right to appeal the denial of the permission to file the belated appeal. Because both parties believed, as evidenced through the briefs, the appellate court was going to address the constitutionality of the sentence rather than the propriety of the denial of the permission to file a belated appeal, the appellate court addressed the Blakely issue.

Blakely applies retroactively to all cases on direct review at the time Blakely was announced. Here, in D's 1995 appeal, he challenged his sentence. When his sentence was affirmed in 1995, D's case was no longer on direct review. Thus, Blakely does not apply retroactively to D's sentence. Held, judgment affirmed.

TITLE: Peguero v. U.S.
INDEX NO.: G.2.a.
CITE: 526 U.S. 23; 119 S.Ct. 961; 143 L.Ed.2d 18 (1999)
SUBJECT: Failure to Advise of Right to Appeal -- Harmless Error Where D Knew of Appellate Rights
HOLDING: Sentencing court's failure to advise D of right to appeal, as required by Fed. R. Crim. Pro. 32(a)(2), does not entitle D to federal habeas corpus relief where he was aware of this right. Failure to provide advisement required by rule is subject to harmless error analysis. Because petitioner's testimony indicated that he was aware of right to appeal, he suffered no prejudice, & failure to advise him of this right was harmless error. O'Connor, Stevens, Ginsburg, & Breyer, JJ, concur, writing separately to note that in their opinion harmless error analysis of this type of error should be limited to review of whether petitioner was aware of right to appeal, & that petitioner should not have to show that had he been advised of & filed an appeal, he would have prevailed.

TITLE: United States v. Frias
INDEX NO.: G.2.a.
CITE: 521 F.3d 229 (2nd Cir. 2008)
SUBJECT: Government's failure to object to late appeal allows court to consider
HOLDING: Second Circuit held the government's failure to object to the lateness of D's notice of appeal leaves the door open for the court of appeals to consider the appeal. Court addressed the timeliness question sua sponte and concluded that it had subject-matter jurisdiction to consider the appeal due to the government's failure to raise a timeliness challenge. Court was interpreting Fed.R.App.P. 4(b) and in the past had said Rule 4(b) was jurisdictional in nature and barred any late appeals. Court rethought issue based on two recent U.S. Supreme Court cases Kontrick v. Ryan, 540 U.S. 443 (2004) and Bowles v. Russell, 81 CrL 376 (U.S. 2007) that analyzed timeliness of claims and whether such limits in other context were jurisdictional or nonjurisdictional. Court concluded that, because Rule 4(b) is purely a court-prescribed rule of procedure, it is not jurisdictional in nature and a circuit court thus may entertain a late appeal if the government fails to contest it on that ground. Court further noted that when the government properlty objects the rule is mandatory as to timeliness.

G. APPEAL

G.2. Procedure

G.2.b. Relief from default (PC 2) (see X.8)

TITLE: Atkins v. Veolia Water
INDEX NO.: G.2.b.
CITE: (10/1/2013), 994 N.E.2d 1287 (Ind. Ct. App. 2013)
SUBJECT: Tr. Ct. did not abuse discretion in denying T.R. 72(E) motion
HOLDING: Tr. Ct. did not abuse its discretion in denying Appellant's Trial Rule 72(E) motion for extension of time to file Notice of Appeal because even if Appellant's counsel "never laid eyes" on a copy of the Tr. Ct.'s order that granted Appellee's motion for judgment on the pleadings, Appellant's counsel received adequate notice because the Chronological Case Summary ("CCS") indicated that notice was mailed to Appellant's counsel.

Here, staff for Appellant's counsel misfiled the notice, so Appellant's counsel did not actually see the order and did not learn about the ruling until two months after the order was issued.

Even if Appellant's counsel did not have actual knowledge of the order, his staff's mishandling of the order does not negate the fact that notice was given. See Blichert v. Brosky, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982) (receipt of a copy of an order "constitutes notice for all purposes"). In fact, where the CCS indicates that notice was provided to counsel, a party's "actual knowledge" of the ruling is irrelevant; the remedial provisions of T.R. 72(E) are available only upon the prerequisite showing that notice was not provided, which Appellant has failed to do. See Collins v. Covenant Mutual Ins. Co., 644 N.E.2d 116, 117-18 (Ind. 1994) and Markle v. Indiana State Teachers Ass'n, 514 N.E.2d 612, 614 (Ind. 1987). Held, judgment affirmed.

TITLE: Cooper v. State
INDEX NO.: G.2.b.
CITE: (12-09-09), (Ind. 2009) 917 N.E.2d 667
SUBJECT: Untimely appeal of probation revocation
HOLDING: A D must file either a notice of appeal or a motion to correct error no later than thirty days after a final appealable order is issued. Ind. Appellate Rule 9(A)(1). However, an appellate court has inherent authority to review an untimely appeal where the appeal qualifies as a rare and exceptional case of great public importance. See Lugar v. State ex rel. Lee, 270 Ind. 45, 383 N.E.2d 287 (1978). Here, Tr. Ct. deprived D of due process when it revoked his probation based solely on probable cause affidavit, without conducting an evidentiary hearing. D did not file a motion to correct error or a notice of appeal but filed a motion to reconsider the probation revocation after the State dismissed new charges underlying the revocation. Although D timely appealed the denial of his motion to reconsider, he used the appeal to argue that the initial revocation was improper because he was denied the right to due process.

Court held that D's failure to timely appeal the probation revocation was fatal to his appeal. Revoking probation without providing even the most rudimentary due process rights is not a rare and exceptional case of great public interest under Lugar to allow appellate review despite D's untimely appeal. Thus, only Tr. Ct.'s denial of D's motion to reconsider was reviewable on appeal.

Dismissal of charges underlying the revocation was inconsequential. A Tr. Ct. may still revoke probation even when a D has been acquitted of the charges providing the basis for the revocation. Brown v. State, 458 N.E.2d 245 (Ind. Ct. App. 1983). Because arrest was reasonable and there was probable cause that D committed the offenses, evidence was sufficient to support Tr. Ct.'s denial of Cooper's motion to reconsider. Brooks v. State, 692 N.E.2d 951 (Ind. Ct. App. 1998). Held, transfer granted, Court of Appeals' opinion at 894 N.E.2d 993 vacated, judgment affirmed. Boehm, J., dissenting, would entertain merits of appeal pursuant to Indiana Post-Conviction Rule 2.

RELATED CASES: Morales, 19 N.E.3d 292 (Ind. Ct. App. 2014) (late notice of appeal did not forfeit appeal where notice was only 1 day late and courts have interest in judicial economy and finality of post-conviction proceedings, (citing In re Adoption of O.R., 16 N.E.3d 964 (Ind. 2014) (late notice of appeal forfeits right to appeal absent "extraordinarily compelling reasons") (see full review, at G.2.e.2)).

TITLE: Dillman v. State
INDEX NO: G.2.b.
CITE: (8/29/2014), 16 N.E.3d 445 (Ind. Ct. App. 2014)
SUBJECT: D not entitled to T.R. 72(E) extension to initiate appeal
HOLDING: Even if D did not receive notice of Tr. Ct. order releasing D's cash bond to pay costs and fees, Tr. Ct. was not obligated to extend deadline, pursuant to Trial Rule 72(E), for D to appeal the order. T.R. 72(E) places an affirmative obligation on a person to apply for such an extension. See id. Because he failed to do so, D waived the right to review of his claim that the Tr. Ct. lacked authority to release his cash bond. Held, judgment affirmed.

Lack of notice of Tr. Ct.'s order that released D's cash bond to pay costs and fees did not extend the deadline for filing notice of appeal.

D posted a cash bond of $700 but after guilty plea the Tr. Ct. ordered that he “pay costs and fees out of cash bond” and D did not appeal. The State conceded that the Tr. Ct. was not statutorily authorized to retain the cash bond. However, D waived the issue and this was not fundamental error.

TITLE: Driver v. State
INDEX NO.: G.2.b.
CITE: (08-11-11), 954 N.E.2d 972 (Ind. Ct. App. 2011)
SUBJECT: Trial Rule 72 is only remedy for extending filing deadline due to lack of notice of ruling
HOLDING: When a party seeks to extend a filing deadline, based upon a claim of failure to receive notice of final judgment, Indiana Trial Rule 72, rather than Trial Rule 60, is the "sole vehicle" for relief. Collins v. Covenant Mut. Ins. Co., 644 N.E.2d 116 (Ind. 1994). Trial Rule 72(E) provides that even when a party could receive an extension of time, the extension commences when the party first obtains actual knowledge of an order or judgment and shall not exceed the original time limitation. Here, post-conviction court's Chronological Case Summary does not indicate whether notice of Tr. Ct.'s final judgment was mailed to D or his counsel. However, D did not file his Verified Motion to Vacate Judgment until over fifty days after gaining actual knowledge of judgment, which is well outside the thirty-day deadline for filing a Notice of Appeal. Trial Rule 60(B) and Soft Water Utils., Inc. v. LeFevre, 301 N.E.2d 745 (Ind. 1973), no longer provide an avenue for relief for a party that can seek relief under Trial Rule 72(E). Held, denial of Motion to Vacate Judgment affirmed.

RELATED CASES: Atkins, 994 N.E.2d 1287 (Ind. Ct. App. 2013) (if CCS indicates that Tr. Ct. sent notice of ruling to a party, the party has received adequate notice and the fact that the party's counsel did not have actual knowledge of the ruling is irrelevant; see full review in this section).

TITLE: Gentry v. State
INDEX NO.: G.2.b.
CITE: (03-08-93), Ind., 609 N.E.2d 1092
SUBJECT: Appeal properly dismissed where record not timely filed - other remedy
HOLDING: Ct. App. decision dismissing D's appeal was proper, but additional remedy was available. After PCR hearing, D timely filed pro se praecipe for transcript. Although transcript was apparently prepared, D was unable to get copy to file to institute appeal. D filed additional pro se motions in attempt to obtain transcript, & to get extensions of time from Ct. of App. to file record. After granting two extensions, Ct. App. set final deadline for filing, & transcript was not filed by that date. Ct. App. therefore dismissed D's appeal. S.Ct. found Ct. App. acted appropriately in following only path available to it, short of granting perpetual extensions. Ct. noted that D might have sought writ in aid of appellate jurisdiction to compel completion of transcript but did not appear to consider failure to do so fatal. Ct. then directed D to PCR Rule 2(3) for belated appeals, finding that he had timely filed praecipe, that failure to perfect appeal was apparently not his fault, & that he had been diligent in effort to have day in appellate ct. Held, petition to transfer granted, & Ct .App.'s order affirmed.

RELATED CASES: George, App., 862 N.E.2d 260 (D should seek permission to file belated appeal with appellate Ct. if notice of appeal previously filed).

TITLE: Taylor v. State
INDEX NO.: G.2.b.
CITE: (01-10-11), 939 N.E.2d 1132 (Ind. Ct. App. 2011)
SUBJECT: Equitable relief given to D who filed untimely notice of appeal
HOLDING: In "rare and exceptional circumstances" appellate courts have the inherent authority to entertain an appeal after the time permitted has expired. Lugar v. State ex rel. Lee, 383 N.E.2d 287 (Ind. 1978). Here, D requested relief pursuant to Trial Rule 72(E), alleging he was moved from one Department of Correction facility to another, alerted the post-conviction court to his new address, but did not receive notice of the post-conviction court's order denying his petition for post-conviction relief until it was mailed to him pursuant to his request for clarification of the status of his case. He therefore requested an extension of time in which to appeal the post-conviction court's denial of his petition. Under facts and circumstances of this case, post-conviction court abused its discretion in denying D the relief he sought under Trial Rule 72(E).

Although D did not appeal the denial of his Rule 72(A) motion within thirty days, instead filing a Post-Conviction Rule 2 petition to file belated appeal, which was an inappropriate procedural vehicle for seeking relief, Court held D demonstrated extraordinary circumstances justifying exercise of its inherent power to grant equitable relief, i.e., the opportunity to appeal the denial of his petition for post-conviction relief. Acting pro se and with limited resources and ability to monitor the progress of his case, D "did everything he knew to do to bring this case to the appellate courts." Held, reversed and remanded with instructions to accept notice of appeal from denial of petition for post-conviction relief.

RELATED CASES: Atkins, 994 N.E.2d 1287 (Ind. Ct. App. 2013) (if CCS indicates that Tr. Ct. sent notice of ruling to a party, the party has received adequate notice and the fact that the party's counsel did not have actual knowledge of the ruling is irrelevant; see full review in this section); Phovemire, 960 N.E.2d 176 (Ind. Ct. App. 2011) (where D did not seek relief under T.R. 72(b) and the circumstances of his case were not extraordinary requiring equitable relief, D's failure to file his belated notice of appeal within thirty days of the Tr. Ct.'s order granting him permission to file the belated appeal barred his appeal).

G. APPEAL

G.2. Procedure

G.2.c Appointment of Counsel of Appeal

TITLE: Gosha v. State
INDEX NO.: G.2.c.
CITE: (5th Dist., 09-18-07), Ind. App., 873 N.E.2d 660
SUBJECT: Appeal from admitted probation revocation- no right to pauper attorney
HOLDING: Tr. Ct. did not abuse its discretion when it refused to appoint D pauper counsel for purposes of appeal from his admitted probation revocation. Following a judgment revoking probation of a D found to have violated the terms of his probation after a contested felony probation revocation proceeding, the judge shall immediately advise D that he is entitled to an appeal & pauper counsel, if necessary. Indiana Rule of Criminal Procedure 11. Here, after D admitted to probation violations, Tr. Ct. revoked probation & sentenced D. D then asked for pauper appellate counsel, which Tr. Ct. denied. Because Criminal Rule 11 only applies to contested felony probation revocation proceedings, there is no right to appellate pauper counsel when a D admits the probation violations. Held, judgment affirmed.

TITLE: Halbert v. Michigan
INDEX NO.: G.2.c.
CITE: 545 U.S. 605 (2005)
SUBJECT: Indigent Defense, Appeals
HOLDING: A state may not refuse to provide counsel to indigent offenders seeking leave of court to appeal after guilty pleas. In criminal proceedings, a state must provide counsel to indigent Ds in a first appeal as a matter of right. Douglas v. California, 372 U.S. 353 (1963). However, the federal constitution does not require a state to provide appointed counsel to a D seeking second-tier discretionary appellate review to a state's highest court. Ross v. Moffitt, 417 U.S. 600 (1974).

Under a 1994 amendment to the Michigan state constitution, D must seek leave of court to appeal after a guilty plea. Michigan judges began to deny appointed appellate counsel to indigents, and the state supreme court upheld the practice, which was codified by the legislature. Halbert, after pleading *nolo contendere*, sought the appointment of counsel to assist him in applying for leave to appeal. The Tr. Ct. denied his request for counsel and the Michigan Court of Appeals denied leave to appeal. The U.S. Supreme Court held that *Douglas*, not *Ross*, controlled, and that Halbert was entitled to the assistance of appointed counsel in seeking leave to appeal. The Court also examined the record and held that Halbert had not waived his right to appointed counsel by his plea of *nolo contendere.*

G. APPEAL

G.2. Procedure

G.2.d. Bail on appeal (Ind. Code 35-33-9)

G.2.d.1. Procedure

TITLE: Tyson v. State
INDEX NO.: G.2.d.1.
CITE: (04/24/92), Ind., 593 N.E.2d 175
SUBJECT: Bail pending appeal
HOLDING: S.Ct. granted transfer for limited purpose of outlining standards & procedures relating to requests for bond pending appeal of criminal case. Ct. found that App. Rule 6 provided for appellate court to consider bail issue. Appellate court's review under App. Rule 6(B) is not de novo, however, nor is it limited to review of Tr. Ct.'s abuse of discretion. Review lies somewhere in middle, with court having ability to examine factors pertinent to bail decision but granting Tr. Ct. appropriate deference on issues where Tr. Ct. is in best position to judge. Because of presumption of guilt after conviction, D bears burden of demonstrating compelling reasons to allow him to remain free pending appeal. Three factors to consider are: 1) probability of reversible error at trial, 2) risk of flight, & 3) potential dangerousness of D. Factors 2 & 3 involve deference to Tr. Ct., while factor 1 does not. To succeed in showing probability of reversible error, D must convince court not just that there are meritorious issues for appeal, but that his case will probably be reversed on appeal. With regard to factor 3, court found that burden is on D to show he is not dangerous. Court determined that record & arguments provided did not show denial of bond was so clearly erroneous that court should exercise inherent authority to overrule it.

G. APPEAL

G.2. Procedure

G.2.d.2. Eligibility

TITLE: Carter v. State
INDEX NO.: G.2.d.2.
CITE: (8/31/84), Ind., 467 N.E.2d 694)
SUBJECT: Bail on appeal - eligibility
HOLDING: Tr. Ct. did not err in denying D an appeal bond where D stood convicted of Class A felony. Eligibility for release on appeal bond is controlled by statute in effect at time such release is sought. State ex rel. Dorton v. Circuit Court of Elkhart County 412 N.E.2d 72. Ind. Code 35-33-9-1, in effect when D sought release on appeal bond, provided that any D convicted of Class A felony "may not be admitted to" appeal bond. Held, no error.

G. APPEAL

G.2. Procedure

G.2.d.3. Exercise of discretion

TITLE: Willis v. State
INDEX NO.: G.2.d.3.
CITE: (3d Dist. 4/29/86), Ind. App., 492 N.E.2d 45
SUBJECT: Bail on appeal - exercise of discretion
HOLDING: Following denial of bail pending appeal by Tr. Ct., D may properly petition appellate court to be let to bail pending appeal. Ind. Code 35-33-9-1. Court finds statute does not vest discretion solely in Tr. Ct. Statute makes discretion available & indicates that D should make initial application to court in which case was tried. Cf. Peek, App., 454 N.E.2d 450 (Tr. Ct. did not abuse discretion by denying D's request for appeal bond). Court concurs with footnote in Naked City, Inc., App., 434 N.E.2d 576 which found proceeding under AR 6(D) is in aid of court's appellate jurisdiction; therefore, court is not limited to reviewing Tr. Ct.'s determination for an abuse of discretion. Court may reconsider application. Held, D ordered let to bail pending diligent prosecution of appeal (order set forth in opinion).

G. APPEAL

G.2. Procedure

G.2.d.4. Other

TITLE: Ryan v. State
INDEX NO.: G.2.d.4.
CITE: (8/26/2015), 42 N.E.3d 1019 (Ind. Ct. App. 2015)
SUBJECT: D not entitled to credit time while on appeal bond
HOLDING: In addressing an issue of first impression, Court held that Appellate Rule 18 and IC 35-33-9-5(c) forbid granting credit time to a person released on an appeal bond. After the Court reversed D's convictions for sexual misconduct with a minor, D sought an appeal bond with the Tr. Ct., which granted the request. D spent 429 days under the conditions of the appeal bond, supervised by Marion County Community Corrections (MCCC), before the Indiana Supreme Court reversed the Court's decision and reinstated D's convictions. Tr. Ct. refused to grant D's request for credit time for the 429 days he was supervised by MCCC.

D's claim that he is entitled to credit time because the terms of his appeal bond were especially onerous misses the mark. Because upon the granting of an appeal bond the judgment "shall be stayed," the Tr. Ct. had no discretion to grant the request for credit time and "was required to simply apply the mandate of IC 35-33-9-5(c)." See also Ind. Appellate Rule 18 and Molden v. State, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001). Held, judgment affirmed.

TITLE: Tyson v. State
INDEX NO.: G.2.d.4.
CITE: (4/24/92), Ind., 593 N.E.2d 175
SUBJECT: S.Ct.'s jurisdiction in case involving bail pending appeal
HOLDING: Although Ind. Code 35-33-9-1 assigns question of bail pending appeal to discretion of Tr. Ct., appellate rules contemplate role for appellate Cts. as well. Ind. Appellate Rule 6(B) states that if stay is denied by Tr. Ct. or judge thereof, appellate tribunal may reconsider application at any time after denial upon proper showing by certified copies of Tr. Ct.'s action & grant or deny same & fix bond. Here, D sought bail from Tr. Ct. pending appeal pursuant to Ind. Code 35-33-9-1 & his request was denied. D immediately filed petition for bail pending appeal in Indiana Ct. App. pursuant to App.R. 6(B), which was also denied. D then filed petition in S.Ct. for request for writ in aid of jurisdiction or in alternative for transfer. Ct. held that writ in aid of appellate jurisdiction was not proper means of invoking S.Ct.'s jurisdiction over appeal of denial of D's request for bail pending appeal in chief. Issue of whether D would receive bail pending his appeal did not involve S.Ct.'s appellate jurisdiction over merits of D's appeal in chief. Held, case returned to Ct. App.

G. APPEAL

G.2. Procedure

G.2.e. Perfecting the appeal

G.2.e.2. Notice of appeal

TITLE: F.E.H. v. State

INDEX NO.: G.2.e.2.

CITE: (2nd Dist., 9-17-99), Ind. App., 715 N.E.2d 1272

SUBJECT: Denial of praecipe for record after true finding of delinquency - not final appealable judgment

HOLDING: Tr. Ct. did not err in denying two of D's motions requesting that record of proceedings be prepared. Although Tr. Ct. issued its true finding in delinquency proceeding on 7/29/98 & 9/2/98, on neither date had Tr. Ct. disposed of all issues in D's case. Tr. Ct.'s true finding in juvenile delinquency proceeding is not "final judgment" that may be appealed. Rather, it was not until after disposition hearing of 10/22/98 that resolution of all issues in D's case occurred. Tr. Ct.'s disposition of 10/22/98 was final judgment from which D was permitted to take appeal. Held, judgment affirmed.

TITLE: Glover v. State
INDEX NO.: G.2.e.2.
CITE: (4th Dist., 8-20-97), Ind. App., 684 N.E.2d 542
SUBJECT: Praecipe for appeal untimely filed - dismissal for lack of jurisdiction
HOLDING: Ind. Appellate Rule 2(A) requires party seeking appeal to file praecipe within thirty days of entry of final judgment. Timely filing of praecipe is jurisdictional prerequisite to appellate Ct. jurisdiction, & failure to conform with applicable time limits results in forfeiture of appeal. Claywell v. Review Bd. of Ind. Dept. of Employment & Training Serv., 643 N.E.2d 330. Ind. Post-Conviction Rule 2 permits Ct. to grant appellant leave to file belated praecipe only if appellant is seeking direct appeal of conviction. Howard, 653 N.E.2d 1389. In this case, Ct. dismissed D's appeal of her probation revocation because praecipe was not timely filed. Held, appeal dismissed.

RELATED CASES: Morales, 19 N.E.3d 292 (In.Ct. App. 2014) (late notice of appeal did not forfeit appeal where notice was only one day late and courts have interest in judicial economy and finality of post-conviction proceedings (citing In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014) (Ind. Sept. 25, 2014) (late notice of appeal forfeits right to appeal absent “extraordinarily compelling reasons") (see full review, this section)); Wilson, 988 N.E.2d 1211 (Ind. Ct. App. 2013) (appeal may raise issues only related to order issued within 30 prior days, not earlier related order); Marlett, App., 878 N.E.2d 860 (date notice of appeal is postmarked & not date received by Tr. Ct. is date of filing); Sagalovsky, App., 836 N.E.2d 260 (failure to file notice of appeal with Dor his counsel until filing of brief did not necessitate dismissal of the appeal); Cooper, App., 714 N.E.2d 689 (time to file praecipe begins running from entry of sentencing order, and praecipe is filed at time it is mailed); Wesley, App., 696 N.E.2d 882 (D was required to file praecipe ten days after Ct. App.'s order accepting jurisdiction of interlocutory appeal, but there was no praecipe in record; Ct. lacked subject matter jurisdiction to review issue presented & dismissed appeal on its own motion).

TITLE: In re Adoption of O.R.
INDEX NO: G.2.e.2.
CITE: (9/25/2014), 16 N.E.3d 965 (Ind. 2014)
SUBJECT: Timely filing of notice of appeal is not jurisdictional
HOLDING: In an adoption matter, Court of Appeals erred in dismissing appeal on basis that Father's failure to timely file Notice of Appeal deprived it of subject matter jurisdiction. Past decisions discussing the viability of an appeal have shown "a tendency to confuse jurisdictional defects with legal errors." R.L. Turner Corp. v. Town of Brownsburg, 963 N.E.2d 453, 457 (Ind. 2012). While Appellate Rule 9(A)(5) states that "the right to appeal shall be forfeited" unless the Notice is timely filed, neither that rule nor any other appellate rule states that such a failure deprives an appellate court of jurisdiction over an appeal. Thus, a belated Notice of Appeal is a legal error by which an appeal is forfeited, but it does not deprive appellate courts of authority to, in their discretion, entertain such an appeal. The fact that Appellate Rule 1 allows an appellate court to, on its own motion, to "permit deviation from these Rules" is a recognition that a court may assume jurisdiction over a forfeited appeal.

Here, Tr. Ct. found that Father's consent was not required to grant foster parents' petition to adopt. Four days before Notice of Appeal was due, Father sent letter to Tr. Ct. clerk requesting appointment of appellate counsel. Tr. Ct. did not appoint counsel until well after Notice of Appeal was due. Appellate counsel filed a belated Notice.

Court found compelling reasons to restore forfeited appeal. A parent's interest in the care, custody and control of his child is "perhaps the oldest of fundamental liberty interests." Similarly, the parent-child relationship is "one of the most valued relationships in our culture." Further, Father sought appointment of counsel before the Notice was due. The "unique confluence" of these factors led the Court to restore the appeal and review Father's claim on the merits. Cf. In re Adoption of T.L., 4 N.E.3d 658, 661 n.2 (Ind. 2014); In re K.T.K., 989 N.E.2d 1225, 1229 (Ind. 2013); In re D.L., 952 N.E.2d 209, 212-14 (Ind. Ct. App. 2011); In re J.G. and C.G., 4 N.E.3d 814, 820 (Ind. Ct. App. 2014). Held, appeal reviewed on merits; judgment affirmed.

RELATED CASES: D.J., 68 N.E.3d 574 (Ind. 2017) (while each parent's premature notice of appeal forfeited their right to appeal the CHINS dispositional order, the Supreme Court still held authority to exercise jurisdiction over the case and did so to address the significant parental interests at stake; see full review, this section); Sanford, 2016 Ind. App. LEXIS 16, sum. aff'd 51 N.E.3d 1182 (Ind. 2016) (declining to find that In re O.R. should be extended to criminal Ds who already have a remedy for reinstating an untimely appeal through Post-Conviction Rule 2); Satterfield, 30 N.E.3d 1271 (Ind. Ct. App. 2015) (despite late notice of appeal, court reviewed denial of bail as the fundamental liberty interests at issue in bail create extraordinarilly compelling reasons to consider appeal on the merits); Morales, 19 N.E.3d 292 (Ind. Ct. App. 2014) (late notice of appeal did not forfeit appeal where notice was only 1 day late and courts have interest in judicial economy and finality of post-conviction proceedings).

TITLE: In re D.J.
INDEX NO.: G.2.e.2.
CITE: (2/7/2017), 68 N.E.3d 574 (Ind. 2017)
SUBJECT: Premature notice of appeal not fatal to appellate jurisdiction
HOLDING: Even though each parent forfeited their right to appeal a CHINS finding by filing a premature notice of appeal, the Supreme Court held discretionary authority to exercise jurisdiction over the case, and did so to reach the merits of the case. Forfeiture and jurisdiction are not the same. In re Adoption of O.R., 16 N.E.3d 965, 970 (Ind. 2014). Forfeiture is the loss of a right while jurisdiction refers to a court's power to decide a case. Id.; id at 971. There are only two prerequisites to appellate jurisdiction: 1) an appealable order and 2) an entry on the CCS that the trial court clerk has filed the notice of completion of clerk's record. See Ind. Appellate Rule 8; Alexander v. State, 4 N.E.3d 1169, 1170 n.3 (Ind. 2014). Here, the notices of appeal were premature because they were filed after the dispositional hearing but before entry of the dispositional order. Thus, each parent forfeited their right to appeal. Nonetheless, the dispositional order is an appealable order, and the CCS reflects the filing of the notice of completion of clerk's record. Thus, the Supreme Court had authority to assume jurisdiction over the case, and did so because of its preference to decide cases on the merits and the important parental interests at stake. Held, transfer granted, Court of Appeals' opinion vacated, and judgment reversed.

RELATED CASES: In re N.C., 72 N.E.3d 519 (Ind. Ct. App. 2017) (had Father been able to take advantage of discretionary rule announced in D.J. of reviewing "premature" appeals, thus allowing him to file his notice of appeal without waiting for the formality of a dispositional order, "this appeal could have been resolved even sooner").

TITLE: Morales v. State
INDEX NO.: G.2.e.2.
CITE: (10/15/2014), 19 N.E.3d 292 (Ind. Ct. App. 2014)
SUBJECT: Late Notice of Appeal did not forfeit post-conviction appeal
HOLDING: D's belated notice of appeal did not forfeit his appeal. See In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014) (late notice of appeal forfeits right to appeal absent "extraordinarily compelling reasons.") Such compelling reasons are not determined solely from the perspective of the litigant but also that of the courts, which have an interest in judicial economy and finality of post-conviction proceedings. The Court also observed that D's notice was only one day late and noted its preference to decide cases on the merits. Thus, it addressed but rejected D's claim that trial counsel was ineffective for failing to object to a nurse's testimony as to what constitutes penetration of the female sex organ. Held, judgment affirmed.

TITLE: Rasaki v. State
INDEX NO.: G.2.e.2.
CITE: (2/18/2014), 3 N.E.3d 1058 (Ind. Ct. App. 2014)
SUBJECT: Untimely appeal – filing PCR petition instead of initiating appeal from denial of motion to correct error
HOLDING: Court sua sponte dismissed appeal of belated notice of appeal, depriving the Court of jurisdiction to hear the appeal.

D filed a motion to correct error, claiming insufficient evidence for his battery convictions. While the motion was pending, D filed a PCR petition. As he waited for a ruling on his petition, he sought and obtained four extensions of time to file his notice of appeal, purportedly authorized by Trial Rule 6(B).

When a Tr. Ct. denies a motion to correct, Appellate Rule 9(A) gives a party no more that thirty days to file a notice of appeal. Where a D fails to do so, he forfeits his appeal. Trial Rule 6(B) does not extend the deadline to file a notice of appeal; it provides "relief from a condition that is less than a final order or judgment . . ." Harvey, 1 Ind. Practice Rules of Appellate Procedure, Annotated, Rule 6 (3d ed.).

To seek post-conviction relief yet preserve his direct appeal, D should have timely initiated this appeal and then have asked the Court to stay the appeal and remand for disposition of his PCR petition. See Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). If the Tr. Ct. were to deny the PCR petition, the Court would reinstate the appeal upon request. See id; see also Davis v. State, 368 N.E.2d 1149, 1151 (Ind. 1977). D's failure to use this procedure and obtaining unauthorized extensions to file his notice of appeal results in forfeiture of this appeal. Nonetheless, D still has a remedy; he can seek relief under PCR Rule 2 to resurrect his direct appeal. Held, appeal dismissed as untimely and judgment affirmed.

TITLE: Strong v. State
INDEX NO.: G.2.e.2.
CITE: (4/9/2015), 29 N.E.3d 760 (Ind. Ct. App. 2015)
SUBJECT: No abuse of discretion for belated appeal of infraction
HOLDING: Tr. Ct. did not abuse its discretion by twice authorizing D under PC Rule 2 to file a belated notice of appeal to appeal his infraction of failing to stop at a stop sign. Even though the rule is restricted to appealing a "conviction or sentence," D's case, as a whole, was a criminal case because he was also convicted of OWI, even if he did not appeal that conviction. Further, the reason D sought appellate relief from the infraction is that he claimed it and the OWI conviction create a double jeopardy violation. See State v. Hurst, 688 N.E.2d 402, 405 (Ind. 1997) (overruled on other grounds by Cook v. State, 810 N.E.2d 1064 (Ind. 2004)) (traffic infractions may be civil proceedings by statute but are nonetheless classified as criminal for purposes of appeal). Finally, even if PC Rule 2 does not authorize D's belated appeal, a belated notice of appeal may be authorized if a D demonstrates "extraordinarily compelling reasons." In Re Adoption of O.R., 16 N.E.3d 965, 971-72 (Ind. 2014). Because the Tr. Ct. "twice grant[ed] [D's] motions to file a belated notice of appeal, it must have found compelling reasons to do so, and we give substantial deference to its decision." Held, judgment affirmed; Bailey, J., dissenting, finding that belated appeals under Post-Conviction Rule 2 are available only for appeals of convictions and sentences.

TITLE: Tarrance v. State
INDEX NO: G.2.e.2.
CITE: (04-29-11), 947 N.E.2d 494 (Ind. Ct. App. 2011)
SUBJECT: Notice of Appeal - pro se letter insufficient
HOLDING: Because D's pro se letter asking for an appeal and an attorney did not meet the requirements of a Notice of Appeal, Court lacks subject matter jurisdiction over the appeal. The timely filing of a notice of appeal is a jurisdictional prerequisite, and failure to conform to the applicable time limits results in forfeiture of an appeal. Sewell v. State, 939 N.E.2d 686 (Ind. Ct. App. 2010). Here, twenty-three days after his sentencing, D, pro se, filed a letter stating that he wished to appeal his sentence and asked for appointment of attorney. Tr. Ct. appointed the State Public Defender, and thirty-four days after the sentencing, the Public Defender accepted appointment. Two days later, D's appointed attorney filed an "Amended Notice of Appeal, claiming that D's pro se letter was the initial notice. But, the pro se letter did not comply with the requirements for a notice of appeal. Although the letter will likely permit D to file a petition for permission to file a belated notice of appeal, it is insufficient to preserve his right to appeal. The fact that D may be allowed to file a belated notice of appeal does not alter the fact that he did not seek permission to do so here. Held, appeal dismissed.

G. APPEAL

G.2. Procedure

G.2.e.4. Extensions of Time (CR 20)

TITLE: Davis v. State
INDEX NO.: G.2.e.4.
CITE: (7-19-02), Ind., 771 N.E.2d 647
SUBJECT: Late filing of notice of appeal - no jurisdiction to hear appeal
HOLDING: When D failed to timely file his notice of appeal, Ct. App. lacked authority to permit D to file belated notice. Unless notice of appeal is timely filed, right to appeal shall be forfeited except as provided by Post-Conviction Rule 2(1), which allows D to file petition for permission to file belated notice of appeal with Tr. Ct. P-C.R. 2(1) provides petitioners with a method to seek permission for belated consideration of appeals addressing conviction but does not permit belated consideration of appeals of other post-judgment petitions. Howard v. State, 653 N.E.2d 1389 (Ind. 1995). Here, D appealed denial of his motion to correct erroneous sentence, which must be considered petition for post-conviction relief. State ex rel. Gordon v. Vanderburgh Circuit Ct., 616 N.E.2d 8 (Ind. 1993). As such, Ct. App. was without authority to hear D's appeal because P-C.R. 2(1) does not permit belated appeals of motions to correct erroneous sentences. Held, transfer granted, Ct. App.' opinion at 764 N.E.2d 761 vacated, appeal dismissed for lack of subject matter jurisdiction.

RELATED CASES: Morales, 19 N.E.3d 292 (Ind. Ct. App. 2014) (late notice of appeal did not forfeit appeal where notice was only one day late and courts have interest in judicial economy and finality of post-conviction proceedings); Hancock, App., 786 N.E.2d 1142 (because D filed Notice of Appeal 115 days after final judgment was entered, appeal was properly dismissed).Hancock, App., 786 N.E.2d 1142 (because D filed Notice of Appeal 115 days after final judgment was entered, appeal was properly dismissed).

TITLE: State v. Brown
INDEX NO.: G.2.e.4.
CITE: (3/21/75), Ind., 324 N.E.2d 266
SUBJECT: Appeals -- extensions of time
HOLDING: State filed petition for extension of time within which to file record of proceedings. Time sought to be extended expired on date upon which petition for extension was filed. Appellate Procedure Rule 14 requires petitions for extension of time, except in appeals from interlocutory orders, to be filed at least five days before expiration of time to be extended, unless it is made to appear by affidavit that facts which are basis of petition did not then exist or were not then known to applicant or his counsel. Although said petition for extension of time has been verified by counsel, no such allegation was contained therein & no such showing had been otherwise made. Held, petition for extension of time denied, & order from which State was appealing enforced.

G. APPEAL

G.2. Procedure

G.2.e.5. Appellate Jurisdiction (AR(4)(B))

TITLE: Pease v. State
INDEX NO.: G.2.e.5.
CITE: (12/22/88), Ind. App., 531 N.E.2d 1207
SUBJECT: Appellate jurisdiction - S. Ct. & Ct. App.
HOLDING: Ability of Indiana Ct. App. to exercise appellate jurisdiction is not dependent upon legislative enactment but devolves instead upon Ct. by virtue of authority vested in State S.Ct. to specify by rule terms & conditions of such jurisdiction. Appellate Rule 4(A) enumerates types of cases over which S. Ct. has exclusive jurisdiction. App. R. 4(B) provides that in all other cases, appeals shall be taken to Ct. App. Here, D moved to suppress admission of amphetamines found upon frisk following stop for traffic violation. Tr. Ct. granted motion & State appealed. D argued that because State allegedly lacked authority to appeal, this Ct. had no jurisdiction. Because this appeal does not involve matter over which S. Ct. enjoys exclusive jurisdiction under App. R. 4(A), this Ct. may exercise jurisdiction pursuant to App. R. 4(B). Held, grant of motion to suppress affirmed.

TITLE: T.W. v. Dept. of Child Services
INDEX NO.: G.2.e.5.
CITE: (3/24/2016), 52 N.E.3d 839 (Ind. Ct. App. 2016)
SUBJECT: Appeal dismissed for lack of subject matter jurisdiction
HOLDING: Tr. Ct.'s order denying Mother's motion to modify a permanency plan in a CHINS case and granting DCS's motion to terminate visitation with child was not a final appealable judgment under Appellate Rule 2(H). In so holding, Court of Appeals distinguished In re: E.W., 26 N.E.3d 1006 (Ind. Ct. App. 2015), where Court addressed Mother's appeal even though the Tr. Ct.'s order did not qualify as a final judgment. Child in In re: E.W. was much older and had another planned permanent living arrangement, which was not at issue in this case. Held, appeal dismissed.

TITLE: Tyson v. State
INDEX NO.: G.2.e.5.
CITE: (4/24/92), Ind., 593 N.E.2d 175
SUBJECT: S.Ct.'s jurisdiction in case involving bail pending appeal
HOLDING: Although Ind. Code 35-33-9-1 assigns question of bail pending appeal to discretion of Tr. Ct., appellate rules contemplate role for appellate Cts. as well. Ind. Appellate Rule 6(B) states that if stay is denied by Tr. Ct. or judge thereof, appellate tribunal may reconsider application at any time after denial upon proper showing by certified copies of Tr. Ct.'s action & grant or deny same & fix bond. Here, D sought bail from Tr. Ct. pending appeal pursuant to Ind. Code 35-33-9-1 & his request was denied. D immediately filed petition for bail pending appeal in Indiana Ct. App. pursuant to App. R. 6(B), which was also denied. D then filed petition in S. Ct. for request for writ in aid of jurisdiction or in alternative for transfer. Ct. held that writ in aid of appellate jurisdiction was not proper means of invoking S. Ct.'s jurisdiction over appeal of denial of D's request for bail pending appeal in chief. Issue of whether D would receive bail pending his appeal did not involve S. Ct.'s appellate jurisdiction over merits of D's appeal in chief. Held, case returned to Ct. App.

Note: See Tyson card at G.2.d.1 for standards & procedures relating to requests for bail pending appeal.

TITLE: Stubblefield v. State
INDEX NO.: G.2.e.5.
CITE: (6/16/77), Ind., 363 N.E.2d 1232
SUBJECT: Initial appellate jurisdiction
HOLDING: Appellate Rule 4(A)(5) provides that S.Ct. shall have initial appellate jurisdiction over those cases involving exercise of jurisdiction by other courts of State, including issuance of writs of mandate & prohibition. Here, D was convicted pursuant to guilty plea of rape & he appealed. Sole question presented by appeal was whether presiding judge, who accepted guilty plea but relinquished jurisdiction for sentencing to special judge, can thereafter resume jurisdiction pursuant to local rule & correct erroneous sentence imposed by special judge. Ct. held that judge could resume jurisdiction & correct erroneous sentence imposed by special judge. Held, conviction affirmed; DeBruler, J., concurring.

TITLE: Wise v. State
INDEX NO.: G.2.e.5.
CITE: (10/31/2013), 997 N.E.2d 411 (Ind. Ct. App. 2013)
SUBJECT: No jurisdiction; motion certify interloc order deemed denied
HOLDING: Court lacked jurisdiction over attempted interlocutory appeal because D's motion to certify ruling on motion in limine was deemed denied; Tr. Ct.'s belated certification of ruling did not cure jurisdictional defect. See Wesley v. State, 696 N.E.2d 882, 883 (Ind. Ct. App. 1998). Court had authority to revisit Motions panel's earlier ruling to accept jurisdiction, which was erroneous. See Bridgestone Americas Holding, Inc. v. Mayberry, 854 N.E.2d 355, 358-59 (Ind. Ct. App. 2006), summarily aff'd in relevant part, 878 N.E.2d 189, 191 n.2 (Ind. 2007). Held, motions panel ruling to accept jurisdiction reversed.

G. APPEAL

G.2. Procedure

G.2.e.6. Record on appeal (AR 7.1 and 7.2)

TITLE: Adams v. State
INDEX NO.: G.2.e.6.
CITE: (4th Dist. 6/20/89), Ind. App., 539 N.E.2d 985
SUBJECT: Appellant's duty to provide adequate record on appeal
HOLDING: D's failure to provide adequate record on appeal constitutes waiver of any alleged error based on absent material. D challenged jury instruction given by Tr. Ct. but failed to include other final instructions in transcript of proceedings. Because jury instructions are evaluated in context of entire charge given to jury, [citations omitted], record here is inadequate for appeal. Burden is on appellant to provide adequate record for review, and failure to do so constitutes waiver. [Citations omitted.] AR 7.2 allows appellate court to order additional parts of record on its initiative & requires appellate court to grant party's petition to supplement record. Further, it states that incompleteness or inadequacy of record shall not preclude review on merits. However, this latter provision applies to record which has been corrected or supplemented, so that corrected record prevails on appeal. Ind. S. Ct. has stated that intent of AR 7.2 is to provide method whereby record may be corrected by parties or by reviewing court, not to shift, from appellant to appellate court, burden of providing adequate record for review. Cox 475 N.E.2d 664. Held, issue waived by D's failure to provide adequate record. **NOTE**: Cf. Andrews 441 N.E.2d 194 (card at G.2.e.6), where Ind. S. Ct. supplemented record on its own initiative.

RELATED CASES: Kunberger, 46 N.E.3d 966 (Ind. Ct. App. 2015) (Court unable to review D's double jeopardy claim because record from guilty plea hearing didn't contain enough facts to determine if the one act of strangulation was basis for all three convictions; see full review in this section); Delao, 940 N.E. 2d 849 (Ind. Ct. App. 2011) (D failed to present adequate record to support claim that Tr. Ct. erred in admitting audio tapes of four cocaine sales; Tr. Ct. was not able to record sidebar conferences, so it advised the parties to alert the court if they wanted a sidebar objection on the record. D objected during sidebar conferences that recordings were of poor quality and would confuse jury; however, D did not ask Tr. Ct. to put sidebar objections on the record); Titone, App., 882 N.E.2d 219 (D cannot pick & choose what parts of transcript are relevant for appellate court); Lightcap, App., 863 N.E.2d 907 (by failing to provide Ct. App. with a copy of testimony & evidence presented at criminal trial upon which Tr. Ct. based its decision to revoke his probation, D waived his challenge to sufficiency of evidence); Posey, App., 622 N.E.2d 1032 (D waived consideration of alleged error in not sentencing specifically for habitual offender enhancement & underlying felony, because he failed to present transcript of record of sentencing hearing).

TITLE: Andrews v. State
INDEX NO.: G.2.e.6.
CITE: (11/3/82), Ind., 441 N.E.2d 194
SUBJECT: Perfecting appeal - completeness of record
HOLDING: AR 7.2(C) provides: "Incompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits." Ward, 439 N.E.2d 156; McNeal, App., 434 N.E.2d 127. Here, D contends Tr. Ct. erred in admitting videotape of his statement to police into evidence because poor quality of tape allowed jurors to speculate about what was contained on intelligible portions of tape. State argues issue waived because videotape of statement not included in record. Citing AR 7.2(C), court rejects waiver argument. Court reviews videotape & finds the sound recording strong & clear. Held, Tr. Ct. did not err in admitting tape.

RELATED CASES: State v. Keith, App., 482 N.E.2d 751 (Crim L 429(2), 1134(2); pleadings prepared by D under oath & relied upon by Tr. Ct. & parties as evidence can be considered as evidence by appellate court even though pleadings were never formally entered into evidence, *citing* State v. Cleland 477 N.E.2d 537; court examines as evidence D's pleadings (motion to dismiss) & exhibit, which included certified docket sheet showing acceptance of guilty plea to misdemeanor).

TITLE: Hudson v. State
INDEX NO.: G.2.e.6.
CITE: (4th Dist. 4/26/84), Ind. App., 462 N.E.2d 1077
SUBJECT: Record on appeal - certification of trial judge
HOLDING: Failure to secure trial judge's certification of transcript of D's trial, as required by A.R. 7.2(A)(4) ordinarily constitutes waiver of any/all errors derived from that portion of record, because it is not properly in record. [Citations omitted]. Here, to save judicial time (obviate belated appeal) & because transcript of trial contains no reversible error, court addresses merits. Held, conviction affirmed.

TITLE: Jones v. State
INDEX NO.: G.2.e.6.
CITE: (2nd Dist., 6-26-98), Ind. App., 695 N.E.2d 1041
SUBJECT: Reconstructing record on appeal
HOLDING: When portions of record are unavailable, petitioner on appeal may prepare statement of evidence or proceedings from best available means, including his recollection. Ind.Appellate Rule 7.2(A)(3)(c). When he fails to do so, petitioner is entitled to new trial only if he demonstrates that it would be impossible to reconstruct record. Lile, App., 671 N.E.2d 1190. Here, appellate counsel filed affidavit with Ct. of appeals stating that he sent letters to Ct. reporter, prosecutor & trial counsel, explaining that record of hearing was incomplete & asking them to prepare statement of evidence & submit it to magistrate. Trial counsel & prosecutor stated they did not have adequate notes to independently reconstruct record of delinquency hearing, but prosecutor informed appellate counsel that magistrate might have sufficient notes to do so. Although counsel made some effort to reconstruct missing testimony, his preliminary attempts were not sufficient to demonstrate that it would be impossible to reconstruct record. There was no evidence that counsel determined whether magistrate or Ct. reporter had memory or notes that could assist in reconstructing missing testimony, & there was no evidence that counsel attempted to contact witnesses who testified during hearing in order to reconstruct their testimony. Held, appeal dismissed without prejudice to provide counsel additional opportunity to reconstruct record.

TITLE: Kunberger v. State
INDEX NO.: G.2.e.6.
CITE: (12/2/2015), 46 N.E.3d 966 (Ind. Ct of App. 2015)
SUBJECT: Double jeopardy claim unreviewable because of bare-bones record
HOLDING: Court was unable to review D's double jeopardy claim because the record from his guilty plea hearing did not contain enough facts to determine if one act – the strangulation of his ex-girlfriend – was the basis for his convictions for strangulation, domestic battery, and criminal confinement.

The factual basis established at the hearing consisted of D merely admitting the elements of the offense, leaving no basis to see if there was a reasonable possibility that facts used to establish one offense – the strangulation – were used to establish the elements of the other offenses – domestic battery and criminal confinement. See Garrett v. State, 992 N.E.2d 710, 719 (Ind. 2013) and Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). Even if the Court were to use the facts recited in the probable cause affidavit, it still would not be able to determine if the strangulation was the basis of all three offenses. Held, judgment affirmed.

TITLE: Mitchem v. State
INDEX NO.: G.2.e.6.
CITE: (2/10/87), Ind., 503 N.E.2d 889
SUBJECT: Record on appeal - procedure for supplementing record
HOLDING: Where D filed motion to supplement record after motion to correct error had been denied & did not seek Tr. judge's approval of proposed supplement to record, appellate court may not consider contents of such motion. Here, D claims he made offer to prove during bench conference. Bench conference was not recorded. D sought to supplement record by filing verified motion pursuant to AR 7.2(A) (3)(c). Rule requires judge's approval of proposed supplement to record. Party making such motion has duty to see that matter is set for hearing & judge in fact gives approval to propose supplement to record. D failed to follow proper procedure. Held, issue waived. Dickson DISSENTS without opinion.

RELATED CASES: Marshall, App., 505 N.E.2d 853 (Crim L 1064(6); where D failed to follow TR 59(H), by presenting affidavits re prosecutor's allegedly improper comments made during unrecorded closing argument, D has preserved nothing for review).

TITLE: State v. Brown
INDEX NO.: G.2.e.6.
CITE: (3-21-75), Ind., 324 N.E.2d 266
SUBJECT: Record on appeal - dismissal based on lack of record
HOLDING: Where determination of issues sought to be presented by State's appeal were dependent upon record of original trial proceedings & such record was not introduced into evidence or otherwise made part of record in post-conviction proceeding, State did not have meritorious appeal & injustice would be worked by grant of State's petition to stay enforcement of order appealed from. Held, State's petition for stay denied.

TITLE: Titone v. State

INDEX NO.: G.2.e.6.

CITE: (5th Dist., 03-05-08), Ind. App., 882 N.E.2d 219

SUBJECT: D must request transcript of all evidence when challenging sufficiency of evidence on appeal

HOLDING: Appellate Rule 9(F)(4) provides that when D challenges sufficiency of evidence on appeal, the entire jury transcript must be requested. Here, D waived his sufficiency of evidence challenge to his obstruction of justice conviction on appeal because he provided only portions of the evidence presented at his jury trial. D, as appellant, has responsibility to present a sufficient record that supports his claim in order for Court to conduct an intelligent review of the issues. Miller v. State, 753 N.E.2d 1284 (Ind. 2001). D cannot pick and choose what parts of the transcript are relevant for appellate court. Court has no way of confirming D's claim that the other, omitted evidence was not relevant to the count on which he was convicted. The ability of the State to supplement the record under Appellate Rule 9(g) does not provide enough of a check on defense because the rule is permissive and State might not supplement the record. Held, appeal dismissed.

TITLE: Williams v. Allen County Superior and Circuit Courts
INDEX NO.: G.2.e.6.
CITE: (11/15/2018), (Ind. Ct. App. 2018)
SUBJECT: D with transcript has no right to trial recording
HOLDING: Memorandum Opinion. Trial court did not abuse its discretion in declining to provide a criminal defendant with an electronic recording of his trial, because he had already received the trial transcript. Nothing in the Access to Public Records Act or Administrative Rule 9 at the time D filed his request required the Tr. Ct. or clerk to give him a second copy of the trial record in a different format. In 2018, Ind. Code §5-14-3-3 was amended to require that "A public agency shall provide an electronic copy or a paper copy of a public record, at the option of the person making the request for a public record." This amendment would not change the result in this case because D originally requested a copy of the trial proceedings in paper format. Held, judgment affirmed.

G. APPEAL

G.2. Procedure

G.2.e.7. Correction of record (AR 7.2(C))

TITLE: Cox v. State
INDEX NO.: G.2.e.7.
CITE: (3/21/85), Ind., 475 N.E.2d 664
SUBJECT: Correction of record
HOLDING: AR 7.2(c) does not require appellate court to order Tr. Ct. to supplement its record. D has duty to provide proper record for appeal. Failure to do so constitutes waiver of alleged error based on absent material. Smith 422 N.E.2d 1179. Here, D contends Tr. Ct. failed to give tendered instruction re circumstantial evidence. Record does not reflect D's tendering of instruction. Court notes: "Use of AR 7.2(C) is to be limited to those circumstances it was intended to cure [not] as a substitute for duties clearly placed on [D] by other portions of AR 7.2." However, court addresses merits of issue by assuming arguendo that D properly tendered instruction & finds no error. Held, conviction affirmed.

G. APPEAL

G.2. Procedure

G.2.e.8. Supplementing Record (AR 32)

TITLE: Dowell v. State
INDEX NO.: G.2.e.8.
CITE: (03/23/23), Ind. Ct. App., 155 N.E.3d 1284
SUBJECT: State's cross-appeal denied after failing to object to reopening Defendant's direct appeal at every opportunity
HOLDING: In this procedurally anomalous case, appellate counsel discovered pages of the transcript of a defense witness's testimony were missing after completion of Defendant's direct appeal in 2020. On Defendant's motion, the Court of Appeals reopened the appeal and permitted counsel to raise any new issues revealed in the missing transcript pages in a supplemental brief. As a result, Defendant raised a new challenge to the sufficiency of evidence for Level 2 felony dealing in methamphetamine. conviction. The State cross-appealed to challenge the reopening of the case for supplemental briefing and asked the Court to vacate the order allowing Defendant to reopen her direct appeal, arguing there was no authority supporting the extraordinary relief of a second direct appeal without first obtaining post-conviction relief. But the Court rejected the State's argument, pointing out that State did not respond to Defendant's petition asking it to reassume jurisdiction and allow supplemental briefing. And after it granted the petition, the State did not ask the Court to reconsider. The State did not respond to Defendant's motion asking to stay the proceedings to allow Defendant to request the missing portions of the transcript from the trial court. Further, the Court granted the motion to stay and the State did not ask it to reconsider its decision. "Plainly put, the State had multiple opportunities to assert its objection to this court’s course of action, but the State failed to do so. Therefore, the State has waived any challenge to our decision to reassume jurisdiction of [Defendant's] direct appeal and permit supplemental briefing." Moreover, waiver notwithstanding, Appellate Rule 1 allows the Court to permit deviation from the appellate rules at its discretion. Turning to the merits of Defendant's arguments, the Court found sufficient evidence to support the conviction given that methamphetamine packaged in small bags was observed in plain view, which the officer testified from his training and experience was consistent with dealing, and the testimony that Defendant had communicated about the sale of methamphetamine earlier in the day. Held: conviction affirmed.

G. APPEAL

G.2. Procedure

G.2.e.9. Unavailability of transcript

TITLE: A.S. v. DCS
INDEX NO.: G.2.e.9.
CITE: (07/30/21), Ind. Ct. App., 175 N.E.3d 318
SUBJECT: Successor judge's order certifying unrecorded evidence in parental termination proceeding was not erroneous
HOLDING: A successor judge who did not hear the evidence in a termination of parental rights hearing had authority to certify the recreated record pursuant to Ind. Appellate Rule 31. An equipment malfunction left most of the hearing unrecorded, so Mother filed a motion to remand the case to the trial court for the purpose of reconstructing the unavailable part of the record. The Court of Appeals remanded, but by the time the parties filed their statements of the evidence, the judge who had heard the case was succeeded by a successor judge, who certified the statements of the evidence. Court found that the very problem of which Mother complains — that the successor judge who certified the statement of the evidence was different from the judge who heard the evidence — is attributable to Mother. Had Mother abided by the appellate court's October 22, 2020, order to complete her statement of evidence within 15 days, the presiding judge who heard the case would have been available. In addition, Mother's failure to object on grounds that successor judge could not certify the reconstructed record was invited error.

The Court also found no abuse of discretion for the trial court to deny Mother's motion to continue and to conduct the termination hearing in her absence at the second hearing. Mother waived this issue because she failed to object on due process grounds before the trial court when her motion to continue was denied.

TITLE: Emmons v. State
INDEX NO.: G.2.e.9.
CITE: (5/16/86), Ind., 492 N.E.2d 303
SUBJECT: Error to refuse recordation of voir dire proceedings
HOLDING: Tr. Ct. abused discretion by denying D's motions for recordation of all courtroom proceedings, including voir dire. Such refusal deprived D of appellate review of specific issue which concerned him (potential prejudice stemming from newspaper accounts & inferences therefrom) & any other errors which may have occurred. Exercise of Tr. Ct.'s discretion must comport with due process requirements of 5th & 14th Amends, which guarantee D be accorded fair trial. To effectuate these rights, General Assembly has provided criminal Ds a statutory right to appeal from any judgment. Ind. Code 35-38-4-1. D's right to appeal errors allegedly committed at trial may be regulated & one such regulation is requirement that D present complete record to reviewing court. Zachary 469 N.E.2d 744. Here, defense counsel filed written statement of evidence pursuant to AR 7.2(C), indicating that no fewer than 11 prospective jurors indicated they had read/heard news

TITLE: Gajdos v. State
INDEX NO.: G.2.e.9.
CITE: (4/30/84), Ind., 462 N.E.2d 1017
SUBJECT: Perfecting appeal - availability of transcript; no right to speedy appeal
HOLDING: Right to speedy trial does not encompass right to speedy appeal. Doescher v. Estelle, (N.D. TX 1978) 454 F.Supp. 943; US v. Alston, (DC 1980) 412 A.2d 351; State v. Lagerquist, (SC 1970) 176 S.E.2d 141; [other citations omitted]. 6th Amend right to speedy "trial" means trial by jury to determine guilt or innocence. It does not include an appeal. Alston; Lagerquist. Here, D was convicted & sentenced 9/19/80. Transcript was not completed until 10/1/82. Court does not condone such "inaction;" "Tr. Ct. reporter should make every effort to assure transcript is provided expeditiously to D." Delay can be attacked under due process or equal protection if purposeful & oppressive. Although D was incarcerated during 2-year period, trial judge did set appeal bond (which D could not meet). Held, no error.

RELATED CASES: Wright, App., 591 N.E.2d 1053 (although there is no 6th Amend. right to speedy appeal, which state provides right to appeal, appellant is entitled to due process. Delay in appellate process may result in denial of due process, but not every delay in appeal violates due process).

TITLE: Roberts v. State
INDEX NO.: G.2.e.9.
CITE: (2nd Dist., 12-04-03), Ind. App., 799 N.E.2d 549
SUBJECT: Lack of trial transcript did not require new trial
HOLDING: D's right to substantive appellate review was not violated when Tr. Ct. reconstructed trial testimony pursuant to Ind. Appellate Rule 31 after Ct.'s recording equipment malfunctioned. Tr. Ct. reconstructed evidence by taking affidavits from the Ct. reporter, public defender, prosecutor & judge. Affidavits of defense counsel & prosecutor provided a sufficient record to permit review. Ct. found that simplicity of case & evidence distinguished it from the "Herculean task" of reconstruction found in Emmons v. State, 492 N.E.2d 303 (Ind. 1986), where defense specifically asked for voir dire to be recorded but Tr. Ct. failed to do so. Ct. found this situation more comparable to Ben-Yisrayl v. State, 753 N.E.2d 649 (Ind. 2001), where gaps in record were "not sufficient to relieve [D] of his burden of making specific claims of error." Here, Ct. found no significant dispute in evidence supporting conviction for resisting law enforcement, where police came to house to serve arrest warrant; D was standing on porch with others when he saw police arrive; & D was ordered by police to stop but instead walked into the house. Held, judgment affirmed.

RELATED CASES: D.G., 947 N.E.2d 445 (Ind. Ct. App. 2011) (issue preserved where no objection and substance of sidebar conference unclear; see full review at G.5.f).

G. APPEAL

G.2. Procedure

G.2.e.10. Motions in Appellate Court

TITLE: Bir v. Bir
INDEX NO.: G.2.e.10.
CITE: (01-14-11), 939 N.E.2d 1096 (Ind. 2011)
SUBJECT: Order clarifying deadline to file reply in support of motion
HOLDING: The time to file a reply in support of a motion served by mail or commercial carrier begins to run from the third calendar day of the automatic three-day extension (Appellate Rule 25, if the third calendar day is a business day, but if the third calendar day falls on a non-business day, the time to file a reply begins to run on the next business day. See Appellate Rule 34(D) ("Any reply must be filed with the motion for leave . . . within five days of service of the response") and Appellate Rule 25(B) ("When the time allowed is less than seven (7) days, all non-business days shall be excluded from the computation.")

TITLE: Wise v. State
INDEX NO.: G.2.e.10.
CITE: (10/31/2013), 997 N.E.2d 411 (Ind. Ct. App. 2013)
SUBJECT: No jurisdiction; motion certify interloc order deemed denied
HOLDING: Court lacked jurisdiction over attempted interlocutory appeal because D's motion to certify ruling on motion in limine was deemed denied; Tr. Ct.'s belated certification of ruling did not cure jurisdictional defect. See Wesley v. State, 696 N.E.2d 882, 883 (Ind. Ct. App. 1998). Court had authority to revisit Motions panel's earlier ruling to accept jurisdiction, which was erroneous. See Bridgestone Americas Holding, Inc. v. Mayberry, 854 N.E.2d 355, 358-59 (Ind. Ct. App. 2006), summarily aff'd in relevant part, 878 N.E.2d 189, 191 n.2 (Ind. 2007). Held, motions panel ruling to accept jurisdiction reversed.

G. APPEAL

G.2. Procedure

G.2.e.11. Appendix

TITLE: Johnson v. State
INDEX NO.: G.2.e.11.
CITE: (10-22-01), Ind., 756 N.E.2d 965
SUBJECT: Appellate procedure - failure to file Appendix with Brief
HOLDING: Failure to file an Appendix with appellant's brief pursuant to Ind. Appellate Rule 49(A) and 50(B)(1) is not necessarily fatal to an appeal. Ind. Appellate Rule 50(B)(1) provides that Appendix shall contain: (a) the Clerk's record, including the chronological case summary (CSS), (b) the portion of Transcript that contains rationale of decision & any colloquy thereto, if & to extent brief challenges any oral ruling or statement of decision, & (c) verification of accuracy by attorney or unrepresented party filing the Appendix. Documents contained in the Appendix are necessary for appellee to prepare responsive brief & to facilitate appellate review of merits of appellant's claim. Here, State moved to compel D to file a conforming Appendix. Instead of dismissing appeal, Court of Appeals could have granted that motion and required compliance with order within a specific time period. Because Appendix is part of physical record on appeal, new appellate rule 49 represents a departure from some of prior case law, and signals a preference for an ameliorative approach toward failures by parties to provide a complete record. New rules also provide opportunities for appellee to file Appendix containing materials not found in appellant's Appendix, and for filing of supplemental appendices. App.R. 50(A)(3), 50 (B)(2), 50(D). Better practice for appellate court to follow in criminal appeals where Appendix is missing or incomplete is to order compliance with rules within reasonable period of time, such as thirty days. Held, transfer granted, Court of Appeals' opinion at 756 N.E.2d 508 vacated and appeal remanded.

G. APPEAL

G.2. Procedure

G.2.e.12. Briefs

TITLE: Baker v. State
INDEX NO.: G.2.e.12.
CITE: (10/1/82), Ind., 439 N.E.2d 1346
SUBJECT: Briefs - citation of authority
HOLDING: Failure to cite authority (case law, statutes, etc.) in appellate brief to substantiate proposition constitutes a waiver of the issue on appeal. AR 8.3(A)(7). Here, court indicates assertion that the argument is a question of first impression such that no authority for proposition can be found will preserve issue on appeal. D in this case failed to cite case law or statutes or to make such assertion, thus he waived issue of admissibility of hearsay testimony on appeal. EXCEPTION: Fundamental error. See Moore 440 N.E.2d 1092 (card at G.5.i).

TITLE: Bigler v. State
INDEX NO.: G.2.e.12.
CITE: (5th Cir.; 7-12-00), Ind. App., 732 N.E.2d 191
SUBJECT: Appellate briefs - may not incorporate by reference from source outside brief
HOLDING: In appeal of denial of D's petition for post-conviction relief, D attempted to incorporate his memorandum of law presented to post-conviction Ct. Concluding that D's ineffective assistance of counsel claims were waived, Ct. held that argument presented entirely through incorporation by reference from source outside of appellate briefs does not comply with Ind. Appellate Rule 8.3(A)(3) & (7). Briefs should be prepared so that each judge, considering brief alone & independent of transcript, can intelligently consider each question presented. Pluard v. Patients Compensation Fund, 705 N.E.2d 1035 (Ind. Ct. App. 1999). Held, judgment affirmed on rehearing & decision at 728 N.E.2d 889 (Ind. Ct. App. 2000) vacated due to administrative error which resulted in Ct. not receiving amended appellate brief prior to first decision.

TITLE: Ferrell v. State
INDEX NO.: G.2.e.12.
CITE: (10/24/95), Ind. App., 656 N.E.2d 839
SUBJECT: Perfecting appeal -- failure of appellee to file brief lowers standard of review
HOLDING: Juvenile was adjudicated delinquent for carrying handgun without license & criminal recklessness. D appealed claiming that evidence was not sufficient to support delinquent acts. State waived its right to file appellate brief in this matter & Ct. held that therefore less stringent standard of review applied. Appellant need only establish prima facie error to win reversal when appellee fails to file brief. Costas, 552 N.E.2d 459. Held, affirmed in part & reversed in part.

TITLE: Forrester v. State
INDEX NO.: G.2.e.12.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: Perfecting appeal - brief should contain verbatim objection
HOLDING: When error is predicated on giving/refusing to give an instruction, instruction must be set out verbatim in argument section of brief with verbatim objections, if any. AR 8.3(A)(7). Failure to follow rule waives error. Here, D failed to set forth verbatim objections made at trial. Court declines to entertain issue but does state instructions, objections & authority cited were reviewed. Held, no error.

TITLE: Harrison v. State
INDEX NO.: G.2.e.12.
CITE: (4th Dist. 10/2/84), Ind. App., 469 N.E.2d 22
SUBJECT: Briefs - verbatim statement of judgment
HOLDING: In a footnote to a case reversed on sufficiency grounds, court "reminds" counsel that statement of case in an appellate brief must include verbatim statement of judgment. AR 8.3(A)(4). "It is not [court's] function to search for it in the record." 469 at 24 n.1.

TITLE: Harts v. State
INDEX NO.: G.2.e.12.
CITE: (3d Dist. 4/10/86), Ind. App., 490 N.E.2d 1158
SUBJECT: Briefs - content results in dismissal of appeal
HOLDING: Court finds numerous problems with D's pro se brief: (1) it was not bound as required by AR 7.1; (2) in argument section, D argued he was unable to submit proper argument because of passage of time; & (3) its pages were "full of calumny & scandalous assertions. Such a document has no place in a court of law," *citing* Barnard v. Kruzan 46 N.E.2d 238. Held, D's brief struck from court's files & appeal dismissal.

TITLE: State v. Delph

INDEX NO.: G.2.e.12.

CITE: (2nd Dist., 10-26-07), Ind. App., 875 N.E.2d 416

SUBJECT: Failure to object to State's motion to file belated Appellant's Appeal waived issue on appeal

HOLDING: Where D acquiesced to delay, there was no CR 4(C) violation. If D sits idly by at a time when the Ct. could yet grant him a trial within the proper period & permits the Ct., without objection, to set a date beyond that period, he will be deemed to have acquiesced therein. Little v. State, 415 N.E.2d 44, 46 (1981). Here, the 221 days between the State's charging & the first trial setting was attributable to the State. Later, D moved for another continuance due to the State's failure to provide discovery. However, D did not object when Tr. Ct. set the trial outside of the one-year period. Thus, D acquiesced to the trial date, & the 147- day delay was attributable to him. Again, D moved for another continuance so his expert could inspect physical evidence, i.e., oil lamps that D just learned were being held at the Fire Department rather than the police department. Because there was no evidence that it was common practice, even in an arson case, to keep evidence at the Fire Department & D had been attempting to find the lamps for months, the delay was attributable to the State's failure to disclose the location of the lamps. However, the delay was calculated only to the motion to discharge, which was sixteen days. Thus, at the time of the motion to discharge, the State had not exceeded the one-year limit & Tr. Ct. erred in granting D's motion.

Further, the State, who initiated the appeal, failed to file a timely brief, but did ask the motions panel for permission to file a belated brief. By failing to object to the State's motion for leave to file a belated brief, D waived the issue on appeal. Further, because of the strong preference to decide issues on the merits, Ct. fully addressed the issues. Held, judgment reversed.

NOTE: Although Ct. App. held that the delay caused by a D's motion to continue begins from the date the motion is filed, there are other cases which hold the delay begins from the vacated trial setting. See, e.g., State ex rel. Bramley v. Tipton Circuit Ct., 835 N.E.2d 479 (Ind. 2005). Because the actual delay caused by D's motion does not begin until after the vacated trial setting, logically the time period attributable to the D should begin on the vacated trial date.

RELATED CASES: Pittman, 9 N.E.3d 179 (Ind. Ct. App. 2013) (failure to serve AG with appellant's brief did not result in dismissal of case).

TITLE: Turner v. State
INDEX NO.: G.2.e.12.
CITE: (6/4/87), Ind., 508 N.E.2d 541
SUBJECT: Briefs - appendix to; contents
HOLDING: Ind. S.Ct. grants state's Motion to Strike Appendix to Appellant's Brief. Here, Appendix contains photocopies of documents & transcripts from original charges filed in adult court. Charges were dismissed & D was later charged in juvenile court & waived to adult court. Contents of Appendix were not certified or shown to be part of record of proceeding. Court agrees with state's position that materials are not part of record of proceedings & are not proper materials for court to consider on appeal. Material contained in Appendix had not properly been made part of record of proceedings pursuant to AR 7.2. Thus, material cannot be used to show or support any allegation of error. Court rejects D's reliance upon AR 8.2(4), which allows for filing of Appendix with a brief for "submission of record or other material deemed useful." Rule contemplates material that is part of a record & properly filed & certified by clerk & judge. Held, motion to strike granted; conviction affirmed.

G. APPEAL

G.2. Procedure

G.2.f Belated appeals

TITLE: Strong v. State
INDEX NO.: G.2.f.
CITE: (4/9/2015), 29 N.E.3d 760 (Ind. Ct. App. 2015)
SUBJECT: No abuse of discretion for belated appeal of infraction
HOLDING: Tr. Ct. did not abuse its discretion by twice authorizing D under PC Rule 2 to file a belated notice of appeal to appeal his infraction of failing to stop at a stop sign. Even though the rule is restricted to appealing a "conviction or sentence," D's case, as a whole, was a criminal case because he was also convicted of OWI, even if he did not appeal that conviction. Further, the reason D sought appellate relief from the infraction is that he claimed it and the OWI conviction create a double jeopardy violation. See State v. Hurst, 688 N.E.2d 402, 405 (Ind. 1997) (overruled on other grounds by Cook v. State, 810 N.E.2d 1064 (Ind. 2004)) (traffic infractions may be civil proceedings by statute but are nonetheless classified as criminal for purposes of appeal). Finally, even if PC Rule 2 does not authorize D's belated appeal, a belated notice of appeal may be authorized if a D demonstrates "extraordinarily compelling reasons." In Re Adoption of O.R., 16 N.E.3d 965, 971-72 (Ind. 2014). Because the Tr. Ct. "twice grant[ed] [D's] motions to file a belated notice of appeal, it must have found compelling reasons to do so, and we give substantial deference to its decision." Held, judgment affirmed; Bailey, J., dissenting, finding that belated appeals under Post-Conviction Rule 2 are available only for appeals of convictions and sentences.

G. APPEAL

G.3. Duties of counsel on appeal (Anders v. California, Barnes v. Jones)

TITLE: Mayberry v. State
INDEX NO.: G.3.
CITE: (5th Dist., 4-20-01), Ind. App., 748 N.E.2d 881
SUBJECT: Duties of counsel on appeal - inappropriate tone of D's petition for rehearing
HOLDING: Ct. granted D's petition for rehearing to address what it considered to be the "inappropriate tone" adopted in petition for rehearing. In petition, appellate counsel advanced claims that Ct. "ignore[d]" an issue & set forth facts in such a way as to be "misleading." Ct. concluded that these assertions went beyond claims of error, implied intentional conduct on part of Ct. App., & as such, "they are unacceptable." While Ct. appreciates & expects zealous advocacy from defense counsel, it does not intend to sanction or accept lack of decorum in pursuit of that end. Ind. Prof. Cond. R. 3.5, Comment. Held, petition for rehearing denied.

TITLE: Mosley v. State
INDEX NO: G.3.
CITE: (06-26-09), 908 N.E.2d 599 (Ind. 2009)
SUBJECT: No Anders briefs in Indiana - indigent criminal appeals
HOLDING: In Anders v. California, 386 U.S. 738 (1967), U.S. Supreme Court established a procedure permitting appointed counsel to withdraw from "frivolous" criminal appeals. Exercising its supervisory authority over matters of appellate procedure and professional responsibility, Court declined to adopt the Anders protocol in Indiana, noting that it is cumbersome, inefficient, and places increased demands on the judiciary, which to some extent is placed in the precarious role of advocate. Requiring counsel to submit an ordinary appellate brief the first time--no matter how frivolous counsel regards the claims to be-- is quicker, simpler, and places fewer demands on appellate courts. See Cline v. State, 253 Ind. 264, 252 N.E.2d 793 (1969) (DeBruler, J., concurring). Moreover, an Anders withdrawal prejudices an appellant and compromises his appeal by flagging the case as without merit, which invites perfunctory review by the court and jeopardizes meaningful appellate review. In a direct appeal a D is entitled to review by the judiciary, not by overworked and underpaid public defenders. Thus, in any direct criminal appeal as a matter of right, counsel must submit an advocative brief in accordance with Indiana Appellate Rule 46 and may neither withdraw on basis that appeal is frivolous nor submit an Anders brief to the appellate court. In so holding, Court disapproved of Packer v. State, 777 N.E.2d 733 (Ind. Ct. App. 2002), and Seals v. State, 846 N.E.2d 1070 (Ind. Ct. App. 2006), which endorsed Anders withdrawals on direct appeal. Held, transfer granted, conviction affirmed.

Note: In addressing State's mootness argument, Court also noted that, unlike Article III of federal constitution, article 7, section 1 of Indiana Constitution does not prohibit Court from issuing "decisions which are, for all practical purposes, "advisory" opinions in cases presenting issues of "great public interest."

RELATED CASES: Hale, 976 N.E.2d 119 (Ind. Ct. App. 2012) (Ct. acknowledged there are no Anders briefs in Indiana, but "cannot ignore the alarming trend of questionable fundamental error claims. For instance, it is not uncommon for a criminal D to argue on appeal that the introduction of evidence amounted to fundamental error whenever the D failed to object to its admission at trial.").

TITLE: Music v. State
INDEX NO.: G.3.
CITE: (3/12/86), Ind., 489 N.E.2d 949
SUBJECT: Duties of counsel on appeal - frivolous issues
HOLDING: Where an issue is clearly not the proper subject for post-conviction relief or is deemed frivolous, the public defender's office need not raise it on appeal. Here, D attempted on appeal from a denial of post-conviction relief to raise issues which did not conform with PC 1, Phillips 441 N.E.2d 201, or Morris 466 N.E.2d 313. Court notes public defender's office has felt compelled to fully litigate such issues pursuant to Dixon, App., 284 N.E.2d 102. To this extent, court overrules Dixon & holds that public defender is not obligated to raise on appeal every issue D requests raised. In Jones v. Barnes (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993, the U.S. S.Ct. held that an indigent D does not have a constitutional right to compel appointed counsel to press nonfrivolous points if counsel, as matter of professional judgment, decides not to present these points. See also Smith 475 N.E.2d 1139. Held, denial of PCR affirmed. DeBruler CONCURS IN RESULT without opinion.

RELATED CASES: Hicks, 491 N.E.2d 996 (Crim L 1130(1); D filed pro se petition alleging appellate counsel denied constitutional/statutory right to appeal by waiving 3 specifications in MCE; court examines disputed issues "in sufficient depth to permit us to determine whether appellate counsel's action was rationally based & whether rebriefing would serve the useful legal purpose" & finds it would not, *citing* Music).

TITLE: Rivera v. State
INDEX NO.: G.3.
CITE: (3d Dist. 4/22/85), Ind. App., 477 N.E.2d 110
SUBJECT: Duties of counsel on appeal
HOLDING: Appellate brief written by attorney from Lake County Appellate Public Defender's Office constitutes "blatant non-representation of [D falling] far short of even minimal standards of representation one would expect of privately retained counsel." Here, argument section of brief was three pages long. Counsel conceded 2 issues & incorrectly asserted D waived sufficiency issue by failing to move for directed verdict at trial. Court finds counsel effectively denied D his statutory & constitutional right to appeal, noting counsel's "flippant" statements that "appellee may well want to adopt [appellant's brief] as its own," & "[D] has had his right to appellate review, so be it." Court orders counsel to rebrief case in compliance with court rules & standards set forth in opinion. Held, rebriefing ordered. Garrard CONCURS with opinion.

G. APPEAL

G.4. Dismissal/withdrawal/ abandonment/waiver of appeal (see, also X.8)

TITLE: Andrews v. State

INDEX NO.: G.4.

CITE: (11/3/82), Ind., 441 N.E.2d 194

SUBJECT: Dismissal of appeal - complete record

HOLDING: AR 7.2(C) provides: "Incompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits." Ward 439 N.E.2d 156; McNeal, App., 434 N.E.2d 127. Here, D contends Tr. Ct. erred in admitting videotape of his statement to police into evidence because poor quality of tape allowed jurors to speculate about what was contained on intelligible portions of tape. State argues issue waived because videotape of statement not included in record. Citing AR 7.2(C), court rejects waiver argument. Court reviews videotape & finds the sound recording strong & clear. Held, Tr. Ct. did not err in admitting tape.

TITLE: Bergstrom v. State
INDEX NO.: G.4.
CITE: (09-09-10), 933 N.E.2d 555 (Ind. Ct. App. 2010)
SUBJECT: Untimely filing of notice of appeal
HOLDING: The timely filing of a notice of appeal is a jurisdictional prerequisite "of the utmost importance," and failure to conform to the applicable time limits results in forfeiture of an appeal. Bohlander v. Bohlander, 875 N.E.2d 299 (Ind. Ct. App. 2007). Here, although neither party raised issue of timeliness of D's appeal of denial of his motion to correct errors, lack of appellate jurisdiction can be raised at any time and Court can consider issue sua sponte. Tr. Ct. held a hearing on D's motion to correct error on November 5, 2009 but did not rule on the motion until ninety-two days later. By operation of Trial Rule 53.3(A), D's motion was deemed denied thirty days after November 5, 2009, i.e., December 7, 2009, and D was required to file his notice of appeal within thirty days of the date his motion was deemed denied. However, D did not file his notice of appeal until March 4, 2010, which, while within thirty days from the date the Tr. Ct. issued an order denying D's motion to correct error, was not within thirty days from date his motion was deemed denied under Trial Rule 53.3(A). D's notice of appeal was therefore untimely. Held, appeal dismissed.

RELATED CASES: Sewell, 939 N.E.2d 686 (Ind. Ct. App. 2010) (letter received within 30-day time limit did not constitute Notice of Appeal because letter did not 1) specify whether the appealed judgment was a final judgment or an interlocutory order; 2) designate the court to which appeal was sought; 3) direct the Tr. Ct. clerk to assemble the record; or 4) contain a request for a transcript).

TITLE: Bolden v. State
INDEX NO.: G.4.
CITE: (5th Dist., 10-24-00), Ind. App., 736 N.E.2d 1260
SUBJECT: State cannot use T.R.60(B) to revive expired appeal
HOLDING: Motion for relief from judgment pursuant to T.R. 60(B) is not substitute for belated appeal, nor can it be used to revive expired attempt to appeal. Masterson, App., 511 N.E.2d 499. Here, Tr. Ct. granted D's motion to correct error, vacated his conviction, & ordered new trial. Upon entry of this final judgment, State's remedy was to appeal judgment by filing praecipe within 30 days of judgment. However, State did not appeal Tr. Ct.'s grant of D's motion. Rather, almost six months later, State filed motion pursuant to T.R. 60(B). Ct. held that, absent exceptional or extraordinary circumstances, State could not use T.R.60(B) to revive its expired appeal, thus Tr. Ct. erred in granting State's motion to reconsider pursuant to T.R. 60(B) & reinstating D's conviction for operating vehicle with BAC of .10%. Held, judgment reversed.

RELATED CASES: Emminger, 204 N.E.3d 926 (Ind. Ct. App. 2023); Miller, 19 N.E.3d 779 (Ind. Ct. App. 2014) (Ct. dismissed D's appeal for mootness and lack of jurisdiction and also reiterated that a motion for relief from judgment under T.R. 60(B) may not be used as a substitute for a direct appeal nor used, as here, to revive an expired attempt to appeal).

TITLE: Byrd v. State
INDEX NO.: G.4.
CITE: (05/29/92), Ind., 592 N.E.2d 690
SUBJECT: Waiver of right to argue untimeliness of appeal
HOLDING: Where State waited until day before appellee's brief was due to file motion to dismiss appeal based on waiver of appellate right by D, State waived it's right to complain, & appeal should not have been dismissed; granting transfer & reversing dismissal by Ct. App.

After several delays in belated appeal, appellant's brief was filed, & at no time did State object to any of D's motions concerning pursuit of appeal. S.Ct. noted that appellate courts look with disfavor on issues raised for first time on appeal, & State is subject to same scrutiny under principles of waiver & estoppel as other parties. At the time of motion to dismiss, Tr. Ct.'s belated praecipe order remained intact, record had been completed & filed, & appellant's brief had been filed. Because State did not object to process prior to this time, its motion to dismiss should have been denied by Ct. App.

RELATED CASES: Bergstrom, 933 N.E.2d 555 (Ind. Ct. App. 2010) (although neither party raised issue of timeliness of D's appeal of denial of his motion to correct errors, lack of appellate jurisdiction can be raised at any time and Ct. can consider issue sua sponte); King, App., 602 N.E.2d 1041 (although appeal dismissed due to untimely filing of praecipe, in lengthy dissent J. Sullivan discussed nonmandatory nature of dismissal & considerations of judicial economy which may be helpful.)

TITLE: Cleff v. State
INDEX NO.: G.4.
CITE: (1st Dist. 01/28/91), Ind. App., 565 N.E.2d 1089
SUBJECT: Waiver of appeal by voluntary absence from sentencing
HOLDING: By voluntarily absenting himself from sentencing, D made knowing voluntary & intelligent waiver of right to appeal, & allowing judges discretion either to impose sentence when D has voluntarily absented himself or to delay sentencing until D's return, does not violate constitutional equal protection provisions. Evidence presented showed that D was present at all court proceedings leading up to conviction on 10 drug-related counts. D was released on bond pending sentencing after date was set in open court, & when D did not appear at sentencing, Court imposed minimum possible sentence & issued warrant for D's arrest. Several months later D was arrested & began sentence. D filed petition to file belated praecipe on his drug conviction case, which court denied without hearing. On appeal D argued that allowing judges discretion as to whether or not to impose sentence in absentia was violation of equal protection, in that judges sometimes waited to sentence similarly situated Ds until they reappeared. Court of Appeals found that right to be present at sentencing was not of fundamental & constitutional proportions & that sentencing discretion was rationally related to legitimate state interest of prompt judicial administration. Court also found that judge's decision in this case was not arbitrary or unreasonable, & that D's continued absence from jurisdiction while time to appeal was running was voluntary & knowing waiver of right to appeal. Held, denial of petition to file belated praecipe affirmed.

TITLE: Cooper v. State
INDEX NO.: G.4.
CITE: (12-09-09), (Ind. 2009) 917 N.E.2d 667
SUBJECT: Untimely appeal of probation revocation
HOLDING: A D must file either a notice of appeal or a motion to correct error no later than thirty days after a final appealable order is issued. Ind. Appellate Rule 9(A)(1). However, an appellate court has inherent authority to review an untimely appeal where the appeal qualifies as a rare and exceptional case of great public importance. *See* Lugar v. State ex rel. Lee, 270 Ind. 45, 383 N.E.2d 287 (1978). Here, Tr. Ct. deprived D of due process when it revoked his probation based solely on probable cause affidavit, without conducting an evidentiary hearing. D did not file a motion to correct error or a notice of appeal but filed a motion to reconsider the probation revocation after the State dismissed new charges underlying the revocation. Although D timely appealed the denial of his motion to reconsider, he used the appeal to argue that the initial revocation was improper because he was denied the right to due process.

Court held that D's failure to timely appeal the probation revocation was fatal to his appeal. Revoking probation without providing even the most rudimentary due process rights is not a rare and exceptional case of great public interest under Lugar to allow appellate review despite D's untimely appeal. Thus, only Tr. Ct.=s denial of D's motion to reconsider was reviewable on appeal.

Dismissal of charges underlying the revocation was inconsequential. A Tr. Ct. may still revoke probation even when a D has been acquitted of the charges providing the basis for the revocation. Brown v. State, 458 N.E.2d 245 (Ind. Ct. App. 1983). Because arrest was reasonable and there was probable cause that D committed the offenses, evidence was sufficient to support Tr. Ct.=s denial of Cooper=s motion to reconsider. Brooks v. State, 692 N.E.2d 951 (Ind. Ct. App. 1998). Held, transfer granted, Court of Appeals' opinion at 894 N.E.2d 993 vacated, judgment affirmed. Boehm, J., dissenting, would entertain merits of appeal pursuant to Indiana Post-Conviction Rule 2.

TITLE: In re Adoption of O.R.
INDEX NO: G.4.
CITE: (9/25/2014), 16 N.E.3d 965 (Ind. 2014)
SUBJECT: Timely filing of notice of appeal is not jurisdictional
HOLDING: In an adoption matter, Court of Appeals erred in dismissing appeal on basis that Father's failure to timely file Notice of Appeal deprived it of subject matter jurisdiction. Past decisions discussing the viability of an appeal have shown "a tendency to confuse jurisdictional defects with legal errors." R.L. Turner Corp. v. Town of Brownsburg, 963 N.E.2d 453, 457 (Ind. 2012). While Appellate Rule 9(A)(5) states that "the right to appeal shall be forfeited" unless the Notice is timely filed, neither that rule nor any other appellate rule states that such a failure deprives an appellate court of jurisdiction over an appeal. Thus, a belated Notice of Appeal is a legal error by which an appeal is forfeited, but it does not deprive appellate courts of authority to, in their discretion, entertain such an appeal. The fact that Appellate Rule 1 allows an appellate court to, on its own motion, to "permit deviation from these Rules" is a recognition that a court may assume jurisdiction over a forfeited appeal.

Here, Tr. Ct. found that Father's consent was not required to grant foster parents' petition to adopt. Four days before Notice of Appeal was due, Father sent letter to Tr. Ct. clerk requesting appointment of appellate counsel. Tr. Ct. did not appoint counsel until well after Notice of Appeal was due. Appellate counsel filed a belated Notice.

Court found compelling reasons to restore forfeited appeal. A parent's interest in the care, custody and control of his child is "perhaps the oldest of fundamental liberty interests." Similarly, the parent-child relationship is "one of the most valued relationships in our culture." Further, Father sought appointment of counsel before the Notice was due. The "unique confluence" of these factors led the Court to restore the appeal and review Father's claim on the merits. Cf. In re Adoption of T.L., 4 N.E.3d 658, 661 n.2 (Ind. 2014); In re K.T.K., 989 N.E.2d 1225, 1229 (Ind. 2013); In re D.L., 952 N.E.2d 209, 212-14 (Ind. Ct. App. 2011); In re J.G. and C.G., 4 N.E.3d 814, 820 (Ind. Ct. App. 2014). Held, appeal reviewed on merits; judgment affirmed.

RELATED CASES: Beasley, 192 N.E.3d 1026 (Ind. Ct. App. 2022) (distinguishing O.R. and dismissing untimely appeal from denial of post-conviction relief; PC-R 2 inapplicable to belated appeal from Order denying post-conviction relief); Sanford, 2016 Ind. App. LEXIS 16, sum. aff'd 51 N.E.3d 1182 (Ind. 2016) (declining to find that In re O.R. should be extended to criminal Ds who already have a remedy for reinstating an untimely appeal through Post-Conviction Rule 2); Morales, 19 N.E.3d 292 (Ind. Ct. App. 2014) (late notice of appeal did not forfeit appeal where notice was only one day late and courts have interest in judicial economy and finality of post-conviction proceedings (*citing* In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014) (late notice of appeal forfeits right to appeal absent "extraordinarily compelling reasons") (see full review at G.2.e.2).

TITLE: Koons v. State
INDEX NO.: G.4.
CITE: (10/20/89), Ind., 545 N.E.2d 826
SUBJECT: Waiver of appeal - D voluntarily absent during time for filing MCE
HOLDING: Tr. Ct. did not err in dismissing timely filed MCE where D was voluntarily absent from jurisdiction during time period for filing. D was tried & sentenced in absentia & did not return to jurisdiction of Tr. Ct. until more than four months after sentencing. D's counsel timely filed MCE, & when D returned, he moved Tr. Ct. to rule on it, which Tr. Ct. denied. Several months later, clerk entered docket entry, pursuant to TR 53.3, overruling D's MCE. Nine days later, Tr. Ct. ordered clerk's entry expunged. State next moved to dismiss D's MCE, & Tr. Ct. did so. On appeal, D claims Tr. Ct. erred in expunging clerk's entry overruling MCE, which was made pursuant to TR 53.3(E)(2). TR 53.3 is to be used in cases where all matters are in proper time frame & Tr. Ct.'s jurisdiction properly invoked, but where Tr. Ct. has failed to rule on MCE. Rule was intended to expedite appeals, not to toll time for filing MCE where D is voluntarily absent from Tr. Ct.'s jurisdiction. During time that D is voluntarily absent, he/she is not entitled to file any plea or ask any consideration from Tr. Ct. Irvin 139 N.E.2d 898. See also Evolga 519 N.E.2d 532; Skolnick 417 N.E.2d 1103. Here, D effectively waived right to appeal by absenting himself from Tr. Ct.'s jurisdiction. Tr. Ct. did not err in refusing to entertain MCE or in striking clerk's entry showing MCE to be overruled. Held, Tr. Ct. affirmed. DeBruler, J., DISSENTS, arguing that constitutional right to appeal ought not to be waived so easily where MCE was in fact timely filed by counsel.

RELATED CASES: Darby, 966 N.E.2d 735 (Ind. Ct. App. 2012) (a D who escapes lawful custody is not entitled to file a notice of appeal and pursue an appeal while at large).

TITLE: Morales v. State
INDEX NO.: G.4.
CITE: (10/15/2014), 19 N.E.3d 292 (Ind. Ct. App. 2014)
SUBJECT: Late Notice of Appeal did not forfeit post-conviction appeal
HOLDING: D's belated notice of appeal did not forfeit his appeal. See In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014) (Ind. 2014) (late notice of appeal forfeits right to appeal absent "extraordinarily compelling reasons.") Such compelling reasons are not determined solely from the perspective of the litigant but also that of the courts, which have an interest in judicial economy and finality of post-conviction proceedings. The Court also observed that D's notice was only one day late and noted its preference to decide cases on the merits. Thus, it addressed but rejected D's claim that trial counsel was ineffective for failing to object to a nurse's testimony as to what constitutes penetration of the female sex organ. Held, judgment affirmed.

TITLE: Ortega-Rodriguez v. U.S.
INDEX NO.: G.4.
CITE: 507 U.S. 237, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993)
SUBJECT: Appeal - dismissal; escapees
HOLDING: Rule calling for automatic dismissal of appeals by Ds who escape while appeal is pending cannot be applied to former escapees who are recaptured prior to filing of appeal unless there is some connection between escape and appeal that warrants dismissal. D here failed to appear at sentencing in federal district court and was sentenced in absentia. While D was fugitive, Court of Appeals vacated convictions of co-D due to insufficient evidence. After D was recaptured, Tr. Ct. reduced his sentence, allowing him to file timely appeal of his own conviction, which was based on same evidence as co-D's. Eleventh Circuit dismissed appeal, relying on its automatic dismissal rule for escapees. It is well established that appellate court may dismiss appeal of D who is fugitive during pendancy of appeal. This rule is supported by variety of rationales, including enforceability, disentitlement theory construing escape as tantamount to waiver or abandonment of appeal, deterrance of escapes, and promotion of efficient, dignified appellate practice. These rationales do not support automatic dismissal of appeal by D who has been returned to custody before initiating appeal. Appellate dismissal amounts to additional punishment, and introduces element of arbitrariness into sentencing for escape. Held, absent some connection between escape and appellate process, dismissal of appeal is not proper. Remanded to 11th Cir. Ct. App. for determination whether its appellate process was sufficiently disrupted (e.g. by inability to consolidate appeal of D and co- D) to justify dismissal.

TITLE: Prater v. State
INDEX NO.: G.4.
CITE: (2/10/84), Ind., 459 N.E.2d 39
SUBJECT: Abandonment of appeal - voluntary act of D
HOLDING: Denial of D's verified petition for permission to file belated MCE (PC 2, Section 1) was proper where D escaped during pendency of MCE & was returned to IN after time limits for bringing appeal expired. Here, D filed MCE 3/16/79. D later escaped from jail. At hearing on MCE, Tr. Ct. granted state's motion to dismiss on grounds D deliberately removed himself from court's jurisdiction & had no standing to appeal. Where D escapes & remains fugitive, D is not subject to jurisdiction of IN courts for purposes of determining appeal; attempted appeals are dismissed. Mason 440 N.E.2d 457; other citations omitted. Where D escapes but is recaptured & incarcerated in IN before time limits for bringing appeal have expired, Tr. Ct. has jurisdiction to hear appeal, because act of escape alone is not proof of D's voluntary/knowing relinquishment of statutory right to appeal. Ruetz v. Lash, (CA7 1974) 500 F.2d 1225. Where D is recaptured after time limit for bringing appeal have expired, D must comply with PC 2 or show noncompliance was excusable. Lewis 375 N.E.2d 1102. Belated appeals will not be granted where rights were lost by voluntary acts; escape is a voluntary act. Lewis. Held, no error.

RELATED CASES: Darby, 966 N.E.2d 735 (Ind. Ct. App. 2012) (a D who escapes lawful custody is not entitled to file a notice of appeal and pursue an appeal while at large); Crank, App., 502 N.E.2d 1355 (where D voluntarily absented himself from jurisdiction during his trial & sentencing & time for direct appeal, court finds remedy of PCR inapplicable & refuses to review alleged trial errors raised for first time in PCR petition, citing Bailey 472 N.E.2d 1260).

TITLE: State v. Monserrate
INDEX NO.: G.4.
CITE: (12/27/82), Ind., 442 N.E.2d 1095
SUBJECT: Dismissal of appeal - failure to serve appellee
HOLDING: Failure to serve copy of brief on appellee within time allowed subjects appeal to dismissal. Howard County Council v. State ex rel. Osborn 215 N.E.2d 191; State ex rel. Dillon v. Shepp, App. 332 N.E.2d 815. Case law generally indicates dismissal is mandatory, but Murphy v. IN Harbor Belt RR, App., 284 N.E.2d 84 indicates noncompliance with AR 12(B) does not mandate dismissal (court has discretion). In Murphy, appellee who was served with appellant's brief one day beyond time limitations of AR 12(B) moved for dismissal which was denied. Here, court distinguishes case from Murphy. State's procedural errors were legion: state served brief on D 2? months late & only then because prompted to do so by S.Ct. administrator; state withdrew record from court & did not return it until one month after time D's brief was due; state failed to comply with AR 7.2(A)(3)(a) requiring notation on margin of transcript; Lake County prosecutor initiated appeal from Tr. Ct.'s grant of D's PCR petition, in contravention of PC 1, Section 9(b) which requires attorney general to represent interests of state. A.G. entered appearance in case on 7/16/82, well after record filed (3/30/82) & appellant's brief filed (4/29/82). Held, dismissal of appeal granted. **Note** that new trial granted D (charged with murder) will be his third. His first direct appeal resulted in a new trial.

TITLE: State v. Wilson
INDEX NO.: G.4.
CITE: (1st Dist., 9-23-96), Ind. App., 671 N.E.2d 148
SUBJECT: Appeal dismissed for lack of jurisdiction
HOLDING: Because praecipe was not timely filed, Ct. App. dismissed State's appeal for lack of jurisdiction. One day after conviction & sentence was entered pursuant to plea agreement, Tr. Ct. granted D's petition for post-conviction relief (PCR), which alleged violation of Interstate Agreement on Detainers. State then filed motion requesting Tr. Ct. to set new trial date, & D responded by filing motion to dismiss pending charges. Tr. Ct. granted D's motion to dismiss. Issue presented for review was whether D's petition for PCR should have been granted, & there was no reference to motion to dismiss anywhere in State's appellate brief. Ct. held that time for bringing appeal began to run from date that Tr. Ct. granted D's petition for PCR, not from date following entry of order granting motion to dismiss. Propriety of Tr. Ct.'s ruling on D's motion to dismiss was not properly presented for Ct. to review. Held, Tr. Ct. affirmed; Baker, J., dissenting.

TITLE: United States v. Frias
INDEX NO.: G.4.
CITE: 521 F.3d 229 (2nd Cir. 2008)
SUBJECT: Government's failure to object to late appeal allows court to consider
HOLDING: Second Circuit held the government's failure to object to the lateness of D's notice of appeal leaves the door open for the court of appeals to consider the appeal. Court addressed the timeliness question sua sponte and concluded that it had subject-matter jurisdiction to consider the appeal due to the government's failure to raise a timeliness challenge. Court was interpreting Fed.R.App.P. 4(b) and in the past had said Rule 4(b) was jurisdictional in nature and barred any late appeals. Court rethought issue based on two recent U.S. Supreme Court cases Kontrick v. Ryan, 540 U.S. 443 (2004) and Bowles v. Russell, 81 CrL 376 (U.S. 2007) that analyzed timeliness of claims and whether such limits in other context were jurisdictional or nonjurisdictional. Court concluded that, because Rule 4(b) is purely a court-prescribed rule of procedure, it is not jurisdictional in nature and a circuit court thus may entertain a late appeal if the government fails to contest it on that ground. Court further noted that when the government properlty objects the rule is mandatory as to timeliness.

TITLE: United States v. Liriano-Blanco
INDEX NO.: G.4.
CITE: 510 F.3d 168 (2nd Cir. 2007)
SUBJECT: Despite appeal waiver, D entitled to new sentencing hearing
HOLDING: Second Circuit Court of Appeals held that a D who waived his right to appeal in a plea agreement is still entitled to a new sentencing hearing in light of comments made by the district judge that indicate he had forgotten about D's appeal waiver. Court's decision was based on the possibility that the sentencing district judge imposed a harsher sentence than he would have had he been reminded of D's appeal waiver. Court distinguished case from other precedent in the circuit, noting "there is more at stake than unnecessary proceedings and false hope. The mistake as to [D's] right to appeal may have directly affected the length of the sentence imposed on him. The [district] court explicitly expressed its view that a more lenient sentence might be appropriate but that it harbored doubts about whether under the applicable law it could impose that sentence. . . . The district court relied on the possibility of appeal in choosing [a] higher sentence" apparently unaware of the waiver. Court also noted prosecution's failure to remind the district judge of the waiver.

TITLE: United States v. Castillo
INDEX NO.: G.4.
CITE: 496 F.3d 947 (9th Cir. 2007)
SUBJECT: Failure to invoke appeal waiver allows entertainment on the merits
HOLDING: Ninth Circuit Court of Appeals, en banc, held that when prosecutors address the merits of a D's appeal rather than invoke an appeal waiver executed when the D pleaded guilty, the federal circuit court may entertain the D's appeal. The Ninth Circuit panel held that D, by failing to preserve claims for appeals in accordance with the federal rule governing conditional guilty pleas, Fed.R.Crim.P. 11(a)(2), raises a jurisdictional bar to appeals of pre-plea constitutional claims. En banc Court pointed out that the Supreme Court has, in more recent cases than those relied on by the panel, drawn a sharp distinction between jurisdictional limits and "nonjurisdictional claim-processing rules." Nothing in Rule 11 affects a court's jurisdiction to hear an appeal following a guilty plea. The Court noted its subject matter jurisdiction is provided by the federal statutes that authorize the district courts to adjudicate federal offenses and the circuit courts to review "final decisions" of the district courts. "These provisions dod not discuss plea agreements or their possible effects on jurisdiction."

G. APPEAL

G.5. Scope of review

TITLE: Ferrell v. State

INDEX NO.: G.5.

CITE: (10/24/95), Ind. App., 656 N.E.2d 839

SUBJECT: Perfecting appeal -- failure of appellee to file brief lowers standard of review

HOLDING: Juvenile was adjudicated delinquent for carrying handgun without license & criminal recklessness. D appealed claiming that evidence was not sufficient to support delinquent acts. State waived its right to file appellate brief in this matter & Ct. held that therefore less stringent standard of review applied. Appellant need only establish prima facie error to win reversal when appellee fails to file brief. Costas, 552 N.E.2d 459. Held, affirmed in part & reversed in part.

G. APPEAL

G.5. Scope of review

G.5.b. Questions of law and fact

TITLE: Ornelas v. U.S.
INDEX NO.: G.5.b.
CITE: 517 U.S. 690, 116 S. Ct. 1657; 134 L.Ed.2d 911 (1996)
SUBJECT: Search & Seizure -- Appellate Review
HOLDING: Appellate Cts. should conduct de novo review of Tr. Ct.'s determinations of reasonable suspicion to make stops and probable cause to make warrantless searches, after reviewing findings of historical fact for clear error and giving due weight to inferences. While it is impossible to define precisely what reasonable suspicion or probable cause mean, it is clear that inquiry for determining either has two parts. The first part is a determination of the historical facts -- the events leading up to stop or search. The second part is a mixed question of law and fact -- determining whether historical facts found satisfy legal standard of reasonable suspicion or probable cause. Ct. has never, when reviewing probable cause or reasonable suspicion determinations, expressly deferred to Tr. Ct.'s determination. Policy of sweeping deference would lead to inconsistent rulings, whereas independent appellate review is necessary to enable the appellate Cts. to maintain control of and clarify legal principles involved. Such unified precedent will come closer to providing law enforcement officers clearly defined set of rules from which to operate and make their own correct determinations. Therefore, as general matter, appellate Cts. should conduct de novo review of determinations of reasonable suspicion and probable cause. In doing so, they should review findings of historical facts regarding events leading up to stop or search only for clear error. They should further give due deference to inferences drawn from those facts by resident judges and local law enforcement officers. Scalia, J., DISSENTS.

TITLE: White v. State
INDEX NO.: G.5.b.
CITE: (11/21/2012), 978 N.E. 2d 475 (Ind. Ct. App. 2012)
SUBJECT: Paper record allows de novo review
HOLDING: Because a paper record, including a stipulation of evidence, was the only evidence the Tr. Ct. reviewed to determine if murder victim's statements were admissible under the "forfeiture by wrongdoing" exception to the hearsay rule, see Ind. Evidence Rule 804(b)(5), Court of Appeals was "able to independently assess" the evidence relevant to the Rule "without invading the province" of the Tr. Ct.. See Bunch v. State, 964 N.E.2d 274, 293 (Ind. Ct. App. 2012), trans. denied. Held, judgment affirmed.

RELATED CASES: In re Adoption of C.B.M., 992 N.E.2d 687 (Ind. Ct. App. 2013) (because trial rule only reviewed paper record in denying Appellant's T.R. 60(B) motion, de novo review was appropriate).

G. APPEAL

G.5. Scope of review

G.5.c. Sufficiency of the evidence (see, also K categories for substantive crimes)

TITLE: Burden v. State
INDEX NO.: G.5.c.
CITE: (1/25/2018), 92 N.E.3d 671 (Ind. Ct. App. 2018)
SUBJECT: Insufficient evidence for neglect of dependent
HOLDING: The State's evidence that D left his putative biological child with the child's mother at the scene of a car accident was not sufficient to support D's conviction for neglect of a dependent as a Level 6 felony. See Ind. Code § 35-46-1-4(a)(1). D lived with his girlfriend Christina and her two young children, B.E. and K.E.; Christina believed D was K.E.'s father. One day, D, Christina and the two children, were passengers in D's sister's ("Tiffany") car. Tiffany began showing off, increasing her speed to more than 100 m.p.h. She lost control of the car, which veered into a cornfield, rolled several times, and came to rest on its roof. Christina and the children were thrown from the car. Once he extricated himself from the car, D repeatedly and frantically asked Christina where K.E. was. Each time, she assured D that K.E. was with her and that K.E. was fine. Also, D was not trained in first aid, and Christina would never let D car for K.E. Because D's cell phone was not working, her persuaded an onlooker to drive D to D's home so he could call for help. After leaving the scene, D did not, in fact, call for help. Some evidence suggested that D left the scene because he had an outstanding warrant. This evidence did not establish a "high probability" that D placed K.E. in a dangerous situation. See Scruggs v. State, 883 N.E.2d 189, 191 (Ind. Ct. App. 2008). Held, judgment reversed.

TITLE: Drane v. State
INDEX NO.: G.5.c.
CITE: 867 N.E.2d 144 (Ind. 2007)
SUBJECT: Murder- sufficiency of the evidence
HOLDING: There was sufficient evidence to support D's convictions for murder and rape. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. The task for the appellate tribunal is to decide whether the facts favorable to the verdict represent substantial evidence probative of the elements of the offense. Here, the victim talked with D multiple times on the night of the murders making arrangements to meet him. The victim was last seen around 10:00 p.m. D admitted meeting the victim and having consensual sex with her. D claimed she left him around midnight. The victim's body was found around 9:00 the next morning in a park. Although D denied being in the park, at around 11:00 p.m. to 11:30 p.m. and then again about two to three hours later on the night of the murder, D's car was seen in the park near where the body was found. The victim's body was bruised, she was strangled, and her skirt was pulled up so her genitalia were visible. DNA samples found on vaginal cervical swabs and external genital swabs from the victim's body could not exclude D as a contributing source. There was evidence of a probative value from which a jury could find D committed the crimes beyond a reasonable doubt. Held, transfer granted, Court of Appeal's memorandum opinion vacated, judgment affirmed.

TITLE: Lehman v. State
INDEX NO.: G.5.c.
CITE: (5/31/2016), 55 N.E.3d 863 (Ind. Ct. App. 2016)
SUBJECT: Sufficient evidence for illegal practice of law
HOLDING: Sufficient evidence supported D's three convictions for unauthorized practice of law under Ind. Code § 33-43-2-1. After being suspended from the practice of law for not less than two years, D illegally practiced law by engaging in negotiations for one client. See State ex rel. State Bar Ass'n v. Diaz, 883 N.E.2d 433, 448 (Ind. 2005). He illegally practiced law with another client by consulting with the client, accepting a consultation fee, and offering to complete paperwork for a divorce. See Ind. Code § 33-43-2-1. He illegally practiced law with a third client by preparing a quitclaim deed. See Ind. Real Estate Ass'n, 191 N.E.2d 711, 717 (Ind. 1963). Held, judgment affirmed.

TITLE: Long v. State
INDEX NO.: G.5.c.
CITE: (09-30-10), 935 N.E.2d 194 (Ind. Ct. App. 2010)
SUBJECT: Theft - difference between breach of contract and theft
HOLDING: Even though the legislature did not intend to criminalize bona fide contract disputes, Jamrosz v. Resource Benefits, Inc., 839 N.E.2d 746, 759 (Ind. Ct. App. 2005), State presented sufficient evidence for Class D felony theft where circumstantial evidence proved beyond a reasonable doubt that D exerted "unauthorized control" over items in furnished condo "by promising performance that the [D] kn[ew] [would] not be performed." Ind. Code § 35-43-4-1(a)(6).

A conviction may be based on circumstantial evidence alone if there are reasonable inferences enabling the factfinder to find a D guilty beyond a reasonable doubt. Brink v. State, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005). The key to the offense of theft by promising performance the person knows will not be performed is the intent of the person when she secures control of property. Kollar v. State, 556 N.E.2d 936, 939 (Ind. Ct. App. 1990), disapproved on other grounds by Jackson v. State, 50 N.E.3d 767 (Ind. 2016). Intent may be proven by circumstantial evidence and it may be inferred from a D's conduct.

Here, D told Seller that he had no money, but that "he was having some money transferred in from somewhere out of state." Seller let D move into condo without down payment, and D lived there for approximately ten weeks before first payment came due. D had a very cordial relationship with Seller, maintaining almost daily contact. When first payment came due, D did not pay, and when Seller asked him about it, D threatened legal action for no apparent reason and cut off all communication. D moved out, taking everything, including appliances, without warning or explanation.

Court said, "This is a close case, and we have the same concern as that expressed by the Tr. Ct. about the propriety of a criminal prosecution in what is primarily a contractual dispute between the parties. But we cannot say that the Tr. Ct. got it wrong in this instance." Court acknowledged plausibility of other inferences drawn by dissent but said it was bound to consider only the probative evidence and reasonable inferences supporting the verdict. Held, judgment affirmed; Kirsch, J., dissenting on basis that some of majority's inferences are speculative. He acknowledged evidence supported some of majority's inferences but evidence equally supported inferences that D did not act with requisite intent for theft. "In baseball, ties go to the runner; in criminal procedure, they go to the D."

TITLE: Taylor v. State
INDEX NO.: G.5.c.
CITE: (3/25/2015), 28 N.E.3d 304 (Ind. Ct. App. 2015)
SUBJECT: Insufficent evidence for neglect of dependent
HOLDING: Court reversed D's conviction for class A felony neglect of a dependent child resulting in death because of insufficient evidence. D left her son, J.N., with her boyfriend, Ryan Worline, while she was at work. While she was gone, Worline beat J.N. and fractured his skull. When D returned from work around 10:00 p.m., she checked on J.N., who was lying in his crib and was not breathing. J.N. died around midnight. At trial, the State presented no evidence that D inflicted an injury, was present when injury was inflicted, heard the infliction of injury, or saw manifestations of an injury necessitating medical care. See Fout v. State, 619 N.E.2d 311, 313 (Ind. Ct. App. 1993). The Court acknowledged that although reasonable inferences may be drawn from evidence, "it is the State's burden to present evidence on each element . . . from which those inferences may be drawn. Ultimately, a criminal conviction absent proof beyond a reasonable doubt on each element of the charged crime amounts to fundamental error." See In re Winship, 397 U.S. 358, 361 (1970). The Court concluded, "The inference-stacking without establishment of a predicate fact, which the prosecution invited and the State deems sufficient to withstand appeal, is not constitutionally adequate." See Brown v. State, 36 N.E.2d 759, 760 (Ind. 1941). The State's new theory by the end of the trial – that D allowed Worline access to J.N. and simply "did nothing to stop [Worline]" is not the offense for which she was charged, and no conviction can be made to stand on that theory. Held, judgment reversed.

TITLE: Williams v. State

INDEX NO.: G.5.c.

CITE: (10/30/2017), 86 N.E.3d 428 (Ind. Ct. App. 2017)

SUBJECT: Sufficient evidence that D failed to warn person at risk that he carried communicable disease

HOLDING: The State presented sufficient evidence to support Williams' conviction for failing to warn a person at risk that he was a carrier of a dangerous communicable disease. See Ind. Code § 35-45-21-3(b) and Ind. Code § 16-41-7-1. Williams was diagnosed with AIDS in 2004. He was twice informed of his duty to warn: first, when he was diagnosed, as memorialized by his "Confidential Case Report," and, second, in 2010, when he signed a "Duty to Warn" form during a meeting with a care coordinator from the Indiana Department of Health. In 2014, Williams began a sexual relationships with R.B.; he never told her he was an AIDS carrier. In 2015, Williams was diagnosed with Kaposi's sarcoma, a skin cancer connected to advanced HIV infection. In 2016, R.B. found the discharge papers related to Williams' cancer treatment, and by reviewing them, learned that Williams has AIDS. R.B. immediately visited a hospital and tested positive for HIV. The State proved Williams knew about his duty to warn; he was advised of this duty both during his initial diagnosis and during his 2010 meeting with a care coordinator from the Indiana Department of Health. The State also proved that the "Stanley Williams" identified in Exhibit 1 was the same Stanley Williams who was put on trial. R.B. testified that she had been in a sexual relationship with Williams and that she had discovered the discharge papers mentioning his AIDS condition in Williams' own home. Held, judgment affirmed.

TITLE: Willis v. State
INDEX NO.: G.5.c.
CITE: (3/24/2015), 27 N.E.3d 1065 (Ind. 2015)
SUBJECT: Insufficent evidence for criminal trespass
HOLDING: Conviction for Class A misdemeanor criminal trespass reversed for insufficient evidence. After a security alarm at Watkins Family Recreation Center was activated, officers responded and saw D running in a field west of the building. No one saw D in the building or leaving the building. While a conviction may rest solely on circumstantial evidence, see Moore v. State, 652 N.E.2d 53, 55 (Ind. 1995), there is no circumstantial evidence here. Mere presence at the scene is insufficient to establish guilt. At most, the evidence showed D was spotted running in a field about one hundred yards away from the store. Flight, standing alone, does not establish guilt. Dill v. State, 741 N.E.2d 1230, 1232-33 (Ind. 2001). The evidence merely shows D's behavior was suspicious and he may have had the opportunity to commit the crime, but "a reasonable inference of guilt must be more than a mere suspicion, conjecture, conclusion, guess, opportunity, or scintilla." Mediate v. State, 498 N.E.2d 391, 392 (Ind. 1986). Held, transfer granted, Court of Appeals' opinion at 13 N.E.3d 460 vacated, and judgment reversed.

G. APPEAL

G.5. Scope of review

G.5.c.1. General principles

TITLE: Goodloe v. State
INDEX NO.: G.5.c.1.
CITE: (12/3/82), Ind., 442 N.E.2d 346
SUBJECT: Sufficiency - uncorroborated testimony of accomplice
HOLDING: A conviction may rest upon the uncorroborated testimony of an accomplice. Drollinger 408 N.E.2d 1228; Roseberry 402 N.E.2d 1248. [See also Thompson 441 N.E.2d 192; Taylor 425 N.E.2d 143.] Here, D challenges sufficiency of robbery conviction. Co-Ds agreed to testify against D pursuant to plea-bargain agreement. The state detailed co-D's plea bargain agreement to jury prior to co-D's testimony. Fact his testimony was exchanged for leniency goes to weight, not admissibility. [Harden 441 N.E.2d 215; Moore 379 N.E.2d 1129; Coleman 339 N.E.2d 51.] Jury was free to believe or disbelieve co-D Held, evidence sufficient to sustain Class A robbery conviction. **NOTE:** Jury must be fully informed of circumstances of accomplice's testimony (plea bargain). Menefee 417 N.E.2d 302; Bond 403 N.E.2d 812; Newman 334 N.E.2d 684.

TITLE: Harper v. State
INDEX NO.: G.5.c.1.
CITE: (2/22/85), Ind., 474 N.E.2d 508
SUBJECT: Sufficiency - rape; proof of use/threat of deadly force
HOLDING: Evidence was sufficient to sustain conviction for Class A felony where D verbally threatened to kill victim while hitting & choking her. Smith 455 N.E.2d 606 (D put hand over rape victim's mouth making breathing difficult & told her "shut up or I'm going to kill you;" held, evidence of threat of deadly force sufficient); Calbert 418 N.E.2d 1158 (rape victim beaten while D told her "I'll kill you;" held, evidence sufficient to sustain Class A felony conviction). Held, conviction affirmed.

TITLE: Houze v. State
INDEX NO.: G.5.c.1.
CITE: (12/3/82), Ind., 441 N.E.2d 1369
SUBJECT: Sufficiency - uncorroborated testimony of victim
HOLDING: Uncorroborated testimony of victim is sufficient to sustain conviction. Poston 429 N.E.2d 643; Pavone 402 N.E.2d 976. Here, D & another man forced their way into C.S.'s truck, held a knife to her throat & made her drive them to an abandoned barn where they both raped her. C.S. positively identified D. D was arrested shortly after commission of the crime. D pointed to inconsistencies in C.S.'s testimony. Court dismissed argument as an invitation to assess credibility of C.S.'s testimony. Held, rape & kidnapping convictions based upon uncorroborated testimony of victim upheld.

RELATED CASES: Dillon 448 N.E.2d 21 (conviction sustained where 2 officers positively identified D as man who fled from building with pants unzipped & fell at their feet, despite fact victim & eyewitness were unable to identify D, *citing* Jordan 432 N.E.2d 9); Brumfield 442 N.E.2d 973 (testimony of eyewitness supports conviction); Walker 442 N.E.2d 696 (conviction may be sustained by uncorroborated testimony of one witness, *citing* Sheckles 440 N.E.2d 121 & Williams 373 N.E.2d 142; held, victim sufficiently identified D; robbery & theft convictions affirmed).

TITLE: James v. State
INDEX NO.: G.5.c.1.
CITE: (1st Dist. 8/14/85), Ind. App., 481 N.E.2d 417
SUBJECT: Repudiated out-of-court statement alone cannot sustain conviction
HOLDING: Evidence was insufficient to sustain D's conviction for child molesting where child denied truth of prior statement & State failed to present corroborating evidence. Peckinpaugh 447 N.E.2d 576 ("close case" supported by evidence of flight, admissions & intimidation of minor witnesses). Here, court rejects state's contention that the following evidence corroborates child's prior statement: "whimsical Patterson on Patterson statement" of wife, D's failure to deny fondling to wife although she never asked, D's failure to explain origin of repudiated statement & graphic & detailed nature of same. Court discusses numerous cases where corroborative evidence was found. Held, conviction reversed.

RELATED CASES: Laswell, App., 494 N.E.2d 981 (child molesting/incest convictions reversed because based solely on out-of-court statements of victim, which in court she described as lies).

Note: Patterson was *overruled* by Modesitt (see card at O.9.b).

TITLE: Keller v. State
INDEX NO.: G.5.c.1.
CITE: (4/4/2013), 987 N.E.2d 1099 (Ind. Ct. App. 2013)
SUBJECT: Insufficient evidence for A misdemeanor failure to report a dead body
HOLDING: State failed to present sufficient evidence for D's conviction of failure to report a dead body, class A misdemeanor under Ind. Code 35-49-19-3. In Spring of 2010, D approached 79-year-old Robert Collier about selling his farm equipment for scrap. Collier initially denied D's request but later agreed. In late August of 2010, while at Collier's property, D found Collier's dead body. About six weeks later, police found Collier, who was "massively decomposed [and] mummified." The State alleged D's duty to report was triggered because Collier "died by violence." The forensic pathologist concluded there was "no anatomic cause of death in this massively decomposed, mummified individual." The State's response that the pathologist also observed that her findings were "consistent with homicide by undetermined means" is not evidence that it would have been apparent to D when he found Collier's decomposed body that Collier died by violence.

TITLE: Love v. State
INDEX NO.: G.5.c.1.
CITE: (5/11/2017), 73 N.E.3d 693 (Ind. 2017)
SUBJECT: Deferential standard of review for video evidence
HOLDING: An appellate court's decision to rely on video evidence to reverse a Tr. Ct.'s findings does not constitute impermissible reweighing of the evidence if the video indisputably contradicts the Tr. Ct.. A video indisputably contradicts the Tr. Ct.'s findings when no reasonable person can view the video and come to a different conclusion. When determining whether the video evidence is undisputable, a court should assess the video quality, including whether the video is grainy or otherwise obscured, the lighting, the angle, the audio and whether the video is a complete depiction of the events at issue, among other things. In cases where the video evidence is somehow not clear or complete or is subject to different interpretations, Court defers to Tr. Ct.'s interpretation. See Robinson v. State, 5 N.E.3d 362 (Ind. 2014) (declining to adopt de novo standard of review for video evidence).

Here, in resisting law enforcement and battery to law enforcement animal prosecution, video evidence was dark, hard to see, and did not indisputably show Defendant's compliance with police. In addition, there was other evidence that sufficiently established the elements of the crimes. Held, transfer granted, Court of Appeals' opinion at 61 N.E.3d 290 vacated, judgment affirmed.

TITLE: Mediate v. State
INDEX NO.: G.5.c.1.
CITE: (10/16/86), Ind., 498 N.E.2d 391
SUBJECT: Sufficiency - conviction based upon fingerprint evidence
HOLDING: Where possibility of legitimate access was adequately foreclosed, evidence of D's fingerprint on object within home was sufficient to sustain burglary conviction. Here, D's fingerprint was found on box of shotgun shells moved from closet to floor of garage during burglary. Homeowner also owned gun shop. Victim testified he sold this type of shell at his store but stated he did not believe this box had ever been offered for sale. Court notes when principal evidence of commission of crime is latent fingerprint, sufficiency of evidence is important/difficult question. Often, state presents additional direct evidence which alone would sustain conviction. Court may consider legitimate access to fingerprinted object, relocation of object from its point of origin & authorization to enter dwelling/structure. Only time fingerprint evidence alone is sufficient to sustain conviction is when print is found at point of entry. Case summarizes numerous cases concerning fingerprint evidence. Held, conviction affirmed.

RELATED CASES: Meehan, 7 N.E.3d 255 (Ind. 2014) (DNA found on glove at scene is sufficient to sustain conviction where D had no legitimate access to burglary scene and N13the glove was found near point of entry; see full review at K.4.c); Kenney, 908 N.E.2d 350 (Ind. Ct. App. 2009) (D's fingerprint left on car at crime scene, along with the fact that D was dating shooter's sister and matched general description of second person witnessed at scene, was sufficient to convict D of felony murder); Curry, App., 440 N.E.2d 687 (see card at K.4.c).

TITLE: Musacchio v. United States
INDEX NO.: G.5.c.1.
CITE: (1/25/2016), 136 S.Ct. 709 (2016)
SUBJECT: Sufficiency elements reviewed against charges, not final instructions
HOLDING: A sufficiency challenge should be assessed against the elements of the charged crime, not against the elements set forth in an erroneous jury instruction.

D accessed his former employer's computer without the former employer's permission. A grand jury indicted him under U.S.C. § 1030(a)(2)(C), under which a person commits a crime when he "intentionally accesses a computer without authorization or exceeds authorized access . . . . " (Emphasis added). At trial, the Government failed to object to the trial court's instruction regarding the elements of the crime, which replaced the conjunction "or" with the conjunction "and." Thus, the instruction stated that a person violates the statute when he intentionally accesses a computer without authorization and exceeds authorized access. As such, the instruction erroneously added an element for the State to prove.

Sufficiency review asks whether the State's case was so lacking that a trial court should not let the case go to a jury. Burks v. U.S., 437 U.S. 1, 16 (1979). When reviewing a sufficiency claim, a court makes a limited inquiry to make sure that a D gets a meaningful opportunity to defend against the charge and a requirement that a jury find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 314-15 (1979). The Government's failure to introduce evidence of the additional element did not implicate the principles of sufficiency review; D was entitled to no more that a legal determination of whether the evidence was strong enough to reach a jury at all. Id. at 319. Held, cert. granted, Fifth Circuit Court of Appeals at 590 Fed. Appx. 359 (2014) aff'd. Thomas, J., for the unanimous Court.

TITLE: Oatts v. State
INDEX NO.: G.5.c.1.
CITE: (7/15/82), Ind., 437 N.E.2d 463
SUBJECT: Sufficiency - general principles
HOLDING: Court rejects D's argument that a verdict may not be sustained if based on mere suspicion, conjecture, or speculation. That standard, employed in Glover 255 N.E.2d 657 & Manlove 232 N.E.2d 874, governs fact-finder's assessment of evidence at Tr. Ct. level. Appellate courts, in reviewing sufficiency of evidence claims, are guided by different standard, namely, examination of evidence most favorable to state plus reasonable inferences therefrom. Unlike Glover, state here proved far more than mere opportunity to commit murder. Held, conviction sustained.

RELATED CASES: Green, 587 N.E.2d 1314 (Ind. 1992) (noting that Manlove has been abrogated; "the standard used in Manlove [when all the evidence in support of a judgment is circumstantial] is no longer used by this Court"); Herrod, 491 N.E.2d 538 (case discusses constitutional basis for standard of appellate review: that jury/Tr. Ct., rather than appellate court, determine facts); Douglas, 441 N.E.2d 957 (appellate court will not weigh evidence nor judge credibility of witnesses); Harden, 441 N.E.2d 215 (if there is substantial evidence of probative value to support conclusion of trier of fact, verdict will not be overturned, *citing* Fielden, 437 N.E.2d 986, Duffy, 415 N.E.2d 715 & Wofford, 394 N.E.2d 100); Trotter, App., 484 N.E.2d 604 (DISSENTING OPINION from denial of rehearing contains lengthy examination of general principals of appellate review & would vacate reversal for insufficient evidence of D's conviction for burglary) Green, 587 N.E.2d 1314 (Ind. 1992) (noting that Manlove has been abrogated; "the standard used in Manlove [when all the evidence in support of a judgment is circumstantial] is no longer used by this Court").

TITLE: Pennington v. State
INDEX NO.: G.5.c.1.
CITE: (2/16/84), Ind. App., 459 N.E.2d 764
SUBJECT: Sufficiency - presence at scene
HOLDING: Evidence is insufficient to support D's conviction for theft where D was merely present in store when brother took stereo, did not aid brother in his getaway & later drove off alone in van in which brother had placed stolen stereo. Here, court notes state brief contains no citation of authority on sufficiency issue, other than statute (Ind. Code 35-43-4-2) & standard (Loyd 398 N.E.2d 1260), thus state's position is waived on appeal. Court finds D's brief states prima facie case for reversal thus court must reverse. Clerk & store manager followed brother, saw him put stereo in van (owned by D's husband). Clerk remained near van while manager called police. D testified clerk did not tell her stolen property was in van when she returned & drove away. Clerk's testimony does not dispute D's testimony. Uncontradicted statements of fact in D's favor are taken as true. Morgan 400 N.E.2d 111; Whitt 361 N.E.2d 913; Winn 111 N.E.2d 653. Court finds state failed to prove D's knowing/intentional exertion of unauthorized control or retention of possession. Held, conviction reversed.

RELATED CASES: EVIDENCE INSUFFICIENT: Cain, App., 451 N.E.2d 672 (evidence was insufficient to support conviction for deception (Ind. Code 35-43-5-3(a)(6)) - cable T.V. service) where evidence showed only that D lived in apartment, sometimes watched T.V. & knew of existence of illegal hook-up; held, conviction reversed). EVIDENCE SUFFICIENT: Smith, App., 719 N.E.2d 1289 (evidence was sufficient to support aiding theft conviction where D diverted clerk's attention while another stole jewelry. D followed co-D out of store, and D interfered with security guard apprehending co-D); Burkes 445 N.E.2d 983 (D's presence at scene of burglary, association with perpetrators, activities in carrying stolen goods from scene & later selling some of them was sufficient to sustain conviction).

TITLE: Phelps v. State
INDEX NO.: G.5.c.1.
CITE: (1st Dist. 9/13/83), Ind. App., 453 N.E.2d 350
SUBJECT: Sufficiency - opportunity to commit crime
HOLDING: Evidence was sufficient to support D's involuntary manslaughter conviction where D's stories were inconsistent & his explanation of 14-month-old victim's bruises was highly improbable & inadequate as to cause of death. State v. Green, (Wash. App. 1970) 466 P.2d 193. Here, D lived with victim's mother. Child was alive when mother went to work at 11 p.m. D was alone for at least one hour with child who was found dead the next morning. An autopsy disclosed multiple bruises all over child's body. Cerebral edema (general swelling of brain) caused by blunt force to the head resulted in death. Circumstantial evidence is sufficient to sustain involuntary manslaughter conviction. See Hutchinson 255 N.E.2d 828; Mobley 85 N.E.2d 489. Means & manner of death may be inferred from proven circumstances. People v. Kinzell, (Ill. App. 1969) 245 N.E.2d 319. Opportunity to commit crime or presence at scene when coupled with other circumstances may be sufficient to support finding of guilt. Manna 440 N.E.2d 473; State v. Pennewell, (Wash. App. 1979) 598 P.2d 748 (similar facts). Held, conviction affirmed.

RELATED CASES: Rohr, 866 N.E.2d 242 (where D was only person with child during time period which pathologist claimed injury had to have occurred, evidence was sufficient); Woodrum, App., 498 N.E.2d 1318 (according to time frame of injuries, D had sole opportunity to inflict them; held, conviction affirmed, citing Phelps).

TITLE: S.M. v. State
INDEX NO.: G.5.c.1.
CITE: (4/13/2017), 74 N.E.3d 250 (Ind. Ct. App. 2017)
SUBJECT: Delinquency adjudication affirmed
HOLDING: Court rejected S.M.'s sufficiency challenge to juvenile court's true finding that she committed what would be Level 6 theft and Class A misdemeanor criminal trespass if done by an adult. Victim had three distinct occasions to observe girl at gas station who stole her car. If believed, victim's identification and testimony established S.M.'s guilt beyond a reasonable doubt and Court will not reweigh her credibility on appeal. Court also declined S.M's invitation to abandon its usual appellate deference because of State's investigation and alleged wrongdoing. Without a constitutional violation requiring suppression or a new trial, questions about how the investigation in a case was performed or not performed are irrelevant to the only dispositive legal question, i.e., whether there was probative evidence such that a reasonable trier of fact could have found guilt beyond a reasonable doubt. Held, judgment affirmed.

TITLE: Sewell v. State
INDEX NO.: G.5.c.1.
CITE: (3d Dist. 12/16/82), Ind. App., 442 N.E.2d 1142
SUBJECT: Sufficiency - weapon not seen
HOLDING: Evidence is not insufficient to prove D was armed simply because witness cannot describe weapon in D's possession during commission of crime. Lyda 395 N.E.2d 776. Here, D told 7-11 cashier he had gun & wanted cash from store register. Cashier testified he never actually saw a gun, but D's posture with one hand on hip behind coat led him to believe D did in fact possess weapon. Revolver was found in D's car when he was arrested. Held, evidence sufficient to sustain Class B robbery conviction.

TITLE: Strong v. State
INDEX NO.: G.5.c.1.
CITE: (5/22/89), Ind., 538 N.E.2d 924
SUBJECT: Sufficiency - expert conclusion based on probability
HOLDING: Fact that expert based conclusion re cause of death on medical probability rather than certainty does not, per se, render evidence insufficient to support finding that D caused death. D faced multiple charges in conjunction with death of grandchild. Physician who performed autopsy testified that victim's brain developed massive swelling & hemorrhaging due to forceful blow, & that "within a reasonable medical probability," this injury caused victim's death. D argues on appeal that because physician's conclusion was based upon medical probability, rather than reasonable medical certainty, evidence was insufficient to prove that D caused victim's death. She argues that evidence establishing only probable cause of death cannot support finding of guilt beyond reasonable doubt. Tr. Ct. does not abuse its discretion by requiring "some degree of certainty" before admitting expert's opinion. Heald 492 N.E.2d 671. However, issue on appeal is not admissibility, but sufficiency. Although weight to be afforded expert opinion is for trier-of-fact to determine, opinion which falls short of reasonable scientific or medical certainty, standing alone, is not sufficient to support conviction. Noblesville Casting Div. of TRW v. Prince 438 N.E.2d 722. Here, however, state offered additional probative evidence on issue of causation. Held, conviction affirmed.

TITLE: Thompson v. State
INDEX NO.: G.5.c.1.
CITE: 441 N.E.2d 192 (Ind. 1982)
SUBJECT: Sufficiency - circumstantial evidence
HOLDING: Conviction based solely on circumstantial evidence will be upheld (Harris 425 N.E.2d 112; Webster 383 N.E.2d 328), so long as inference may reasonably be drawn therefrom which supports jury finding (Hall 405 N.E.2d 530; Parks 389 N.E.2d 286). Here, D & 2 others (including Burris who received death penalty) robbed & killed Indianapolis cab driver. Court rejects D's sufficiency arguments (no evidence presented concerning money; victim killed after, not during, robbery). Held, felony murder conviction affirmed.

RELATED CASES: Pelley 901 N.E.2d 494 (Ind. 2009) (circumstantial evidence of motive, access to weapon of the type used and presence at scene at least prior to the murders was sufficient to support conviction); Rohr, 866 N.E.2d 242 (where D was only person with child during time period which pathologist claimed injury had to have occurred, evidence was sufficient); Woodrum, App., 498 N.E.2d 1318 (according to time frame of injuries, D had sole opportunity to inflict them; held, conviction affirmed, citing Phelps); Drane, 867 N.E.2d 144 (fact that D's car was seen near place at which victim's body was found & it was undisputed victim was with D night of murder was sufficient evidence of murder & rape); Lovell 474 N.E.2d 505 (court finds traces of human blood, consistent with victim's & inconsistent with D's blood type, to be determining factor in upholding D's convictions for battery & attempted murder based wholly on circumstantial evidence); LaBine 447 N.E.2d 592 (Homic 255(2); court notes distinction exists between law governing Tr. Ct.s & appellate courts when circumstantial evidence is involved, *citing* Spears 401 N.E.2d 331 & Ruetz 373 N.E.2d 152; held, voluntary manslaughter conviction affirmed); McFadin, App., 494 N.E.2d 983 (conviction for leaving scene of accident reversed because D, found driving truck 1.5 hours after accident, was never identified as driver/looking like driver; where state fails to connect D with crime, conviction must be reversed, citing Freeman, App., 458 N.E.2d 694); Mickens 439 N.E.2d 591.

TITLE: Van Donk v. State
INDEX NO.: G.5.c.1.
CITE: (3rd Dist., 1-17-97), Ind. App., 676 N.E.2d 349
SUBJECT: Battery - sufficient evidence to corroborate repudiated out-of-Ct. statements
HOLDING: Evidence was sufficient to support conviction for battery, despite fact that complaining witness (CW) recanted statements she made to police officers & never testified at trial that D battered her. Conviction may not be predicated upon repudiated out-of-Ct. statement unless there is substantial evidence of probative value from which trier of fact could infer that repudiated statement is credible. Peckinpaugh, 447 N.E.2d 576. Here, when police officers responded to emergency call placed by CW, they observed D carrying clothes from residence. D stated to officers that he & his wife had engaged in "scuffle." CW stated to officers that D pushed & dragged her down stairs & hit her head against doorway. Officers observed bruise under CW's left eye. Further, CW signed written statement describing battery, & at trial, she admitted giving this statement to officers. Because State's case did not rest solely upon CW's repudiated out-of- Ct. statements, sufficient evidence corroborated repudiated statements & supported conviction. Held, conviction reversed & remanded on other grounds.

G. APPEAL

G.5. Scope of review

G.5.c.2. Inherent improbability/inherently unbelievable

TITLE: A.H. v. State
INDEX NO.: G.5.c.2.
CITE: (01-26-11), 941 N.E.2d 559 (Ind. Ct. App. 2011)
SUBJECT: Sufficiency - admitted failed polygraph result
HOLDING: Evidence was insufficient to sustain D's conviction for incest with K.C. Once stipulated polygraphs are admitted, courts have looked to the results as part of the evidence sufficient to sustain a conviction, but only in conjunction with other evidence of probative value. In light of the Indiana Supreme Court's concerns about the doubtful reliability of polygraphs and the difficulty faced by juries in determining their proper weight, the normal practice- of using polygraphs only with other probative evidence - reflects a general rule that an incriminating polygraph alone will be insufficient to sustain a conviction.

Here, neither victim testified to any contact between K.C.'s penis and D's mouth or anus, nor any penetration, as is required to prove incest. However, D stipulated to a polygraph that indicated he was deceptive when he gave a negative answer to whether he made K.C. "touch [his] bare penis with [K.C.'s[mouth or tongue." After the polygraph, he admitted that he sexually abused K.C. and his sister but did not provide specifics. D did not challenge his convictions for molest based on fondling. Viewing the record as a whole, the only evidence that suggests D engaged in deviate sexual conduct with K.C., as opposed to fondling or touching, is the polygraph results. While these indicated he was deceptive when he denied oral-genital contact, there is no other evidence he was deceptive in making this denial. Thus, the State failed to present substantial evidence of probative value that D committed deviate sexual conduct with K.C., as was required for the incest conviction. Held, incest conviction reversed.

TITLE: Brown v. State
INDEX NO.: G.5.c.2.
CITE: (9/19/83), Ind., 453 N.E.2d 232
SUBJECT: Sufficiency - inherently unbelievable
HOLDING: Testimony of 15-year-old robbery victim was sufficient to sustain D's conviction; record does not support D's contention that testimony was inherently unbelievable. Here, D argues victim's testimony was inherently unbelievable because of his young age, speculating victim made up story to avoid punishment for spending the $30 he told police D took from him. Evidence is insufficient where only incriminating evidence is inherently unbelievable. Held, no error.

RELATED CASES: Moore, 27 N.E.3d 749 (Ind. 2015) (incredible dubiosity not applicable where there were multiple witnesses, any inconsistencies were put before jury, and there was circumstantial evidence of guilt); Dokes, 971 N.E.2d 178 (Ind. Ct. App. 2012) (nothing inherently improbable in testimony of sole witness, who testified D possessed a gun); White, App., 846 N.E.2d 1026 (standard for dubious testimony is inherent contradiction, not contradiction between witness' testimony); Polk, App., 783 N.E.2d 1253 (incredible dubiosity rule inapplicable where evidence did not rest on testimony of one witness, & corroborative & circumstantial evidence exist); White, 706 N.E.2d 1078 (incredible dubiosity rule did not apply where seven witnesses testified and circumstantial evidence supported convictions, even though three witnesses provided different information after being offered incentives; jury was presented with information about incentives); Williams, 741 N.E.2d 1209 (that witness was unable to positively identify D on night of crimes but was later able to positively identify him is not inherently contradictory); Reyburn, App., 737 N.E.2d 1169 (rule of incredible dubiosity concerns testimony, not statements made outside of trial or courtroom); Davenport, 689 N.E.2d 1226 (fact that witness, during immunized testimony, gives statements which contradict earlier statements, does not necessarily make testimony incredibly dubious); Jenkins, 686 N.E.2d 1278 (incredible dubiosity rule does not sanction setting aside jury's role as fact finder simply when facts of case are exceedingly strange); Heeter, 661 N.E.2d 612 (Eight year-old girl's allegations that D molested her were not incredible, dubious or inherently improbable to prove guilt beyond reasonable doubt); Davis, 658 N.E.2d 896 (testimony of witness who was initially co-D who plea-bargained to drop charges was not case of incredible dubiosity); Hill, App., 646 N.E.2d 374 (although testimony of 7 year-old victim was inconsistent with deposition & police statement, evidence was sufficient to support conviction for child molesting; nothing inherently improbable or incredibly dubious about testimony concerning events upon which D's conviction was based); Gaddis, 251 N.E.2d 658 (victim's testimony was at best equivocal and result of coercion because victim had been unsure of ID of criminal; there was complete lack of circumstantial evidence in support of D's guilt); Cf., Thomas 154 N.E.2d 503 (testimony of 2 girls, aged 7 & 8 years, was inherently inconsistent/improbable; D's conviction for public indecency reversed).

TITLE: C.S. v. State
INDEX NO.: G.5.c.2.
CITE: (2/24/2017), 71 N.E.3d 848 (Ind. Ct. App. 2017)
SUBJECT: Evidence for delinquency finding was not incredibly dubious
HOLDING: The evidence supporting the juvenile's true finding for Child Molesting was not incredibly dubious, even though the testimony of the victim, A.G., was at times at times vague and inconsistent. A.G lived with her mother, but sometimes stayed with David Gray, her father, and Gray's girlfriend, Bretina Craft. The juvenile is Craft's son. One night when A.G. was three, she was staying with her father and Craft when the juvenile, then nine, entered A.G.'s room, removed her clothes, and put his penis in her vagina. Later, A.G. later made a videotaped statement to the Child Advocacy Center ("CAC") about what happened. Pursuant to Protected Person Statute, the trial court held a hearing to determine if A.G.s statement would be admissible. A.G. testified and was cross examined at the hearing. Her testimony was videotaped. Both videotaped statements were admitted at the delinquency hearing.

While A.G.'s testimony at the admissibility hearing was sometimes vague and contradictory, her statement to CAC had no such defects. Crucially, she never wavered on her claim that the juvenile touched her where he was not supposed to. Despite A.G.'s inconsistencies at the admissibility hearing, such inconsistencies do not require reversal if there is any basis on which a reasonable trier of fact could choose between conflicting accounts or reconcile inconsistencies. See Edwards v. State, 753 N.E.2d 618, 623 (Ind. 2001). The bar for finding such a basis is low. See Smith v. State, 34 N.E.3d 1211, 1222 (Ind. 2015). Thus, it cannot be said that no reasonable fact-finder could have believed A.G.'s allegations against the juvenile. Accordingly, the evidence supporting the juvenile's true finding was not incredibly dubious. See Moore v. State, 27 N.E.3d 749, 754 (Ind. 2015). Held, judgment affirmed.

TITLE: D.G. v. State
INDEX NO.: G.5.c.2.
CITE: (04-13-11), 947 N.E.2d 445 (Ind. Ct. App. 2011)
SUBJECT: Identification not incredibly dubious despite CW's blindness
HOLDING: Six-year-old complaining witness' ("CW's") testimony that boy nicknamed "Pooder" stuck his penis in her mouth was sufficient to identify juvenile as perpetrator of what would be class B child molesting if committed by an adult, even though CW is blind and did not make a positive in-court identification. Identity may be established entirely by circumstantial evidence and logical inferences drawn therefrom. Bustamante v. State, 557 N.E.2d 1313 (Ind. 1990). Here, CW's mother testified that the juvenile's nickname was "Pooder," which the juvenile confirmed in his testimony. When asked how she knew it was "Pooder" who molested her, CW described "Pooder's" tummy as a circle, which was consistent with other evidence suggesting that the "Pooder" was overweight. CW also testified she recognized "Pooder's" voice because she had heard him talk before. Further, despite "some shortcomings" in CW's testimony, her testimony that Pooder stuck his penis in her mouth was unequivocal and not incredibly dubious. Held, sufficient evidence supported true finding, but true finding reversed for Tr. Ct.'s failure to determine CW's competence to testify.

TITLE: Sisson v. State
INDEX NO.: G.5.c.2.
CITE: (4th Dist.; 5-10-99), Ind. App., 710 N.E.2d 203
SUBJECT: Insufficient evidence; sole witness inherently unbelievable
HOLDING: Testimony of accomplice who kept changing his story was insufficient to support D's conviction for burglary. Where sole witness presents inherently contradictory testimony which is equivocal or result of coercion & there is complete lack of circumstantial evidence of D's guilt, Ct. may find that no reasonable person could believe testimony & reverse Tr. Ct.'s decision. Davenport v. State, 689 N.E.2d 1226 (Ind. 1997), *reh'g granted on other grounds*. Here, alleged accomplice initially implicated D in burglaries of three houses. At trial, accomplice testified inconsistently with his former statement by stating that D was only involved in burglary of one home. When confronted on cross-examination with inconsistencies, accomplice admitted that he lied in attempt to get D in trouble. State contended that even if accomplice's testimony was contradictory, fact that expert testified that shoe print found at burglary of one house "could have" been made by D's shoe was sufficient to support burglary conviction. However, evidence of shoe print was inconclusive at best because expert also testified that D's shoes could not be identified or eliminated as having made impression at burglarized home. Lastly, jury found D guilty of participating in burglary of only one house, but accomplice testified that D did not burglarize that house. Thus, even if jury believed accomplice, there was insufficient evidence to support D's conviction of burglary. Held, conviction reversed.

RELATED CASES: Leyva, Jr., 971 N.E.2d 699 (Ind. Ct. App. 2012) (Baker, J., dissenting on the basis that the child's testimony runs counter to human experience, was uncorroborated and showed a motive to lie; noting that "we should be vigilant when a conviction is obtained on the basis of one eyewitness, so that we do not execute an injustice" and that "it is time to consider whether the court should require corroborating evidence when these types of offenses are supported only by the testimony of a single witness."); West, 907 N.E.2d 176 (Ind. Ct. App. 2009) (the rule of incredible dubiosity is not necessarily rendered inapplicable merely because more than one witness testifies for the State; however, the witness's testimony must be inherently contradictory within itself and not contradictory to another witness' testimony).

TITLE: Toles v. State

INDEX NO.: G.5.c.2.

CITE: (08/18/20), Ind. Ct. App., 151 N.E.3d 805

SUBJECT: No separate "reliability" or "unreliability" test as an alternative to the incredible-dubiosity doctrine

HOLDING: During attempted murder trial, complaining witness (C.W.) testified she had no doubt Defendant was the one who shot her. *Citing* Moore v. State, 27 N.E.3d 749 (Ind. 2015), the Court of Appeals noted that appellate courts do not judge witness credibility unless the incredible-dubiosity doctrine applies, which requires that there be: 1) a sole testifing witness; 2) testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence. The Court declined to adopt a separate "reliability" test in addition to that doctrine and applied the incredible-dubiosity standard to hold that C.W.'s testimony was not incredibly dubious. Thus, there was sufficient evidence to affirm Defendant's conviction.

TITLE: Watkins v. State
INDEX NO.: G.5.c.2.
CITE: (1st Dist. 05/21/91), Ind. App., 571 N.E.2d 1262
SUBJECT: Credibility of testimony as matter of law
HOLDING: Unless witness' testimony involves situations where facts alleged could not have happened as described & be consistent with laws of nature or human experience, it will not be found incredible as matter of law. Child victim testified that his father fondled boy's genitals & placed his (father's) "private" in boy's rectum.

Evidence revealed that child had difficulty discerning dreams from reality & had perceived father performing criminal acts against others which were difficult to believe. Child never equivocated about these specific acts however, & mother's testimony corroborated child's allegations. Therefore, testimony was not incredible as matter of law & was instead issue for jury. Held, convictions on Counts I & II affirmed. **Note:** Conviction on Count I reversed on transfer on other grounds, see Watkins 575 N.E.2d 624, at K.3.e.3.

RELATED CASES: Feyka, 972 N.E.2d 387 (Ind. Ct. App. 2012) (C.W.'s testimony was not incredibly dubious even thought it conflicted with another witness's testimony, she told investigator in pretrial interview she did not know whether incident with D was real or a dream, and she was initially unable to identify D in court).

G. APPEAL

G.5. Scope of review

G.5.d. Verdict contrary to law

TITLE: Johnson v. State
INDEX NO.: G.5.d.
CITE: (3/27/86), Ind., 490 N.E.2d 333
SUBJECT: Verdict contrary to law - remedy
HOLDING: Although verdict was contrary to law, D suffered no apparent prejudice from discrepancy between charging instrument (robbery - bodily injury) (R-BI) & jury finding (robbery - serious bodily injury); therefore, remand for correction of conviction to R-BI is ordered. Here, D had notice of charge because he was also charged with (but acquitted of) accessory to felony-murder. Tr. Ct. imposed enhanced sentence; therefore, possibility that D could have received suspended sentence on R-BI does not convince court that D suffered any prejudice. Held, remanded with order to amend judgment.

TITLE: Vandeventer v. State
INDEX NO.: G.5.d.
CITE: (1st Dist. 2/22/84), Ind. App., 459 N.E.2d 1221
SUBJECT: Verdict contrary to law - nonexistent offense
HOLDING: Conviction for non-existent crime is fundamental error. Moon 366 N.E.2d 1168; Young 231 N.E.2d 797; Hargis 44 N.E.2d 307. Here, D charged with attempted voluntary manslaughter was convicted of attempted reckless homicide as lesser included offense, pursuant to D's tendered instruction. State contends D invited error/cannot now complain. Stamper 294 N.E.2d 609; Moore, App., 445 N.E.2d 576. Rule has been applied to instructions stating offense is lesser included when it is not (Loza 325 N.E.2d 173; Moore; Sund, App., 320 N.E.2d 790), but cases involved statutorily defined offenses. Rule does not apply to non-existent offenses. Held, reversed.

RELATED CASES: Wilhoite, 7 N.E.3d 350 (Ind. Ct. App. 2014) (although the State charged D with the non-existent crime of "conspiracy to commit attempted armed robbery," the record shows he was actually convicted of conspiring to commit armed robbery; thus, Ct. rejected D's claim he was convicted of a crime that does not exist); Anderson, App., 674 N.E.2d 184 (despite fact that D requested instruction on aggravated battery as lesser included offense in attempted murder trial, conviction was fundamental error because aggravated battery did not exist at time of offense).

G. APPEAL

G.5. Scope of review

G.5.e. Failure to preserve error

TITLE: Alexander-Woods v. State

INDEX NO.: G.5.e.

CITE: (02/03/21), Ind. Ct. App., 163 N.E.3d 902

SUBJECT: Argument regarding police officer's qualifications to distinguish smell of marijuana from hemp waived on appeal

HOLDING: On appeal of his convictions and habitual offender enhancement for possession of a narcotic drug, carrying a handgun without a license and possession of marijuana, Defendant challenged the admission of evidence as unconstitutional, and the evidence of marijuana admitted in court was fundamental error because a police officer failed to show he was qualified to distinguish between the odors of illegal marijuana and legal hemp. Defendant's failure to raise the "hemp argument" or challenge the officer's qualifications in the trial court was fatal to his claim that the trial court fundamentally erred in finding probable cause for the vehicle search. Moreover, waiver notwithstanding, Court found that the facts and circumstances within officer's knowledge support the trial court's finding of probable cause for the vehicle search.

TITLE: Banks v. State
INDEX NO.: G.5.e.
CITE: (03/08/91), Ind., 567 N.E.2d 1126
SUBJECT: Un-objected to hearsay - sufficiency to support conviction
HOLDING: Ind. S. Ct. grants transfer & vacates Court of Appeals decision in Banks 549 N.E.2d 1072, holding that typewritten notation of mailing of notice of driver's license suspension on computer printout of driving record, while generally inadmissible as hearsay, may be considered for substantive purposes & is sufficient to establish material fact at issue if not objected to. D argued that evidence was insufficient to support his conviction for operating motor vehicle while license suspended as HTO because it was supported by inadmissible hearsay evidence concerning his knowledge of suspension. To prove his knowledge, State offered 2 documents, copy of letter addressed to D, & computerized printout of D's driving record with typewritten notation of mailing & no return. Court of Appeals had held that notation was inadmissible hearsay, relying on Chambers, Ind. App., 547 N.E.2d 301, & concluded that there was insufficient admissible evidence to support conviction. S. Ct. noted that in Chambers there was timely objection to inadmissible hearsay, while in instant case there was none, & held that otherwise inadmissible evidence may be considered substantively & therefore may be sufficient to establish a material fact at issue if not objected to. Held, opinion of Court of Appeals vacated & Tr. Ct. affirmed, J. DeBruler concurring but disagreeing with unqualified proposition that material facts in issue are proved by hearsay evidence which comes in without objection.

RELATED CASES: Broude, 956 N.E.2d 130 (Ind. Ct. App. 2011) (otherwise inadmissible evidence may be considered for substantive purposes and is sufficient to establish a material fact at issue when the hearsay evidence is admitted without timely objection at trial).

TITLE: Bigger v. State

INDEX NO.: G.5.e.

CITE: (3/26/2014), 5 N.E.3d 516 (Ind. Ct. App. 2014)

SUBJECT: D waived issue of whether State presented sufficient evidence to disprove D's abandonment defense

HOLDING: D waived claim that the State failed to present sufficient evidence to disprove his claim of abandonment. In December of 2012, D tried to rob a Fort Wayne bank. After the State charged D, at no time did he assert the defense of abandonment. He did not, before trial, file some sort of pleading or notice to advise Tr. Ct. about his intentions. Once the trial was underway, D did not, in any way, inform the court that he intended to pursue this defense. Thus, the jury could not have known to consider the defense in its deliberations of a D's guilt. See Norton v. State, 273 Ind. 635, 408 N.E.2d 514 (1980). Thus, the issue is waived. Held, judgment affirmed.

TITLE: Carroll v. State
INDEX NO.: G.5.e.
CITE: (8/16/82), Ind., 438 N.E.2d 745
SUBJECT: Failure to preserve error - different grounds on appeal
HOLDING: Grounds for an objection presented to Tr. Ct. may not be changed on appeal. Phelan 406 N.E.2d 237. Here, D objected to admission of confession at trial on a different ground than that raised on appeal. Held, argument waived.

RELATED CASES: Vega, (2/14/2019), 119 N.E.3d 193 (Ind. Ct. App. 2019) (D did not preserve for appellate review his "drumbeat evidence" argument where objection at trial was based on confrontation clause violation); Meriwether, 984 N.E.2d 1259 (Ind. Ct. App. 2013) (D waived his argument regarding an alleged violation of his Fifth Amendment and Article 1, Section 14 rights because he did not make that argument in his pre-trial motion to suppress and did not object contemporaneous to the admission of his statement during trial); Petruso, 441 N.E.2d 446.

TITLE: Clark v. State
INDEX NO.: G.5.e.
CITE: (2nd Dist., 06-07-05), Ind. App., 829 N.E.2d 589
SUBJECT: Forfeiture of Blakely claim on appeal
HOLDING: On August 23, 2004, Tr. Ct. ordered D to serve a six-year executed sentence for nonsupport of a child, as a Class C felony. On appeal, D argued that imposition of enhanced sentence violates Blakely v. Washington, 124 S. Ct. 2531 (2004), which was handed down two months before D's sentencing hearing. Because D failed to object to his sentence at any time to Tr. Ct., & because his case was not on direct review at time Blakely was announced, D forfeited his right to have this issue reviewed on appeal. Smylie v. State, 823 N.E.2d 679, 693 n.13 (Ind. 2005). Held, judgment affirmed.

RELATED CASES: Chupp, App., 830 N.E.2d 119 (given short amount of time between Blakely decision & sentencing hearing, Ct. was not willing to say that D forfeited any Blakely claim for failure to object at sentencing hearing; however, D should have advanced Blakely argument in his appellant's brief, & may not invoke Appellate Rule 48 to raise issue for first time in reply brief by filing citation to additional authority).

TITLE: Galvan v. State
INDEX NO.: G.2.e.
CITE: (2nd Dist., 12-03-07), Ind. App., 877 N.E.2d 213
SUBJECT: Perfecting an appeal - dismissal of case for failure to follow rules
HOLDING: Ct. App. dismissed D's appeal for failing to follow the appellate rules. Dismissal of an appeal can be an appropriate sanction for violations of the appellate rules. Smith v. State, 610 N.E.2d 265, 267 n.2 (Ind. Ct .App. 1993). Here, D's attorney had been warned on at least three other occasions about violations of the appellate rules. However, in the instant appeal, D failed to comply with Appellate Rule 46(A)(6), requiring the statement of facts to describe the facts relevant to the issues presented; Rule 46(A)(5), requiring the statement of the case to be supported by record cites; Rule 46(A)(7), prohibiting a mere repetition of the argument headings as the summary of the argument; & Rule 50(C), requiring the appendix table of contents to identify each item in the appendix, including the item's date. The attorney was not entitled to a fee for his appellate services in this case & directed to return to the payor any fee he may have already received. Held, appeal dismissed.

TITLE: Joy v. State
INDEX NO.: G.5.e.
CITE: (1st Dist. 3/8/84), Ind. App., 460 N.E.2d 551
SUBJECT: Failure to preserve error - specificity of objection
HOLDING: D failed to preserve any possible error by objecting to questions as leading or irrelevant. Objecting on grounds question is leading & arguing on appeal that it was inflammatory presents no issue for appellate review. Vasquez, 449 N.E.2d 284; Simmons, App., 455 N.E.2d 1143; Dougherty, App., 451 N.E.2d 382. An objection solely on grounds of relevancy is too general to preserve any possible error. Williams, 455 N.E.2d 299; Wallace, 453 N.E.2d 245; Daniels, 453 N.E.2d 160; Hyde, 451 N.E.2d 648. Held, conviction affirmed.

RELATED CASES: Young, App., 620 N.E.2d 21 (D waived any error in admitting testimony regarding search of another's home month after D sold drugs to CI, because objection was simply that evidence was irrelevant. Objection was not specific enough to preserve error & did not explain why testimony was prejudicial. Despite waiver, in footnote Ct. noted that evidence of search & seizure of contraband from another's house, although offered to show D's predisposition, was not germane to issue & was erroneously, but harmlessly, admitted.)

TITLE: Martin v. State
INDEX NO.: G.5.e.
CITE: (10-29-93), Ind., 622 N.E.2d 185
SUBJECT: Procedure used sufficient to preserve error in DSI admission
HOLDING: Where on two separate occasions during trial, before evidence of other acts of sexual misconduct was admitted, D brought issue to Tr. Ct.'s attention & Ct. informed him error was preserved, procedure was adequate to preserve error for review, reversing Ct. App. decision. In trial for deviate sexual conduct & child molesting, Tr. Ct. denied D's motion in limine (ML) to exclude testimony about past acts of sexual misconduct. At trial, prior to daughter testifying & outside presence of jury, D objected to forthcoming testimony for reasons stated in his ML, & stated he wanted to object that way rather than jumping up every two seconds when she was testifying. Tr. Ct. said it would consider record preserved with all arguments made in previous hearing on ML. On second occasion, generally similar exchange took place. Contrary to Ct. App. S. Ct. found issue was preserved. Effect of Tr. Ct.'s rulings outside presence of jury was to overrule D's objection & allow daughter to testify. Tr. Ct. was informed of content of proposed testimony & had opportunity to consider context in which it was to be presented. Ct., however, found that although issue was preserved, it was proper to be considered under rule of Lannan, 600 N.E.2d 1334, & evidence was erroneously admitted under that rule; error in admission was harmless because of other evidence of guilt. **Note:** In footnote Ct. noted that Lannan decision would not be affected by upcoming adoption of IRE 404(b) providing valuable commentary on rule 404(b).

TITLE: McKeown v. State
INDEX NO.: G.5.e.
CITE: (3rd Dist., 10-29-92), Ind. App., 601 N.E.2d 462
SUBJECT: Preservation of error sufficiency of relevancy objection
HOLDING: In trial for Operating While Habitual Traffic Offender, the following objection to admission of documents relating to previous case where D was charged with Operating While Suspended was insufficient to preserve issue for appeal: Your honor, the matter that we are addressing here today happened in March of 1989. To present court documents of something that happened in 1987, I see absolutely no relevance...

Court found that relevancy was clearly only ground of objection in regard to documents, & noted that objection on grounds of relevance is not considered specific objection in Indiana, & therefore will not preserve error, Schoby, App. 235 N.E.2d 495. **Note:** In Schoby the objection was simply "Objection your honor. It is irrelevant," & objection here appears much more specific, but was still found insufficient.

RELATED CASES: Carter, App., 634 N.E.2d 830 (Although D requested continuing objection to Ct.'s ruling on motion in limine concerning other misconduct, this was not sufficient to preserve error for appeal, because he did not renew objection at trial).

TITLE: R.E. v. M.S.
INDEX NO.: G.2.e.
CITE: (1/6/2015), 43 N.E.3d 1276 (Ind. Ct. App. 2015)
SUBJECT: Transfer granted to substitute D's initials for her full name
HOLDING: The Indiana Supreme Court granted transfer to overrule the Court of Appeals' denial of D's motion to substitute her initials for her full name. The decision was affirmed in all other respects. Held, transfer granted, reversed in part and affirmed in part.

NOTE: In granting relief, the Indiana Supreme Court reads Administrative Rule 9(G) broadly, as the text of the rule does not appear to dictate this result.

TITLE: Tyson v. State
INDEX NO.: G.5.e.
CITE: (2nd Dist., 08-06-93), Ind. App., 619 N.E.2d 276
SUBJECT: Failure to preserve error - motion in limine & rape shield
HOLDING: Three different issues were waived due to failure to preserve error in Tr. Ct. First issue related to evidence concerning complaining witness' (CW) relationship with her parents relating to motive to fabricate & provide alternative explanation for psychological counseling after incident. State filed motion in limine & at trial D did not try to elicit information on CX or make offer of proof during direct exam. Because motion in limine was not final ruling, failure to raise issue at trial waived any error. Prosecutor had stated that issue was preserved for appellate purposes without "being revisited during the trial," but Ct. found this was only legal opinion of prosecutor, not law.

Second issue related to evidence of CW's prior sexual conduct offered to rebut impression conveyed by prosecution that she was paragon of innocence & virtue, & possibly virgin. D filed pre-trial motion to admit evidence that was denied under rape shield law. Ct. rejected argument that State opened door to this evidence by its testimony, again finding issue waived due to failure to try to admit evidence during trial.

Third issue related to prosecution's reading from partial dissent in U.S. v. Wade (1967), 388 U.S. 218, 256-57, concerning role of defense counsel (in very negative light). Ct. found issue waived because objection was only to reading case law in general, not specific to Wade. Ct. additionally found waiver of issue because D did not request admonition & mistrial. Trans. denied.

RELATED CASES: Evans, 30 N.E.3d 769 (Ind. Ct. App. 2015) (D waived issue of admission of cash beyond buy money found on him at his arrest; D objected in motion in limine and when a photo of the cash was offered into evidence, but not before, when detective testified about the cash); Dickey, 999 N.E.2d 919 (Ind. Ct. App. 2013) (because motion in limine ruling on 404(b) evidence was not a final ruling, D's failure to object to admission of evidence at trial waived appellate review); White, 978 N.E. 2d 475 (Ind. Ct. App. 2012) (failure to make offer of proof at trial waives any error regarding admission of evidence); Mitchell, 742 N.E.2d 953 (because D failed at trial to offer evidence about possible penalties Co-D faced had he not pleaded guilty, D did not preserve error for appellate review); Martin, App., 636 N.E.2d 1268 (Motion in limine does not preserve error).

TITLE: Ware v. State
INDEX NO.: G.5.e.
CITE: (2d Dist. 10/20/82), Ind. App., 441 N.E.2d 20
SUBJECT: Failure to preserve error - constitutionality of statute
HOLDING: D waived any challenge to constitutionality of statute by failing to raise it at trial. Here, D contends on appeal child neglect statute (Ind. Code 35-46-1-4(a)(1)) under which she was convicted was unconstitutionally vague. Any question concerning constitutionality of statute must be raised at trial in order to be reviewable on appeal. Lee, 156 N.E.2d 78; Chism, (1932), 203 Ind. 241. Held, any error is waived.

RELATED CASES: Burke, 943 N.E. 2d 870 (Ind. Ct. App. 2011) (Ct. reviewed D's claim that religious worship enhancement in burglary statute violates the Establishment Clause of 1st Amendment, even though D's motion to dismiss raised only state constitutional issue under Ind. Const. Art. I, § 4; "appellate courts have considered challenges to the constitutionality of criminal statutes even when Ds have failed to file motions to dismiss"); Regan, 590 N.E.2d 640 (failure to file proper motion to dismiss on constitutional grounds, waives issue on appeal).

TITLE: Warren v. State
INDEX NO.: G.5.e.
CITE: 121 Nev. 886, 124 P.3d 522 (Nev. 2005)
SUBJECT: Preserving Challenge to Ruling Admitting Impeachment Evidence
HOLDING: The Nevada Supreme Court has held that a D need not testify at trial in order to preserve challenge to pre-trial ruling that impeachment evidence would be admissible. Court declined to follow Luce v. U.S., 469 U.S. 38 (1984). In Luce, which interpreted federal evidence law, the Court gave two main reasons for its holding in the absence of D's testimony there is an insufficient record (1) from which to determine whether the Tr. Ct. properly weighed the evidence's probativeness against its potential for prejudice, and (2) to conduct harmless error analysis. The Nevada Supreme Court and other courts which have declined to follow Luce point out that these concerns are eliminated where the D makes an offer of proof. The Court wrote that in order to preserve the issue for trial, the D must make an offer of proof, and it must be clear from the record that, but for the pre-trial ruling, the D would have testified. Cf. Azania v. State, 730 N.E.2d 646 (Ind. 2000)(D's offer of proof was not sufficient to preserve challenge to Tr. Ct.'s pre-trial limine ruling that evidence of prior conviction would be admissible to rebut character evidence put on at capital penalty phase; Boehm, J., DISSENTS).

TITLE: Wilson v. Williams
INDEX NO.: G.5.e.
CITE: 182 F.3d 562 (7th Cir. 1999)
SUBJECT: Contemporaneous Objection Rule -- Definitive Pretrial Evidentiary Rulings
HOLDING: When an adverse ruling on a pretrial motion to exclude evidence is definitive, a party does not have to object at trial to preserve issue for appeal, according to 7th Circuit Court of Appeals. Here, plaintiff filed civil rights claim based on beating by jail guard during pretrial incarceration on a murder charge. Plaintiff filed motion in limine to bar admission of fact that victim of charged murder was police officer. Tr. Ct. denied motion in limine, and plaintiff decided instead to disclose his criminal history to jury, and to pursue theory that the nature of his charged offense had precipitated the guard's attack. Plaintiff further did not object when defense counsel repeatedly referred to him during trial as a "cop killer," and suggested that the nature of his crime justified the beating he received. On appeal, en banc majority acknowledged that 7th Circuit case law is inconsistent on question of whether objection at trial is required to preserve claim of error in pretrial evidentiary ruling. Court here holds that trial objection is not required where pretrial ruling was "definitive." Court overrules U.S. v. York, 933 F.2d 1343 (7th Cir. 1991) "to the extent that it holds that an objection at trial is invariably required to preserve for appeal arguments that were fully presented to the district court before trial." Purpose of bringing matters to attention of trial judge has been fulfilled by obtaining definitive pretrial ruling, and further requiring objection at trial would serve only as a trap for the unwary. Definitive pretrial rulings allow litigants to craft their strategies at trial and focus on unresolved issues. However, even definitive pretrial ruling resolves only the issues actually presented, and other grounds cannot be raised later on appeal. Further, pretrial objection to and ruling on a particular use of evidence does not preserve objection to a different inappropriate use. Here, pretrial ruling allowed use of murder charge and conviction to be used to impeach plaintiff's credibility. It did not give D permission to repeatedly refer to plaintiff as a "cop killer," or to argue that plaintiff's crime justified his beating, and plaintiff's failure to object to this at trial forfeits the issue on appeal.

G. APPEAL

G.5. Scope of review

G.5.f. Waiver of issues

TITLE: Bostic v. State
INDEX NO: G.5.f.
CITE: (11/2/2012), 980 N.E.2d 335 (Ind. Ct. App. 2012)
SUBJECT: Waiver - failure to raise CR 4 and special judge issue at trial level
HOLDING: Trial counsel waived any challenge to the State's failure to try D within the Criminal Rule 4 timeline or the improper procedure for appointing the special judge. A D waives his Criminal Rule 4(C) challenge by neither objecting to the Tr. Ct.'s setting of the trial date nor moving the Tr. Ct. for discharge. Likewise, where a D does not object to an irregularity in the appointment of a special judge, he accepts the appointment, submits to the jurisdiction, and waives the irregularity. To be sure, a party may not submit matters to and await rulings by a special judge before objecting to the special judge's presence in the action. Here, D was not tried within one year of his charges. However, the Court need not calculate the number of days chargeable to each party, because here, at no point during his proceedings, did the D file a motion for discharge under Criminal Rule 4(C) or object to the Tr. Ct.'s setting of any of his trial dates. Similarly, this Court need not address the propriety of the appointment of the special judge beause D did not object-either at the trial or the sentencing hearing-to the senior judge presiding as special judge in his cause. Held, judgment affirmed.

RELATED CASES: Layman, 42 N.E.3d 972 (Ind. 2015) (Ds waived constitutionality of statute on appeal by failing to file pre-trial motion to dismiss and object at trial).

TITLE: Burnell v. State
INDEX NO.: G.5.f.
CITE: (9/14/2018), 110 N.E.3d 1167 (Ind. Ct. App. 2018)
SUBJECT: Waiver of IAC issues on appeal for lack of cogent reasoning
HOLDING: D waived seven of his eight ineffective assistance of counsel contentions on appeal because he failed to provide cogent argument and citation to legal authority in compliance with Indiana Appellate Rule 46(A)(8). Some of D's claims were only one sentence long , "and incomplete sentences at that — with no citation to legal authority or the record." In a footnote, Court noted that much of D's "brief consists of incomplete sentences and other grammatical errors, making it difficult to even ascertain what his contentions are." Held, judgment affirmed.

TITLE: Bush v. State.
INDEX NO.: G.5.f.
CITE: (07-06-10), 929 N.E.2d 897 (Ind. Ct. App. 2010)
SUBJECT: Unlawful detention argument not waived
HOLDING: Court granted State's petition for rehearing to address claim that D had waived arguments upon which Court reversed conviction for class A misdemeanor carrying handgun without a license. Conviction was reversed because State failed to meet its burden of showing traffic stop for speeding was not unreasonably prolonged as officers awaited canine unit or that there was independent reasonable suspicion to justify canine sniff.

D preserved issue for appeal by objecting at trial that officers lacked reasonable suspicion to search his car and should not have detained him while awaiting canine unit. D's appellate arguments under Article I, Section 11 of Indiana Constitution and Fourth Amendment adequately raised issue on appeal. The latter argument relied on Arizona v. Gant, 129 S.Ct. 1710 (2009), and claimed the search-incident-to-arrest exception to warrant requirement did not apply. State did not respond to Gant argument but instead claimed the applicable exception to warrant requirement was probable cause created by positive canine alert. At oral argument, D argued canine sniff was unreasonable because it occurred after officers cited D for speeding, and thus completed the purpose of the investigation.

Court rejected State's claim that it raised issue *sua sponte*. The State, by not responding in its brief to [D's] contentions regarding Gant and instead focusing on its Fourth Amendment argument on the canine sniff as the basis for the warrantless search, *impliedly consented to litigating this case on the grounds addressed in our original opinion.* (emphasis added) Held, rehearing granted to clarify original opinion; in all other respects, original opinion affirmed.

TITLE: Carroll v. State
INDEX NO.: G.5.f.
CITE: (8/16/82), Ind., 438 N.E.2d 745
SUBJECT: Waiver of issues - action required to preserve issue
HOLDING: If curative action (admonition, request to strike from record or for mistrial) is not requested, D cannot claim error in as much as D did not give the court an opportunity to act. Here, D's objection to prosecutor's question was sustained. On appeal D claimed that the question constituted prosecutorial misconduct & required a new trial. Held, conviction affirmed.

RELATED CASES: Douglas, App., 878 N.E.2d 873 (D who pleads guilty without benefit of agreement does not waive constitutional issues for appeal); Gamble, App., 831 N.E.2d 178 (by not requesting admonishment to challenge alleged prosecutorial misconduct during closing argument, D invited error); Wade, 490 N.E.2d 1097 (D's failure to move to strike photo, conditionally admitted with allowance for state to authenticate later, waived issue, *citing* Dean v. Dean, App., 439 N.E.2d 1378; here, D's objection to lack of proper foundation was sustained); Pinkston, App., 479 N.E.2d 79 (failure to petition for transfer waives issue). Brewer, 605 N.E.2d 181 (Where counsel objected to prosecutor's closing comments about role of defense counsel, but did not request admonishment or move for mistrial, possible error was waived. Failure to request admonishment or move for mistrial results in waiver of issue of improper argument Brown, 572 N.E.2d 496.)

TITLE: Class v. United States
INDEX NO.: G.5.f.
CITE: (2/21/2018), 138 S. Ct. 798 (U.S. Supreme Court 2017)
SUBJECT: Guilty plea doesn't automatically waive all constitutional claims
HOLDING: A guilty plea does not automatically waive a challenge to the constitutionality of a statute a D was charged under, if the challenge questions the State's very right to bring the charge.

D was charged with possessing firearms in his Jeep because it was parked on the grounds of the U.S. Capitol building. See U.S.C. § 5104(e)(1). D filed a motion to dismiss, claiming the statute violated his 2nd Amendment right to bear arms. The Tr. Ct. denied the motion. D later pled guilty. The waiver of rights form did not list the right to challenge the constitutionality of the statute as one of the rights D was waiving.

A guilty plea bars appeal of many constitutional claims, such as the right against compulsory self-incrimination, the right to jury trial, and the right to confront one's accusers. Blackledge v. Perry, 417 U. S. 21, 30 (1974); see also Haynes v. United States, 390 U.S. 85, 87 n.2 (1968). However, where, as here, the constitutional claim implicates the very power of the State to prosecute a D, a guilty plea does not waive such a claim absent an explicit waiver of that right. Blackledge, 417 U.S. at 30–31; see Menna v. New York, 423 U.S. 61, 63, n.2 (1975) ("a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."); United States v. Broce, 488 U.S. 563,569 (1989) (guilty plea does not bar claim on appeal "where on the face of the record the court ha[s] no power to enter the conviction or impose the sentence."). Because D did not explicitly waive his claim about the statute, he may raise it on direct appeal. Held, cert. granted, opinion of D.C. Circuit Court of Appeals reversed, and remanded.

Note: Because the opinion sometimes refers to "federal" Ds and other times just "Ds," the scope of the decision is not clear. However, the opinion cites both state and federal cases and the logic of its analysis would seem to make the decision apply to state court proceedings as well. Breyer, J., joined by Roberts, C.J., Ginsburg, Sotomayor, Kagan, and Gorsuch, JJ.; Alito, J., dissenting, joined by Kennedy and Thomas, JJ., writing, "There is no justification for the muddle left by today's decision," adding, "I fear that today's decision will bedevil the lower courts."

TITLE: D.G. v. State
INDEX NO.: G.5.f.
CITE: (04-13-11), 947 N.E.2d 445 (Ind. Ct. App. 2011)
SUBJECT: Issue preserved despite no objection and substance of sidebar conference unclear
HOLDING: Juvenile did not waive claim that Tr. Ct. erred in letting six-year-old complaining witness ("CW") testify that juvenile molested her without determining that CW was competent to testify, even though juvenile did not object to testimony and Tr. Ct.'s certified statement of evidence about the contents of a sidebar conference was inconclusive. Pursuant to Appellate Rule 31, juvenile's appellate counsel filed a motion to certify verified statement of the contents of a sidebar colloquy, which included a sworn statement of defense counsel, claiming, "At the sidebar, I seem to recall I objected to the competency of [the complaining witness] as [a] witness due to her responses and further recall alleging that the child was coached." The State objected to certifying the content of the sidebar because there was no audible transcript of the colloquy. In its Verified Statement, Tr. Ct. found that it had "no recollection of what was discussed or decided during that [sidebar] conversation."

When bench conference records are lacking, "a reviewing court should take an appropriately liberal approach to issues that might otherwise be considered waived at trial for lack of either objection or argument. It also justifies giving [the petitioner] the benefit of the doubt in speculating about what may have been discussed during any of the unrecorded sidebars." Ben-Yisrayl v. State, 753 N.E.2d 649, 661 (Ind. 2001); see also Steinberg v. State, 941 N.E.2d 515, 530-31 (Ind. Ct. App. 2011) ("Because the record is silent on this point through no fault of Steinberg, and given our oft-stated preference for deciding issues on their merits, we will assume for purposes of this appeal that the issue has been preserved and address Steinberg's argument"), trans. denied.

"With this in mind we take the appropriate approach to the issue of waiver and give [the juvenile] the benefit of the doubt as to what may have been discussed during the unrecorded sidebar. Neither the State nor the Tr. Ct. could say definitively that [the juvenile] did not object to [the CW's] competency. Because the failure to record the sidebar was not [the juvenile's] fault, we cannot agree with the State that the issue is waived. As such, we assume that [the juvenile] raised the issue of [the CW's] competency and address his claim on the merits." Held, judgment reversed and remanded.

TITLE: Dillman v. State
INDEX NO: G.5.f.
CITE: (8/29/2014), 16 N.E.3d 445 (Ind. Ct. App. 2014)
SUBJECT: D not entitled to T.R. 72(E) extension to initiate appeal
HOLDING: Even if D did not receive notice of Tr. Ct. order releasing D's cash bond to pay costs and fees, Tr. Ct. was not obligated to extend deadline, pursuant to Trial Rule 72(E), for D to appeal the order. T.R. 72(E) places an affirmative obligation on a person to apply for such an extension. See id. Because he failed to do so, D waived the right to review of his claim that the Tr. Ct. lacked authority to release his cash bond. Held, judgment affirmed.

Lack of notice of Tr. Ct.'s order that released D's cash bond to pay costs and fees did not extend the deadline for filing notice of appeal.

D posted a cash bond of $700 but after guilty plea the Tr. Ct. ordered that he “pay costs and fees out of cash bond” and D did not appeal. The State conceded that the Tr. Ct. was not statutorily authorized to retain the cash bond. However, D waived the issue and this was not fundamental error.

TITLE: Dilts v. State

INDEX NO.: G.5.f.

CITE: (12/31/2015), 49 N.E.3d617 (Ind. Ct. App. 2015)

SUBJECT: D waived appellate review of evidentiary issues by failing to make contemporaneous objection at time evidence was introduced at trial

HOLDING: In child molesting prosecution, trial court did not abuse its discretion by admitting testimony regarding D's suicidal ideation following his daughter's accusations against him. D did not object to this specific evidence at the time it was actually presented during trial, thus he waived review of this issue on appeal. D likewise waived issue of admission of victim's videotaped interview with child abuse forensic interviewer because he failed to make a timely objection when this challenged evidence was admitted at trial. As with the attempted suicide evidence, the parties extensively discussed admission of the videotaped interview prior to the time when the State called its sponsoring witness for the videotape exhibit.

Regarding State's cross-appeal issue, Court found that trial court erroneously vacated one of D's two child molesting convictions pursuant to the continuing crime doctrine, where one conviction was for sexual intercourse and the other was for deviate sexual conduct that occurred on different days. See Hines v. State, 30 N.E.3d 1216 (Ind. 2015) (clarifying continuing crime doctrine). Held, judgment affirmed in part and reversed in part.

TITLE: Dokes v. State
INDEX NO.: G.5.f.
CITE: (07-30-12), 971 N.E.2d 178 (Ind. Ct. App. 2012)
SUBJECT: Probation revocation - testimony not incredibly dubious
HOLDING: State presented sufficient evidence to support revocation of D's probation, even though: 1) only one witness testified that D possessed a gun and 2) D was acquitted of criminal charge of possession of a handgun by a serious violent felon. There was nothing inherently improbable in the testimony of the sole witness who testified that D possessed a gun. See Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). There was also no evidence the testimony was coerced or unequivocal. Further, even though D was acquitted of the handgun offense, the evidence was sufficient to revoke his probation because of the lower burden of proof needed to revoke probation. See Thornton v. State, 792 N.E.2d 94, 97 (Ind. Ct. App. 2003); Jackson v. State, 420 N.E.2d 1239 (Ind. Ct. App. 1981); Hoffa v. State, 267 Ind. 133, 368 N.E.2d 250, 252 (1977). Held, judgment affirmed.

TITLE: Greenlaw v. United States
INDEX NO.: G.5.f.
CITE: 554 U.S. 237, 128 S.Ct. 2559, 171 L.Ed.2d 399, LEXIS 5259 (2008)
SUBJECT: *Sue sponte* increase of sentence inappropriate pursuant to cross-appeal rule
HOLDING: Majority held absent a government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Petitioner's sentence. The district court made an error in calculating Petitioner's sentence imposing a 10-year sentence on a count that carried a 25-year mandatory minimum term, which the government objected to at the time. Petitioner appealed his total sentence, but the government did not address the error by the district court in its appeal. The Eighth Circuit, on its own, increased Petitioner's sentence by 15 years. Majority noted, in both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, *i.e.*, the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. The Court has called the rule "inveterate and certain" and has in no case ordered an exception to it, with no exception being warranted here. The Eighth Circuit held that the plain-error rule, Fed. Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*, but nothing in the text or the history of the rule or in the Court's decisions suggests that the plain-error rule was meant to override the cross-appeal requirement. Breyer, J., filed a concurring opinion. Alito, J., filed a dissenting opinion, in which Stevens, J., joined, and in which Breyer, J., joined as specific part.

TITLE: Griffin v. State

INDEX NO: G.5.f.

CITE: (9/11/2014), 16 N.E.3d 997 (Ind. Ct. App. 2014)

SUBJECT: Autopsy photograph issue waived where grounds for objection at trial substantially different from argument on appeal

HOLDING: Though D objected to autopsy photos at trial under same Indiana Evidence Rule that he raised on appeal, he waived issue because appellate argument was substantially different than the one he presented to Tr. Ct.. At trial, D objected under Rule 403 and argued only that the photographs were gruesome and depicted altered wounds. On appeal, D argued photos were prejudicial because co-D, not D, inflicted wounds to victim. But he made no mention of co-D's involvement or why that involvement might be prejudicial to his trial. Thus, even though D objected under the same rule of evidence both at trial and on appeal, because Tr. Ct. never had an opportunity to consider the argument D now makes on appeal, he waived issue. Waiver notwithstanding, Tr. Ct. did not abuse its discretion when it admitted the photographs into the record. Held, judgment affirmed.

TITLE: Hendricks v. State
INDEX NO.: G.5.f.
CITE: 897 N.E.2d 1208 (Ind. Ct. App. 2008)
SUBJECT: Waiver - D's trial testimony cannot waive preserved search and seizure issue
HOLDING: D does not waive or abandon his right to object on appeal to the introduction of cocaine by later admitting at trial that he possessed it. A minority of states has adopted the rule that a D may not complain on appeal about Tr. Ct.'s admission of evidence if the D testified to possessing the evidence at trial. Of the distinct minority of states who have followed this rule, about half have abandoned the rule in recent years. This is an encouraging development, for the rule is unsound. 5 Wayne R. LaFave, Search and Seizure 11.1(c) (West 3rd ed. 1996).

Here, D testified at trial that he possessed the cocaine which was found during a search of his person. If the evidence of cocaine in this case would have been suppressed as D requested, D would not have been required to decide whether to testify about it. Logic and sound policy considerations lead Court to agree with the majority view discussed by Professor LaFave. Although the search issue warranted evaluation on its merits, the search of D's person which included looking in his waistband and seizing a napkin full of cocaine protruding from his buttocks, was reasonable under the Indiana Constitution. Held, judgment affirmed.

TITLE: Hughes v. State
INDEX NO.: G.5.f.
CITE: (02-21-08), Ind., 880 N.E.2d 1186
SUBJECT: Sentencing issue waived by procedural default
HOLDING: D's belated appeal challenging the appropriateness of his forty-year murder sentence was waived due to procedural default. D raised the issue of improper aggravators and disregard of mitigators during post-conviction relief proceeding where relief was granted based on other grounds (application of appropriate presumptive sentence). D's sentencing claim should have been appealed following post-conviction proceeding, but wasn't. Court held that D cannot now relitigate issue in present belated appeal. Issues presented, or available but not presented, at one stage in the proceedings are forfeited and cannot be brought in a subsequent stage. State v. Holmes, 728 N.E.2d 164 (Ind. 2000). Although State did not raise issue of procedural default, appellate court can raise the issue *sua sponte*. Bunch v. State, 778 N.E.2d 1285 (Ind. 2002). Held, transfer granted, Court of Appeals' opinion at 872 N.E.2d 180 vacated, judgment affirmed.

TITLE: Kunberger v. State
INDEX NO.: G.5.f.
CITE: (12/2/2015), 46 N.E.3d 966 (Ind. Ct. of App. 2015)
SUBJECT: Guilty plea did not waive direct review of double jeopardy claim
HOLDING: D did not waive direct review of his double jeopardy claim by pleading guilty because he pled in open court without the benefit of a plea deal. See Wharton v. State, No. 49A02-1502-CR-85, *slip op*. at 3 (Ind. Ct. App. Aug. 26, 2015); Graham v. State, 903 N.E.2d 538, 540-41 (Ind. Ct. App. 2009); McElroy v. State, 864 N.E.2d 392, 396 (Ind. Ct. App. 2007), *trans. denied*. D pleaded guilty in open court without an agreement that might have brought him some benefit in return; thus, he did not waive his right to challenge his convictions). Held, judgment affirmed.

TITLE: Mickens v. State
INDEX NO.: G.5.f.
CITE: (08/06/92), Ind., 596 N.E.2d 1379
SUBJECT: Raising waiver without need to file cross-appeal
HOLDING: When State raises waiver in response to PCR petition, but PCR Ct. denies petition on other grounds without finding waiver & D appeals denial, it is not necessary for state to file cross-appeal to argue waiver on appeal; granting D's petition to transfer Mickens, 579 N.E.2d 615, but vacating portion of opinion which held State could not raise waiver issue on appeal. S.Ct. found that while Ct. of Appeals correctly interpreted Johnson 313 N.E.2d 542, as requiring the filing of cross- appeal to argue additional defense raised, but not decided, below, amendment of Trial Rule 59(G) in 1990, allowing opposing party to raise any grounds as cross-errors & raise any reasons to affirm judgment directly in appellate brief, superseded Johnson. Therefore, State could raise waiver on appeal without filing cross-appeal, DeBruler & Krahulik, JJ., DISSENTING.

RELATED CASES: Bunch, 778 N.E.2d 1285 (although State must raise waiver in PCR proceeding, appellate court may nevertheless find that issue presented in PCR petition was waived by procedural default for failure to raise on direct appeal; see full review at X.5.b).

TITLE: Meunier-Short v. State
INDEX NO.: G.5.f.
CITE: (4/14/2016), 52 N.E.3d 927 (Ind. Ct. App. 2016)
SUBJECT: No waiver from failing to object to probation conditions
HOLDING: D did not forfeit his right to challenge two probation conditions by failing to object at the sentencing hearing and by later signing the probation order. In Piercefield v. State, 877 N.E.2d 1213 (Ind. Ct. App. 2007), trans. denied, Court analogized "the appeal of [a] probation condition to an appeal of a sentence, which we may review 'without insisting that the claim first be presented to the trial judge." Id. at 1218 (quoting Kincaid v. State, 837 N.E.2d 1008, 1010 (Ind. 2005)); accord Bratcher v. State, 999 N.E.2d 864, 873-74 (Ind. Ct. App. 2013), trans. denied. We decline to follow the cases holding a D's failure to object waived appellate review of probation conditions. See Patton v. State, 990 N.E.2d 511, 514 (Ind. Ct. App. 2013); Hale v. State, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008), trans. denied; Stott v. State, 822 N.E.2d 176, 179 (Ind. Ct. App. 2005), trans. denied. Thus, D did not waive review of his probation conditions. Held, judgment affirmed in part, reversed in part.

TITLE: Newton v. State
INDEX NO.: G.5.f
CITE: (9/6/2017), 83 N.E.3d 726 (Ind. Ct. App. 2017)
SUBJECT: Juvenile's guilty plea waived constitutional challenge to LWOP statute
HOLDING: Because the juvenile D's LWOP sentence was the result of a plea agreement, he waived the right to raise an Eighth Amendment claim against the LWOP statute.

In September of 1994, D, then 17 years-old, and fellow gang members tried to rob Christopher Coyle. Coyle had no money so D shot Coyle in the back of the head. The State charged D with murder and sought the death penalty. The parties later agreed that the State would not seek the death penalty in exchange for D pleading guilty and agreeing to an LWOP sentence. In his 2013 Successive Petition for Post-Conviction Relief, D claimed his LWOP sentence was unconstitutional in light of Miller v. Alabama, 132 S.Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016). Miller held that mandatory LWOP sentencing for juveniles violates the 8th Amendment, and Montgomery held that Miller is retroactive. D claimed he did not waive his 8th Amendment claim, even though he pled guilty, because he could not have waived a right "that was unknown or unavailable to him at the time he pled guilty," citing Miller, Montgomery, and 2002 changes to Indiana's death penalty statute. However, "a D may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." Stites v. State, 829 N.E.2d 527, 529 (Ind. 2005). D claimed Stites does not apply because he did not receive a significant benefit through his plea bargain by "avoiding . . . a sentence he would have been ineligible for seven years later." However, a petitioner receives the benefit of a plea agreement at the time the agreement was entered, and cannot later challenge the sentence as illegal, despite later case law that would have rendered the sentence illegal. See Fowler v. State, 977 N.E.2d 464, 468 (Ind. Ct. App. 2012). Despite ruling that D waived his Eighth Amendment claim, the Court chose to review the claim on the merits because D's LWOP sentence has never been subject to appellate review. Held, judgment affirmed.

TITLE: Rodgers v. State
INDEX NO.: G.5.f.
CITE: (8/7/2015), 40 N.E.3d 969 (Ind. Ct. App. 2015)
SUBJECT: D didn't waive review claim about Victim-Offender Reconciliation
HOLDING: D's failure to object did not waive review of claim that Tr. Ct. should not have ordered him to, in lieu of conducting a restitution hearing, participate in Victim-Offender Reconciliation Program. "[A]ppellate courts will review a Tr. Ct.'s restitution [order] even where the D did not object based on the rationale that a restitution order is part of the sentence, and it is the duty of the appellate court to bring illegal sentences into compliance." Rich v. State, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008) (internal citations omitted). Held, appeal reviewed on merits and judgment reversed.

TITLE: Ryan v. State
INDEX NO.: G.5.f.
CITE: (8/26/2015), 42 N.E.3d 1019 (Ind. Ct. App. 2015)
SUBJECT: Conditions of appeal bond moot
HOLDING: Whether the conditions the Tr. Ct. imposed on D once it released him on an appeal bond were an abuse of discretion became moot once the Indiana Supreme Court reinstated D's convictions and he was returned to incarceration. Also, by failing to initiate an immediate appeal under Appellate Rule 18 to challenge the conditions, D forfeited review of the issue.

After the Court of Appeals reversed D's convictions for sexual misconduct with a minor, D sought an appeal bond with the Tr. Ct., which granted the request but imposed conditions that D found onerous. While D sought and the Tr. Ct. granted relief from two of the conditions, D did not challenge any other conditions, first in the Tr. Ct., and second, in the Court of Appeals. See Ind. Appellate Rule 18.

Once the Supreme Court's decision to reinstate D's convictions was certified, the appeal bond was revoked and "any complaints [D] had about the Tr. Ct.'s judgment on his appeal bond were rendered moot." See Alleyn v. State, 427 N.E.2d 1095, 1100 (Ind. 1981). And by not appealing those conditions pursuant to Appellate Rule 18, D forfeited review of those conditions. Held, judgment affirmed.

TITLE: Sedelbauer v. State
INDEX NO.: G.5.f.
CITE: (3d Dist. 11/16/83), Ind. App., 455 N.E.2d 1159
SUBJECT: Waiver of issues - compliance with AR 8.3(A)(7)
HOLDING: Failure to comply with AR 8.3 waives specification of error only when noncompliance with rule is sufficiently substantial to impede court's consideration of issue raised. Davis 355 N.E.2d 836. Substantial or bad faith noncompliance waives issue. Frasier 312 N.E.2d 77; Martin 306 N.E.2d 93; Bonds 280 N.E.2d 313. Where issue of propriety of instruction is presented in manner sufficiently clear to allow court to reach substance of D's contention, court will rule on merits. Here, D failed to include instructions/objections in brief. AR 8.3(A)(7) provides such failure is deemed to waive any error. Citing Davis, court considers merits. D tendered instructions concerning contemporary community standards of deviate sexual group. Court finds instruction was properly refused because there was no evidence in record bearing on film's prurient appeal to male homosexuals. Held, no error.

RELATED CASES: A.R.M., 968 N.E.2d 820 (Ind. Ct. App. 2012) (failure to include videotape in record did not waive issues related to whether Tr. Ct. followed proper procedures under Protected Person Statute before admitting videotape but did waive issues related to content of video); Baker 439 N.E.2d 1346 (Crim L 1178; failure to cite authority waives error, except in case of fundamental error; see Moore 440 N.E.2d 1092, card at G.5.i); Priestley, App., 451 N.E.2d 88 (Crim L 825(1); failure to tender jury instruction waives error in instruction given by Tr. Ct., *citing* Clemons 424 N.E.2d 113).

TITLE: State v. Luna
INDEX NO.: G.5.f.
CITE: (08-05-10), 932 N.E.2d 210 (Ind. Ct. App. 2010)
SUBJECT: State waived reserved question of law
HOLDING: Court did not reach merits of State's reserved question of law about whether Tr. Ct. erred in admitting evidence that complaining witness ("CW") had earlier made "demonstrably false" allegation of molestation, where the only evidence that allegation was demonstrably false was that no charges were filed against the alleged perpetrator. State waived the issue because it, not D, raised the issue at trial and did not object when D asked about this evidence during cross examination. Court declined to address merits also because State's reserved question of law required factual determinations, which are not appropriate for such questions. Finally, Court passed on reserved question of law because existing case law sufficiently guides Tr. Ct.s on how to determine if an allegation is demonstrably false. See Candler v. State, 837 N.E.2d 1100, 1102 (Ind. Ct. App. 2005) and Williams v. State, 779 N.E.2d 610, 611-14 (Ind. Ct. App. 2002). Held, judgment affirmed.

TITLE: State v. Mooney
INDEX NO.: G.5.f.
CITE: (2/4/2016), 51 NE3d 281 (Ind. Ct. App. 2016)
SUBJECT: State not entitled to relief from judgment
HOLDING: In reviewing consolidated appeals, the Court held that the trial court properly denied the State's T.R. 60(B) Motions for Relief from Judgment, which asked the trial court to set aside earlier rulings that reinstated Ds' driving privileges, even though they provided no proof of future financial responsibility. The State claimed "mistake, surprise, or excusable neglect" justified relief from judgment. See T.R. 60(B)(1). However, the substance of the State's arguments challenges the merits of the underlying judgment instead of highlighting facts to support its claims of mistake, surprise, or excusable neglect. Thus, the State's Motion for Relief for Judgment attempts to belatedly raise grounds it should have raised in a timely motion to correct error or direct appeal. Held, judgment affirmed.

TITLE: State v. Peters
INDEX NO.: G.5.f.
CITE: (2nd Dist., 02-23-10), 921 N.E.2d 861 (Ind. Ct. App. 2010)
SUBJECT: Motion to suppress - State waived issues on appeal
HOLDING: Court affirmed granting of Ds' motions to suppress because State waived issues presented on appeal. After Ds= home burned down, firefighters took three officers through home and showed them suspected methamphetamine precursors. Officer contacted prosecutor, who obtained telephonic warrant. Officers executed warrant, and State charged Ds with dealing methamphetamine as class B felonies.

State waived claim that officers= initial, warrantless search was constitutional because State failed to make any argument that search was reasonable under Article I, Section 11 of the Indiana Constitution. AThe Tr. Ct. unambiguously rested its holding on Article I, Section 11.@ State also waived argument that evidence firefighters found at scene established probable cause because State raised issue for first time on appeal. AWhen the State is a party to a state court proceeding, it, like all parties, must comply with the rules then governing, and its actions, like those of all parties, are subject to scrutiny under principles of waiver and estoppel.@ Because State waived its issues, Court need not address merits of Tr. Ct.'s granting of motions to suppress. Held, granting of motions to suppress affirmed.

RELATED CASES: Snow, 137 N.E.3d 965 (Ind. Ct. App. 2019) (D waived issue of insufficient evidence to support probable cause because he addressed the good faith exception to the exclusionary rule in his reply brief but not in his appellant's brief); Zagorac, 943 N.E.2d 384 (Ind. Ct. App.) (D waived claim that expungement statute violates the privileges and immunities clause of Indiana Constitution because he raised the issue for first time on appeal).

TITLE: Yost v. State
INDEX NO.: G.5.f.
CITE: (06/29/2020), 150 N.E.3d 610 (Ind. Ct. App. 2020)
SUBJECT: Defendant could not directly appeal convictions resulting from "open" plea
HOLDING: It is well-settled that a conviction based on a guilty plea may not be challenged by direct appeal. Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996); rather, it must be challenged through a petition for post-conviction relief. Here, after entering an open guilty plea to five criminal recklessness convictions, Defendant was prohibited from raising a double jeopardy challenge to the convictions on direct appeal. To the extent cases cited by Defendant allow direct appeals from "open" guilty pleas, Court noted they are inconsistent with Tumulty and Hayes v. State, 906 N.E.2d 819, 821 n.1 (Ind. 2009), both of which involved "open" guilty pleas. Moreover, cases *cited* by Defendant all involved open pleas from which the defendants received no benefit, yet here Defendant clearly received a benefit from his open guilty plea to duplicative charges (i.e., avoiding additional charge of attempted murder). Thus, the Court dismissed Defendant's appeal of without prejudice as to his ability to present his claim in a petition for post-conviction relief.

RELATED CASES: Weaver, 189 N.E.3d 1128 (Ind. Ct. App. 2022) (by pleading guilty, D waived argument that separate, consecutive sentence for included offense was barred); McDonald, 173 N.E.3d 1043, (Ind. Ct. App. 2021), summ. Aff'd, 179 N.E.3d 463 (Ds who plead open without a plea agreement cannot bring double jeopardy claims on direct appeal of the sentence); also, to Weekly, E.8.c (Tr. Ct. improperly entered D's HVSO sentencing enhancement as a separate, consecutive sentence rather than specifically attaching it to one of his felony convictions).

TITLE: Warren v. State
INDEX NO.: G.5.f.
CITE: 121 Nev. 886, 124 P.3d 522 (Nev. 2005)
SUBJECT: Preserving Challenge to Ruling Admitting Impeachment Evidence
HOLDING: The Nevada Supreme Court has held that a D need not testify at trial in order to preserve challenge to pre-trial ruling that impeachment evidence would be admissible. Court declined to follow Luce v. U.S., 469 U.S. 38 (1984). In Luce, which interpreted federal evidence law, the Court gave two main reasons for its holding in the absence of D's testimony there is an insufficient record (1) from which to determine whether the Tr. Ct. properly weighed the evidence's probativeness against its potential for prejudice, and (2) to conduct harmless error analysis. The Nevada Supreme Court and other courts which have declined to follow Luce point out that these concerns are eliminated where the D makes an offer of proof. The Court wrote that in order to preserve the issue for trial, the D must make an offer of proof, and it must be clear from the record that, but for the pre-trial ruling, the D would have testified. Cf. Azania v. State, 730 N.E.2d 646 (Ind. 2000)(D's offer of proof was not sufficient to preserve challenge to Tr. Ct.'s pre-trial limine ruling that evidence of prior conviction would be admissible to rebut character evidence put on at capital penalty phase; Boehm, J., DISSENTS).

G. APPEAL

G.5. Scope of review

G.5.g. Harmless error

TITLE: Arizona v. Fulminante

INDEX NO.: G.5.g.

CITE: 499 U.S. 279, 111 S. Ct. 1247, 113 L.Ed.2d 3 (1991)

SUBJECT: Harmless error analysis applies to admission of involuntary confession

HOLDING: Constitutional error does not automatically require reversal of conviction. Chapman v. California (1967), 386 U.S. 18, 87 S. Ct 824, 17 L.Ed.2d 705. Most constitutional errors can be harmless. [Long list of citations omitted.] Common thread connecting cases where error may be harmless is that each involved "trial error" - error which occurred during presentation of case to jury, & which may be quantitatively assessed in context of other evidence in order to determine whether its admission was harmless beyond reasonable doubt. These cases are markedly different from those where error found not subject to harmless error analysis. E.g., Gideon v. Wainwright (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (total deprivation of right to counsel at trial); Tumey v. Ohio (1926), 273 U.S. 510, 47 S. Ct. 437, 71 L.Ed.2d 749 (judge not impartial). These cases defy harmless error analysis because entire conduct of trial from beginning to end affected by absence of counsel or presence on bench of judge who is not impartial. Only those constitutional violations affecting framework within which trial proceeds, rather than error in trial process itself, will not be subject to harmless error analysis. Here, involuntary confession improperly admitted. Admission of involuntary confession is trial error subject to harmless error review. This is not type of error that "transcends the criminal process." Reviewing court reviews remainder of evidence to determine if improper admission harmless. Opinion as to this part of case by Rehnquist, with O'Connor, Kennedy, Souter, & Scalia, joining; White, joined by Marshall, Blackmun, & Stevens, DISSENTING.

TITLE: Arizona v. Fulminante
INDEX NO.: G.5.g.
CITE: 499 U.S. 279, 111 S.Ct. 1247, 113 L.Ed.2d 3 (1991)
SUBJECT: Admission of involuntary confession
HOLDING: Erroneous admission of involuntary confession was not harmless in light of facts here. Confession is like no other evidence. It is probably most probative & damaging evidence that can be admitted against him. Where confession is coerced, as here, risk that confession is unreliable, coupled with profound impact confession has on jury, reviewing Ct. must exercise "extreme caution" before determining admission was harmless. Here, state failed to meet burden of proof. Absent 2 confessions (1 of which was coerced & other of which relied for corroboration upon first confession) it is doubtful that prosecution would have been successful because physical evidence from scene & other circumstantial evidence would have been insufficient to convict. It is doubtful D would have been prosecuted at all without confessions. Further, jury may have viewed second confession with suspicion on credibility grounds without admission of earlier coerced confession. Finally, coerced confession led to admission of other evidence prejudicial to D. Finally, presence of confession influenced sentencing phase of trial. Judge found murder "especially heinous, atrocious, & cruel" based upon manner of killing & motive - facts which could only be found in confessions. Held, admission of coerced confession was not harmless beyond reasonable doubt. Opinion as to this part of opinion by White, joined by Marshall, Blackmun, Stevens, & Kennedy; Rehnquist, joined by O'Conner, Souter, & Scalia, DISSENTING.

TITLE: Currie v. State
INDEX NO.: G.5.g.
CITE: (4th Dist. 9/16/87), Ind. App., 512 N.E.2d 882
SUBJECT: Harmless error - Miranda violation
HOLDING: Admission of testimony regarding uncounseled statements made during custodial interrogation, after right to counsel was invoked, was not harmless error. Violations of Miranda are subject to harmless error analysis. Sleek 499 N.E.2d 751. Standard for determining harmless error is not whether there is sufficient untainted evidence to support conviction, but whether tainted evidence was likely to have prejudicial impact on jury. Otto, App., 398 N.E.2d 716. Here, D was charged with burglary. Untainted evidence placed D in building & showed building had been ransacked. There was no other untainted direct evidence of intent. Police officer improperly testified that D told him "he would have taken just about anything." Held, police officer's testimony had prejudicial impact on jury, & error was not harmless.

TITLE: Delaware v. VanArsdall
INDEX NO.: G.5.g.
CITE: 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)
SUBJECT: Impeachment - interest / bias / prejudice - harmless error
HOLDING: D is constitutionally entitled to fair trial - not perfect one. Certain constitutional errors may be "harmless" in terms of their effect on fact-finding process at trial. Chapman v. CA (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Otherwise valid conviction should not be set aside if reviewing court may confidently say, based upon whole record, that constitutional error was harmless beyond a reasonable doubt. However, some constitutional errors - such as denying D assistance of counsel at trial, or compelling him/her to stand trial before trier of fact with financial stake in outcome - are so fundamental & pervasive that they require reversal without regard to facts or circumstances of particular case. Constitutionally improper denial of D's opportunity to impeach witness for bias, like other Confrontation Clause errors, is subject to harmless error analysis & does not require automatic reversal. Correct inquiry is whether, assuming damaging potential of CX is fully realized, reviewing court might nonetheless say that error was harmless beyond a reasonable doubt. Factors to be considered include importance of witness' testimony in prosecution's case, whether testimony was cumulative, presence or absence of evidence corroborating or contradicting testimony of witness on material points, extent of CX otherwise permitted & overall strength of prosecution's case. Held, case remanded to state S.Ct. for determination as to whether error was harmless. White Concurs. Marshall & Stevens Dissent with separate opinions.

RELATED CASES: Hall, 36 N.E.3d 459 (Ind. 2015) (applying the factors set forth in VanArsdall to find that multiple Sixth Amendment violations were harmless beyond a reasonable doubt)

TITLE: Ex parte Baker
INDEX NO.: G.5.g.
CITE: 906 So.2d 277 (Ala. 2004)
SUBJECT: Harmless Error -- Reliability of Hearsay
HOLDING: Reliability of erroneously admitted hearsay evidence increases, rather than decreases, likelihood that error was not harmless. The very reliability of the evidence suggests that jury would have weighed it more heavily and given it greater impact on the jury's verdict. If reliability were a criterion for harmlessness, then the erroneous admission of illegally seized narcotics would nearly always be harmless per se. D's murder conviction and death sentence are reversed.

TITLE: Ex parte Hutcherson
INDEX NO.: G.5.g.
CITE: 677 So.2d 1205 (Ala. 1995)
SUBJECT: Improper Admission of DNA Evidence Can Never Be Harmless Error
HOLDING: Alabama Supreme Court finds that improper admission of DNA evidence is too inherently prejudicial ever to be harmless. Tr. Ct. admitted DNA evidence without following three-pronged test, which focuses on theory and technique of testing, and which is essential to ensure the reliability and trustworthiness of the evidence. "Harmless error" is defined as "an error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it and in no way affected the final outcome of the case." Black's Law Dictionary. DNA "matching" evidence and frequency statistics creates such a possibility for prejudicial impact upon the jury that the admission of DNA evidence without complying with test for reliability can never be harmless.

TITLE: Johnson v. State
INDEX NO.: G.5.g.
CITE: (04-03-23), 201 N.E.3d 1198 (Ind. Ct. App. 2023)
SUBJECT: Rehearing granted to clarify harmless error standard, but Court reaffirms that constitutional violations were harmless
HOLDING: Court granted Defendant's petition for rehearing to clarify its reasoning as to why a confrontation violation resulting from requiring testifying witnesses to wear masks was harmless error. At her criminal recklessness trial, Defendant requested that she be able to see the witnesses' faces so she could confront them face to face. But the witnesses wore opaque masks because the Marion County Courts required anyone involved in a jury trial to wear a mask at that time due to COVID-19. The Court of Appeals held that Defendant's constitutional rights were violated by the masks, but determined the error was harmless. In seeking rehearing, Defendant argued that the Court applied the incorrect harmless error standard of review, and that the violation of her confrontation rights was not harmless. The Court agreed that its previous opinion did not explicitly state that the violations of the Sixth Amendment to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution's confrontation rights were considered under the appropriate standard of review. On rehearing, Court expressly applied the harmless error analyses described in Koeing v. State, 933 N.E.2d 1271 (Ind. 2010), and Torres v. State, 673 N.E.2d 472 (Ind. 1996). Torres, in particular, stated that as with federal constitutional error, the proper standard of review for harmless error analyses of violations of Indiana constitutional rights is whether the error was harmless beyond a reasonable doubt. Applying that standard, the Court again affirmed Defendant's conviction. "The masked witnesses were subject to cross-examination in Johnson's presence and the State had a strong case against Johnson," thus "the federal and state constitutional errors were harmless beyond a reasonable doubt."

TITLE: Koenig v. State
INDEX NO.: G.5.g.
CITE: (09-21-10), 933 N.E.2d 1271 (Ind. 2010)
SUBJECT: Right of confrontation violation can be harmless beyond a reasonable doubt
HOLDING: D's conviction for Dealing in a Schedule II Substance was affirmed, even though Tr. Ct. denied D's 6th Amendment Right of Confrontation when it admitted lab report without letting D confront person who prepared report. Although 6th Amendment requires confrontation to determine reliability of out-of-court statement and does not allow alternative procedures to ensure reliability, Crawford v. Washington, 541 U.S. 36 (2004), denial of right to confrontation may nonetheless be harmless. Chapman v. California, 386 U.S. 18 (1967). An otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.

Here, D admitted he gave methamphetamine to his friend, who later died. D also gave friend a list of drugs, which included methamphetamine. Friend=s girlfriend corroborated D's statement that he gave pills to friend. D also told police where he obtained the methamphetamine. Thus, admission of the lab report finding the presence of methadone in the victim's blood was constitutional error, but harmless beyond a reasonable doubt. Held, transfer granted, Court of Appeals' opinion at 916 N.E.2d 200 vacated, judgment affirmed.

TITLE: Konopasek v. State
INDEX NO.: G.5.g.
CITE: (05-05-11), 946 N.E.2d 23 (Ind. 2011)
SUBJECT: Judicial temperance presumption - limitations
HOLDING: The Supreme Court reaffirmed the limitation on the judicial-temperance presumption, as stated in Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976). The longstanding principle termed "judicial temperance presumption" generally presumes that in a proceeding tried to the bench, a court renders its decisions solely on the basis of relevant and probative evidence. The Fletcher Court set parameters on the judicial temperance presumption in cases where a D makes a specific objection to the admission of evidence. "It is a curious ratiocinative process which presumes that the Tr. Ct. will disregard that which it holds admissible over specific objection." Id. Court reaffirmed Fletcher and held that when a D challenges the admissibility of evidence at a bench trial and the evidence in fact was inadmissible, the judicial-temperance presumption comes into play. One way a D can overcome the presumption is by showing the Tr. Ct. admitted the evidence over a specific objection, as in Fletcher. If a D does overcome the presumption, the reviewing court then engages in full harmless-error analysis: the error is harmless if the reviewing court is satisfied that the conviction is supported by substantial independent evidence of guilt so that there is no substantial likelihood that the challenged evidence contributed to the conviction. If a D cannot overcome the presumption, a reviewing court presumes the Tr. Ct. disregarded the improper evidence and accordingly finds the error harmless. In short, an analysis of the presumption may either trigger or circumvent full harmless error analysis.

Here, Tr. Ct. did not abuse its discretion by overruling D=s relevancy objection to the State=s questioning of D regarding the length of his suspended sentence for a prior crime because it was relevant to D's interest in testifying falsely under Indiana Rule 616. Thus, the judicial-temperance presumption was inapplicable. Held, transfer granted, Court of Appeals' application of the judicial-temperance presumption at 934 N.E.2d 762, disapproved of, but finding of sufficient evidence summarily affirmed.

RELATED CASES: Miller, 72 N.E.3d 502 (Ind. Ct. App. 2017) (trial court's mistaken statement about attempted murder mens rea rebutted presumption that trial judge is presumed to know and follow law. Transfer granted, yet summarily affirmed on all issues except the nature of the remedy. See Supreme Court opinion at K.3.b.1 and K.2.b."), Hinesley, 999 N.E.2d 975 (Ind. Ct. App. 2013) (applying judicial-temperance presumption in affirming denial of PCR); Tibbs, 996 N.E.2d 1288 (Ind. Ct. App. 2013) (generally valid issues with regard to fundamental error such as "unfair prejudice, confusion of the issues, or potential to mislead the jury" are relevant only in jury trials).

TITLE: Rose v. Clark
INDEX NO.: G.5.g.
CITE: 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)
SUBJECT: Instructions - effect of instruction which impermissibly shifts burden of proof
HOLDING: An otherwise valid conviction should not be set aside if reviewing court may confidently say, based upon whole record, that constitutional error was harmless beyond a reasonable doubt. DE v. Van Arsdall (1986), 475 U.S. __, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674. Despite strong interests that support harmless error doctrine, some constitutional errors require reversal without regard to evidence in particular case. Chapman v. CA (1967), 386 U.S. 18, 23, n.8, 87 S.Ct. 824, 828, n.8, 17 L.Ed.2d 705. This limitation recognizes that some errors necessarily render trial fundamentally unfair. However, where reviewing court can find that record developed at trial establishes guilt beyond a reasonable doubt, interest in fairness has been satisfied & judgment should be affirmed. Here, D received full opportunity to put on evidence & make argument to support claim of innocence. He was tried by fairly selected, impartial jury, supervised by impartial judge. Apart from one instruction which impermissibly shifted burden of proof on element of malice, jury was clearly instructed that it had to find D guilty beyond a reasonable doubt of every element of each offense. This type of error is not "so basic to a fair trial" that it can never be harmless. Reversal is not required where guilty verdict is correct beyond a reasonable doubt. Held, case remanded for determination as to whether error was harmless. Burger, & Stevens CONCURS IN JUDGMENT (writing separately); Blackmun, joined by Brennan & Marshall, DISSENTS.

TITLE: Saperito v. State
INDEX NO.: G.5.g.
CITE: (03/25/86), Ind., 490 N.E.2d 274
SUBJECT: Harmless error - test
HOLDING: Test for harmless error is whether testimony might have had a substantial influence on verdict, not whether evidence was sufficient without offending testimony. White 272 N.E.2d 312. Here, witness testified D had not created any trouble "since he came back from prison the last time." Evidence of unrelated criminal activity is inadmissible on question of guilt, but reversal is not required unless D shows he was placed in grave peril. Court concludes he was not. Court finds in light of evidence error was harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. Held, conviction affirmed.

RELATED CASES: Nowling, 955 N.E.2d 854 (Ind. Ct. App. 2011) (although Tr. Ct. abused its discretion by admitting drugs found in D's room, the error was harmless where State admitted into evidence D's admission under oath that he possessed the drugs during probation revocation hearing); But see Smith 565 N.E.2d 1059 see also card at Z.3.a (admission of large quantities of marijuana in violation of 4th Amend. was not harmless error even though D admitted charged conduct & charges weren't based on disputed evidence, because D raised defense of entrapment); Delaware v. VanArsdall (1986), __ U.S. __, 106 S. Ct. 1431, 89 L.Ed.2d 674 (harmless error to deny D opportunity to CX re bias); Williams, 477 N.E.2d 96 (evidence of stop should not have been admitted, but error was harmless in light of other evidence).

TITLE: Sullivan v. Louisiana
INDEX NO.: G.5.g.
CITE: 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)
SUBJECT: Jury instructions - reasonable doubt; harmless error
HOLDING: Jury instruction misleading jury regarding reasonable doubt standard is not subject to harmless error analysis. Because jury was wrongly instructed, it did not reach conclusion that D was guilty beyond reasonable doubt. Thus, there was no jury verdict within meaning of 6th amend, and reviewing court cannot analyze effect this instruction had on jury verdict.

TITLE: Yates v. Evatt
INDEX NO.: G.5.g.
CITE: 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)
SUBJECT: Harmless error analysis - burden shifting instructions
HOLDING: Giving unconstitutional burden-shifting instruction may be treated as harmless error if it "appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705. To be harmless, error must be unimportant in relation to everything else jury considered on issue in question as revealed in record. Court must first ask what evidence jury actually considered in reaching verdict, then weigh probative force of that evidence against probative force of presumption standing alone. Error is harmless only if force of evidence presumably considered by jury in accordance with instructions is so overwhelming as to leave it beyond reasonable doubt that verdict resting on that evidence would have been same in absence of presumption. Here, jury was unconstitutionally instructed that "malice is implied or presumed" from "willful, deliberate, & intentional doing of an unlawful act" & from "use of a deadly weapon." Jury was told unlawful act presumption was rebuttable, & regarding deadly weapon presumption, jury was told they must consider all evidence to make determination as to whether malice existed in mind & heart of killers. State appellate court found error harmless. because it found beyond reasonable doubt that jury would have found it unnecessary to rely on unconstitutional presumptions. Inquiry about necessity for reliance does not satisfy all of Chapman's concerns. Held, Court applies proper standard & determines error not harmless; case remanded. Scalia, joined by Blackmun, CONCURRING IN PART & CONCURRING IN JUDGMENT.

G. APPEAL

G.5. Scope of review

G.5.h. Reversible error per se

TITLE: Vasquez v. Hillery

INDEX NO.: G.5.h.

CITE: 474 U.S. 254, 106 S. Ct. 617, 88 L.Ed.2d 598 (1986)

SUBJECT: Reversible error per se - racial discrimination in selection of grand jury

HOLDING: Where D has proved racial discrimination in selection of grand jury that indicted him, harmless error doctrine does not apply & D's conviction must be reversed. Court bases its holding on numerous grounds. First, it is required by prior precedent. Rose v. Mitchell (1979), 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739. Second, reversal is only effective remedy. Third, even if grand jury's determination of probable cause is confirmed in hindsight by later conviction on indicted offense, that confirmation in no way suggests that discrimination did not impermissibly infect framing of indictment &, consequently, nature or very existence of proceedings to come. Fourth, when constitutional error calls into question the objectivity of those charged with bringing D to judgment, reviewing court can neither indulge presumption of regularity nor evaluate resulting harm. Held, discrimination in selection of grand jury requires automatic reversal. O'Connor CONCURS IN JUDGMENT; Powell, joined by Burger, & Rehnquist, DISSENTS.

G. APPEAL

G.5. Scope of review

G.5.i. Plain error/fundamental error

TITLE: Armstrong v. State
INDEX NO.: G.5.i.
CITE: (4th Dist. 6/28/89), Ind. App., 540 N.E.2d 626
SUBJECT: Fundamental error - attempt instruction lacking specific intent element
HOLDING: Attempt instruction indicating that D must act with culpability required for commission of crime, given in conjunction with murder instruction including definition of felony murder, is fundamental error. Combined instructions permitted jury to convict Armstrong of "attempted felony murder," which is not recognized offense in IN. Head 443 N.E.2d 44. Instructions did not adequately advise jury that D must have acted with specific intent to kill. Fact that definition of murder requiring specific intent was also given does not cure error. Id. Although D raises error for first time in petition for post-conviction relief, it is fundamental error. See Abdul-Wadood 521 N.E.2d 1299. Held, reversed.

RELATED CASES: Coleman, App., 708 N.E.2d 25 (where intent is not in issue, instructions which fail to advise jury regarding requirement of specific intent to kill do not necessarily constitute fundamental error).

TITLE: Brown v. State
INDEX NO.: G.5.i.
CITE: (06-29-10), 929 N.E.2d 204 (Ind. 2010)
SUBJECT: Failure to object to search and seizure issue - no fundamental error
HOLDING: A claimed error in admitting unlawfully seized evidence at trial is not preserved for appeal unless an objection was lodged at the time the evidence was offered. The fundamental error exception is extremely narrow and must either "make a fair trial impossible" or constitute "clearly blatant violations of basic and elementary principles of due process." Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009). Such a claim, without more, does not assert fundamental error.

Here, D filed a motion to suppress based on Fourth Amendment and Article I, Section 11 violations, which was denied pre-trial. At trial, D did not object when the evidence was introduced and affirmatively stated that he had no objection to its admission. However, after the jury was subsequently released for lunch, D restated his pre-trial objections previously wrote in the motion to suppress. Because the only practical means of granting relief at the point D did attempt to lodge a continuing objection would have been to declare a mistrial, D's attempt to resurrect an objection after the evidence was admitted, at least without Tr. Ct.'s recognizing a continuing objection, was inadequate to preserve the issue. Moreover, error in ruling on a motion to exclude improperly seized evidence is not per se fundamental error. But, where there is a claim of fabrication of evidence, willful malfeasance on the part of the investigating officers or that the evidence is not what it appears to be, a fair trial may be impossible, making the admission of the evidence fundamental error. See, e.g., Hayworth v. State, 904 N.E.2d 684 (Ind. Ct. App. 2009). Held, transfer granted, Court of Appeals' opinion at 913 N.E.2d 1253 vacated, judgment affirmed.

RELATED CASES: Mamon, 6 N.E.3d 488 (Ind. Ct. App. 2014) (error, if any, in admitting evidence leading up to and through completion of traffic stop was not fundamental because D did not contend officer fabricated evidence, or, at trial, dispute authenticity of evidence or truthfulness of officer's testimony).

TITLE: Dack v. State
INDEX NO.: G.5.i.
CITE: (3d Dist. 6/19/85), Ind. App., 479 N.E.2d 96
SUBJECT: Fundamental error - prosecutor's comment re D's failure to testify
HOLDING: Prosecutor's comment (set forth in opinion) re pro se D's failure to testify constituted fundamental error. Dooley 393 N.E.2d 154. Trial judge "has an obligation to justice" which requires judge to direct course of trial & where D represents self, judge should not permit prosecutor "'to secure convictions of accused by use of tactics which prevent achievement of fair & just decision.'" Grubbs 265 N.E.2d 40 (reversing conviction over introduction of inadmissible but unobjected-to evidence). Reversible error occurs where prosecutor makes statement in argument which directly or indirectly may be interpreted by jury as comment on accused's exercise of rights. Denton 455 N.E.2d 905; Holland 454 N.E.2d 409; Pitman 436 N.E.2d 74; Barnes 435 N.E.2d 235; Crosson 410 N.E.2d 1194; Wofford 394 N.E.2d 100. Here, court does not believe prosecutor deliberately attempted to prejudice jury by remark. Although comment could be deemed harmless, such ruling "would be at odds" with IN law. Held, reversed & remanded for new trial.

TITLE: Dillman v. State
INDEX NO: G.5.i.
CITE: (8/29/2014), 16 N.E.3d 445 (Ind. Ct. App. 2014)
SUBJECT: Erroneous release of cash bond did not create illegal sentence or fundamental error
HOLDING: Although the Tr. Ct. erred in releasing D's cash bond to pay costs and fees, this not constitute an illegal sentence and fundamental error that would allow the Court to review D's appeal on the merits despite his failure to timely appeal the Tr. Ct.'s order. Although the Tr. Ct. made its statement regarding costs and fees at sentencing, this order was not part of his sentence.

"In 2005, when D was sentenced, Ind. Code 33-37-2-2(a) provided: '[c]osts in a criminal action are not a part of the sentence . . . .'" Also, "fees" . . . are costs." Ind. Code 33-37-2-5 (2005). Thus, the Tr. Ct.'s order regarding D's costs and fees was not a part of his sentence, so his sentence was not illegal. Because the sentence was not illegal and did not constitute fundamental error, D has waived review of his claim regarding the release of his cash bond. Held, judgment affirmed.

TITLE: Durden v. State
INDEX NO.: G.5.i.
CITE: (6/20/2018), 99 N.E.3d 645 (Ind. 2018)
SUBJECT: Defective juror-removal procedure was structural error but D invited the error
HOLDING: Even though trial court committed "structural error" in how it removed and replaced a juror, D's attorney invited the error, so D is not entitled to a new trial.

D was charged with murder and eight drug-related offenses. Once jury deliberations began, Juror 12 asked to be excused. In deciding whether to grant her request, the trial court did not follow the requirements of Riggs v. State, 809 N.E.2d 322 (Ind. 2004). Riggs requires a trial court to determine, on the record, that removal "is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties[']right to a trial by jury." Id. at 327–28. The court must also: (1) avoid questions that affect the juror's judgment, in case he or she continues to serve; and (2) in the event of removal, take steps to minimize any prejudicial impact removal may have had on the remaining jurors. Id. at 329. Based on these omissions, the Court of Appeals ruled D was entitled to a new trial. Structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Ds enjoy a constitutional right to an impartial jury; that right "is a structural guarantee," Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), and its "infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 668 (1987). Structural error also results if "the precise effect of the violation cannot be ascertained" from the record. Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

Here, the trial court committed structural error by not following Riggs. The error affected the framework within which the trial proceeded, and the precise effect of the error cannot be determined because the trial court did not "demonstrate, through a carefully developed record, that removal was "necessary for the integrity of the process.'" Riggs, 809 N.E.2d at 327. However, by agreeing to the trial court's procedure, D invited the error. It is not true, as D contends, that there are no circumstances where structural error permits anything other than reversal. There is "no reason to exempt 'structural errors'" from the invited-error doctrine. United States v. Gaya, 647 F.3d 634, 640 (7th Cir. 2011); Ex parte Thuesen, No. WR-81584-01, 2018 WL 1179875, at *5 (Tex. Crim. App. Mar. 7, 2018) ("This Court and other courts often apply the doctrine of invited error to rule against Ds on a wide variety of matters, including errors that might amount to fundamental or structural errors.").

Further, D did far more than simply fail to object to the procedure. His attorney expressly declined "any caveats" or special instructions for the jury and repeatedly assured the court of his approval of the procedure employed. Based on the record, "we can only conclude that [D] decided to engage in a rational, albeit unsuccessful, trial strategy. Any other conclusion runs contrary to our 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' at trial. Strickland v. Washington, 466 U.S. 668, 689 (1984)." Held, transfer granted, Court of Appeals opinion at 83 N.E.3d 1232 vacated, and judgment affirmed.

TITLE: Hale v. State
INDEX NO: G.5.i.
CITE: (09-24-12), 976 N.E.2d 119 (Ind. Ct. App. 2012)
SUBJECT: "Alarming" misuse of fundamental error doctrine
HOLDING: In affirming D's robbery conviction, Court highlighted the frequent misuse of the fundamental error doctrine, which is "extremely narrow" and available only in "egregious circumstances." Brown v. State, 929 N.E.2d 204 (Ind. 2010). Anders Briefs are not permissible in Indiana. Mosely v. State, 908 N.E.2d 599 (Ind. 2009). "Nevertheless, this Court cannot ignore the alarming trend of questionable fundamental error claims. For instance, it is not uncommon for a criminal D to argue on appeal that the introduction of evidence amounted to a fundamental error whenever the D failed to object to its admission at trial." Here, Tr. Ct. did not err in admitting show-up identification evidence. In light of victim's in-court testimony identifying D, no fundamental error could have occurred even if the admission of the show-up identification had been error. Held, judgment affirmed.

TITLE: Hall v. State
INDEX NO.: G.5.i.
CITE: (11-30-10), 937 N.E.2d 911 (Ind. Ct. App. 2010)
SUBJECT: Mens rea instruction for operating as HTV - fundamental error
HOLDING: Instruction was fundamentally erroneous as it instructed jury that D could be found guilty of operating a vehicle as an habitual offender (Ind. Code 9-30-10-16(a)(1)) if D knew or *should have known* that his driving privileges were suspended.

The State must prove beyond a reasonable doubt that "the person *knows* that the person's driving privileges are suspended." Ind. Code 9-30-10-16(a)(1) (emphasis added). Fundamental error may occur where jury is instructed that it may convict [a person] based on a lesser *mens rea* than provided in a statute. See Metcalfe v. State, 715 N.E.2d 1236, 1237 (Ind. 1999); Wilson v. State, 644 N.E.2d 555, 557 (Ind. 1994). Error in a *mens rea* instruction is not fundamental error where either: 1) the instructions as a whole sufficiently inform the jury of required *mens rea* or 2) D's *mens rea* was not a central issue at trial. See Ramsey v. State, 723 N.E.2d 869, 872-73 (Ind. 2000); Yerden v. State, 682 N.E.2d 1283, 1286 (Ind. 1997).

Here, D claimed he did not receive notice of his license suspension. The other instructions did not sufficiently inform jury of the required *mens rea*. "Moreover, *mens rea* was the central issue of [D's] trial. D did not dispute that he was an HTV or that he was driving when he was stopped. He only disputed that he knew of his suspension." Held, judgment reversed and remanded for a new trial.

TITLE: Huff v. State
INDEX NO.: G.5.i.
CITE: (1st Dist. 1/11/83), Ind. App., 443 N.E.2d 1234
SUBJECT: Fundamental error - sentencing
HOLDING: Error in sentencing is fundamental & can be raised for first time on appeal. Palmer 386 N.E.2d 946; Beasley 370 N.E.2d 360; Kleinrichert 297 N.E.2d 822. Rule applies to petition on appeal by state. Rogers 383 N.E.2d 1035. Here, D, convicted of conspiracy to deal in concaine, contends sentence is suspendible. State responds by arguing for the first time on appeal that Ind. Code 35-50-2-2(4) precludes suspension. Court entertains argument but rejects state's position, finding conspiracy is not specifically excluded from suspendible sentences. Held, no error.

TITLE: Jackson v. State
INDEX NO.: G.5.i.
CITE: (4th Dist. 10/4/84), Ind. App., 469 N.E.2d 753
SUBJECT: Fundamental error (FE) - court holds error not fundamental
HOLDING: Admission of oral confession (taken in contravention of 48-hour detention rule) was not FE. See Winston, App., 332 N.E.2d 229 (admission of evidence allegedly seized in violation of 4th Amend not FE; to hold otherwise would require judge to be "super-trial-defense counsel"). Held, any error is waived. CONCURRING IN RESULT, Young contends majority errs in stating appellate court may never review admission without objection of illegally obtained evidence. 3-step determination of FE: (1) could alleged error have denied D due process (DP); (2) if so, does alleged error appear plainly in record, allowing intelligent review; (3) if so, did error occur & did it deny D fundamental DP? See Williams, App., 451 N.E.2d 687. U.S. S.Ct. has held admission of involuntary confession deprives D of DP. Citations omitted. Young finds record is plain. Examination of record indicates statement was not coerced/produced by unlawful detention; thus, no FE.

RELATED CASES: Baker, App., 483 N.E.2d 772 (Crim L 1178; double jeopardy can be waived; see card at J.10).

TITLE: Lacey v. State
INDEX NO.: G.5.i.
CITE: (3rd Dist., 8-21-96), Ind. App., 670 N.E.2d 1299
SUBJECT: Erroneous self-defense instruction - no fundamental error
HOLDING: For mistake to constitute fundamental error, it must be so prejudicial to rights of D as to make fair trial impossible, or render verdict clearly wrong or of such dubious validity that justice cannot permit it to stand. Winegeart v. State, 665 N.E.2d 893 (Ind. 1996); Stewart v. State, 567 N.E.2d 171 (Ind. Ct. App. 1991). Fundamental fairness doctrine should not become safe harbor for Ds who fail to raise proper & timely objections at trial. Stewart. At whatever point reviewing Ct. engages in its harm analysis vis-a-vis fundamental error, review concerns record in its entirety. Collins v. State, 567 N.E.2d 798 (Ind. 1991). Here, D failed to show how he was prejudiced by erroneous self-defense instruction, or that he could not possibly have had fair trial because of instruction. Although record revealed dispute as to whether there was physical confrontation between D & victim, there was no evidence or testimony to support that D was reasonably in fear of death or serious bodily injury, which is required to prevail on claim of self-defense. Dean v. State, 432 N.E.2d 40 (Ind. 1982). When instruction is viewed as fundamental error subject to harmless error analysis, result is same. Based on evidence as whole, Ct. concluded that honest & fair- minded jury would have rendered guilty verdict absent use of erroneous instruction. Held, conviction affirmed.

TITLE: Lechner v. State
INDEX NO.: G.5.i.
CITE: (2d Dist. 9/27/82), Ind. App., 439 N.E.2d 1203
SUBJECT: Fundamental error - conviction for crime not charged
HOLDING: Conviction upon a charge not made or for an offense that is not a lesser included offense of charged crime constitutes a denial of due process - fundamental error which may be raised for first time on appeal. Sanford 265 N.E.2d 701; Young 231 N.E.2d 797; Addis, App., 404 N.E.2d 59. Here, D charged with attempted child molesting (Ind. Code 35-42-4-3(c) sexual deviate conduct) but convicted of fondling (subsection (d)). D failed to raise issue at trial (judgment on evidence for D on (c)) or in MCE. Held, fundamental error, conviction reversed.

RELATED CASES: Moore, App., 445 N.E.2d 576 (card at D.9.g.2.e).

TITLE: Moore v. State
INDEX NO.: G.5.i.
CITE: (10/20/82), Ind., 440 N.E.2d 1092
SUBJECT: Fundamental error
HOLDING: Compliance with contemporaneous objection rule or with AR 8.3(A)(7) (briefing issue for appeal) not required in case of fundamental error. Crosson 410 N.E.2d 1194; Nelson 409 N.E.2d 637; Dodson 381 N.E.2d 90; Young 231 N.E.2d 797. Here, judge informed jury that witness (prosecutrix in rape case) was unavailable because she was dead & allowed jury to view death certificate. D did not object. Court finds admission of death certificate fundamental error because from it (notations indicated homicide investigation) jury could infer D caused her death to prevent her from testifying. Held, conviction reversed.

TITLE: Sasser v. State
INDEX NO.: G.5.i.
CITE: (03-09-11), 945 N.E.2d 201 (Ind. Ct. App. 2011)
SUBJECT: Fundamental error - error in credibility contest
HOLDING: Tr. Ct. committed fundamental error by admitting into evidence D's prior conviction for failing to register as a sex offender. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the D as to make a fair trial impossible. Here, D was charged with failure to register as a sex offender, as a class C felony. D testified that he tried to register on multiple occasions but for various reasons- a detective's mistaken advice, computers that were down, and a non-returned voicemail- was never successful in doing so. The detective who dealt with D had a different version of events. During direct examination of the detective, the State asked whether D had ever registered in other jurisdictions and thus had notice of his duty to register. On cross, D clarified that the same document used on direct to show that he knew of his duty to register illustrates that he did register when required. Tr. Ct. erroneously found that D's cross opened the door to D's previous conviction for failing to register. D was clarifying the State's exhibit illustrating D registered in the two instances he was required to in that exhibit. This did not open the door to evidence regarding other instances in which D did not register as required. Given that this case turned solely on the credibility of the witnesses, the admission of the prior conviction for the very crime D was charged with herein was a proverbial poison pill that would have made it nearly impossible for the jury to listen to his version of events objectively and prevented him from receiving a fair trial. Held, judgment reversed.

TITLE: Taylor v. State
INDEX NO.: G.5.i.
CITE: (12/5/2017), 86 N.E.3d 157 (Ind. 2017)
SUBJECT: References to nickname not fundamental error
HOLDING: The State did not commit fundamental error by referring to Defendant as "Looney the Shooter," Defendant's nickname, at his trial for murder and conspiracy to commit murder. Though the use of "Looney" was important to the State's effort to identify Defendant as the perpetrator, using Defendant's full nickname was improper because it "ratcheted up the prejudice." However, the State used the name only four times, and the evidence of Defendant's guilt was strong, minimizing the danger that the jury found him guilty based on his nickname. Held, judgment affirmed.

TITLE: Thomas v. State
INDEX NO.: G.5.i.
CITE: (4th Dist. 10/28/82), Ind. App., 442 N.E.2d 700
SUBJECT: Fundamental error - standard of proof instruction
HOLDING: Two characteristics of fundamental error cases: (1) proceedings below as a whole were void of any indicia of fairness; (2) errors were result of mistake/misconduct by trial judge in exercise of affirmative duties. Pedigo, App., 412 N.E.2d 132. Here, effect of jury instruction was to change standard of proof from beyond a reasonable doubt to preponderance of evidence. Fundamental due process requires that a criminal charge be proven beyond a reasonable doubt (In re Winship, (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368); therefore, proceedings below lacked any indicia of fairness. Error clearly resulted from mistake by trial judge in exercise of affirmative duty. Cf. Lacy 438 N.E.2d 968 (failure to instruct on elements of offense is fundamental error). Held, fundamental error; denial of PCR reversed. INSTRUCTION GIVEN: "By burden of proof is meant that, considering all of the evidence in the cause, the evidence tending to establish a given fact must outweight [sic] the evidence to the contrary. If, after considering all the evidence in the cause, you shall find that the evidence upon any question is evenly balanced, you should answer such question against the party who has the burden of proof on that issue, for in such a case there would be no preponderance in favor of such proposition."

TITLE: U.S. v. David
INDEX NO.: G.5.i.
CITE: 83 F.3d 638 (4th Cir. 1996)
SUBJECT: Plain Error -- Application of Well-Established Law That Is Later Reversed
HOLDING: Where well-settled rule of law is held to be erroneous in decision rendered after Petitioner's trial, federal appeals court may recognize error despite petitioner's failure to object at trial. Barring remedy in such circumstances would not further purposes of contemporaneous objection rule.

TITLE: United States v. Marcus
INDEX NO.: G.5.i.
CITE: 130 S.Ct. 2159 (05-24-10)
SUBJECT: Plain error - must have reasonable probability error affected outcome
HOLDING: The Second Circuit's standard for Aplain error@ is inconsistent with this Court's plain error cases. An appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that: (1) there is an "error"; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error (affected the appellant's substantial rights, which in the ordinary cases means [it]affected the outcome of the district court proceedings); and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Puckett v. United States, 556 U.S. __, __ (2009).

Here, D was convicted of charges that he engaged in unlawful forced labor and sex trafficking between January 1999 and October 2001. On appeal, D pointed out for the first time that the statutes he violated did not become law until October 28, 2000, and argued his convictions were plain error because they violated the Ex Post Facto Clause. The Second Circuit agreed, reversed the convictions, and held that it must recognize a "plain error" if there is any possibility, however remote, that a jury convicted a D exclusively on the basis of actions taken before enactment of the statute that made those actions criminal. The Second Circuit's standard is inconsistent with the third and fourth criteria of plain error analysis. In order to meet the third criteria and affect the D's substantial rights, the error must be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome, not that there is "any possibility", however remote, that the jury could have convicted based exclusively on pre-enactment conduct. Moreover, this is not a structural error that affects substantial rights regardless of its impact on the appellant's trial. If the jury, which was not instructed on the crime's enactment date, erroneously convicted D based exclusively on noncriminal, pre-enactment conduct, D would have a valid due process claim. The effect of failing to instruct the jury can be assessed by a court. The kind and degree of harm that such errors create can consequently vary. In order to meet the fourth criteria requiring the error to seriously affect the fairness, integrity or public reputation of judicial proceedings, the error must affect the jury's verdict in most circumstances. However, the Second Circuit's (any possibility, no matter how unlikely) standard would require finding a "plain error" in a case where the evidence supporting a conviction consisted of a few days of pre-enactment conduct along with several continuous years of identical post-enactment conduct. Such an error is most unlikely to cast serious doubt on the fairness, integrity or public reputation of the judicial system. Held, judgment reversed and remanded for Court of Appeals to determine whether the error at issue satisfies the Court's "plain error" standard; Stevens, J., DISSENTING on basis that the error prejudiced D and seriously undermined the integrity of the proceedings.

RELATED CASE: Durden v. State, 99 N.E.3d 645 (Ind. 2018) (defective juror removal procedure was structural error, but since Defendant invited the error, he was not entitled to a new trial).

G. APPEAL

G.5. Scope of review

G.5.j. Cumulative Effect of Errors

TITLE: Myers v. State
INDEX NO.: G.5.j.
CITE: (5th Dist., 05-30-08), Ind. App., 887 N.E.2d 170
SUBJECT: Cumulative effect of multiple errors did not render trial unfair
HOLDING: D has a right to a fair trial, not a perfect trial. The Supreme Court has provided for the possibility that the cumulative effect of trial errors may warrant reversal. Hubbell v. State, 754 N.E.2d 884, 895 (Ind. 2001). Here, the victim was found in the forest years after her murder. A forensic pathologist testified to his belief that the victim had been raped before being shot. However, because none of the victim's soft tissue remained, there was no physical evidence to support this determination and the opinion was inadmissible under Evidence Rule 403. However, the opinion was thoroughly explored by D on cross-examination and demonstrated to be unconnected to any evidence specific to the victim. Moreover, a detective testified, despite a Motion in Limine, that he had spoken to D "about possibly taking a polygraph examination." The detective also testified, in violation of Evidence Rule 704, that he, D and another person had certain information that no one else knew. Although both of these references were impermissible, they were countered by strict and thorough admonitions by the Tr. Ct. Although State's case was entirely circumstantial, these errors, occurring over the span of a two-week trial, were more isolated than pervasive in nature and did not create the cumulative effect of depriving D of a fair trial. Held, judgment affirmed.

G. APPEAL

G. APPEAL

G.6. Principles of appellate review

G.6.a. Stare decisis

TITLE: Rutledge v. State
INDEX NO.: G.6.a.
CITE: (7/24/81), Ind., 426 N.E.2d 638
SUBJECT: Appeals -- stare decisis
HOLDING: Following principle of stare decisis, Ct. properly denied State's petition for rehearing because subsequent case, Faught, 390 N.E.2d 1011, did not overrule Steinbarger, 82 N.E.2d 519, on which reversal was based Here, D's conviction was reversed based on improper reasonable doubt instruction, & State filed petition for rehearing. Ct. held that Faught, which approved instruction identical to State's instruction on reasonable doubt that formed basis of reversal, did not overrule prior decision of S. Ct., Steinbarger, declaring same instruction invalid, because in Faught no objection at trial level was made to instruction. Thus, Faught Ct. was not faced, as was this Tr. Ct., with challenge to instruction that it impermissibly invaded law of reasonable doubt. Held, petition for rehearing denied.

RELATED CASES: Emerson, App., 812 N.E.2d 1090 (holding in co-D's case regarding sufficiency of evidence did not dictate outcome of D's ineffective assistance of appellate counsel claim).

G. APPEAL

G.6. Principles of appellate review

G.6.b. Standing

TITLE: Miller v. State
INDEX NO.: G.6.b.
CITE: (10/28/2014), 19 N.E.3d 779 (Ind. Ct. App. 2014)
SUBJECT: Dismissal of appeal for mootness and lack of standing - "two bites at the proverbial appellate apple" not allowed
HOLDING: Tr. Ct. erred in granting D's Trial Rule 60(B) motion to set aside its previous order, which declined to hold sheriff in contempt for failing to transport him to the Department of Corrections within five days of his sentencing pursuant to Ind. Code 35-38-3-4. Tr. Ct. should have dismissed D's underlying contempt motion for lack of jurisdiction. D lacked standing to bring such a motion because he failed to show he suffered a demonstrable or direct injury from sheriff's failure to fulfill his administrative duty to transport him. See, e.g., Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505 (Ind. 2005).

Moreover, even if D had a private right of action sufficient enough to find that he had standing, his argument was rendered moot when the sheriff transferred D to the DOC. Because D's argument does not meet the public interest exception to mootness, Court dismissed appeal. In footnote, Court reiterated that a motion for relief from judgment under T.R. 60(B) may not be used as a substitute for a direct appeal nor used, as here, to revive an expired attempt to appeal. See Snider v. Gaddis, 413 N.E.2d 322 (Ind. Ct. App. 1980). Held, appeal dismissed.

TITLE: Palmer v. State
INDEX NO.: G.6.b.
CITE: (12/12/85), Ind., 486 N.E.2d 477
SUBJECT: Standing
HOLDING: D does not have standing to raise issue (GBMI verdict erroneously permits convictions absent proof of intent beyond a reasonable doubt). To have standing to challenge constitutionality of statute, D must establish that his/her rights were adversely affected by operation of statute. State v. Clark 217 N.E.2d 588; Terrel, App., 353 N.E.2d 553. Here, jury had to find D intended to rape prosecutrix before returning guilty verdict. Therefore, D was not harmed by alleged defect in GBMI statute. If there was error, it was harmless. Held, conviction affirmed.

TITLE: State v. Doyle
INDEX NO.: G.6.b.
CITE: (1st Dist. 2/5/87), Ind. App., 503 N.E.2d 449
SUBJECT: Standing - prosecuting attorney
HOLDING: Prosecuting attorney has no authority to appeal criminal cases; that is duty of attorney general. Ind. Code 4-6-2-1; State v. Market, App., 302 N.E.2d 528. Here, prosecuting attorney alone appealed overruling of its petition to revoke suspended sentence. Because prosecuting attorney lacked standing, court is without jurisdiction to address issue. Although not raised by D, court has inherent authority to raise issue of standing sua sponte. [Citations omitted.] Held, appeal dismissed.

RELATED CASES: State v. Monserrate, 442 N.E.2d 1095 (PC 1, Section 9(b) requires attorney general to represent interests of state; Lake County prosecutor could not initiate appeal of Tr. Ct.'s grant of PCR petition/new trial).

G. APPEAL

G.6. Principles of appellate review

G.6.c. Mootness

TITLE: Alvarez v. Smith

INDEX NO.: G.6.c.

CITE: (U.S.), (12-08-09), 130 S. Ct. 576

SUBJECT: Mootness after certiorari granted

HOLDING: Court concluded that case involving challenge to an Illinois statute authorizing forfeiture of personal property used to facilitate drug crimes became moot after certiorari had been granted. Seventh Circuit had ruled that statutory procedures failed to comply with due process requirement of providing a speedy probable cause hearing after seizure of potentially forfeitable property. However, by time of oral argument in U.S. Supreme Court, the State had returned all the cars it had seized, and claimants had either forfeited any seized cash or had accepted as final the State's return of only some of it. Presence of federal case played no significant role in termination of separate state-court proceedings. Because case more closely resembled mootness through happenstance than through settlement, Court vacated Seventh Circuit judgment, which clears path for re-litigation of issues and preserves rights of parties while prejudicing none by a preliminary decision. Held, Seventh Circuit decision at 524 F.3d 834 vacated. Stevens, J., CONCURRING in part and DISSENTING in part, agreed case was moot but would dismiss writ of certiorari as improvidently granted to preserve Seventh Circuit's judgment.

TITLE: Bell v. State
INDEX NO.: G.6.c.
CITE: (12/31/2013), 1 N.E.3d 190 (Ind. App. 2013)
SUBJECT: Contempt Finding Moot Where D Has Served Sentence
HOLDING: Because the D has already served his 90 day sentence for direct contempt, whether he should have been held in direct or indirect contempt is moot and appeal is dismissed. During trial of the D's brother, the Tr. Ct. found that D had threatened witnesses in the hallway outside the courtroom. The Tr. Ct. ordered him jailed for the remainder of trial, and then found D in direct contempt and sentenced him to 90 days. The Tr. Ct. explained that this was direct contempt because it happened right outside the courtroom. D appealed, arguing that his actions constituted indirect, rather than direct, contempt, and that he was entitled to procedural safeguards normally available for indirect contempt proceedings. He argues that while these issues are moot, his appeal should be heard under the public interest exception. However, the Court of Appeals holds that it would merely be applying existing law rather than deciding any new issue in the public interest, and dismisses the appeal.

RELATED CASES: C.J., 74 N.E.3d 572 (Ind. Ct. App. 2017) (because C.J. had already been released from his commitment to the DOC, Court dismissed his appeal as moot), Breedlove, 20 N.E.3d 172 (Ind. Ct. App. 2014) (because D has already been released from prison less than a month after Tr. Ct. revoked his placement in community corrections program, whether Tr. Ct. violated his due process rights by revoking his placement without first finding that a violation occurred is moot and appeal is dismissed).

TITLE: C.J. v. State
INDEX NO.: G.6.c.
CITE: (4/11/2017), 74 N.E.3d 572 (Ind. Ct. App. 2017)
SUBJECT: Appeal from juvenile court order modifying dispositional decree after delinquency adjudication dismissed as moot.
HOLDING: Court dismissed C.J.'s appeal of his commitment to the Indiana Department of Correction (DOC), finding that because he has already been released, his appeal is moot. C.J. had been placed on a suspended commitment to the DOC after a true finding for what would be armed robbery. After another arrest and failed drug screens, juvenile court modified the disposition, sending C.J. to the DOC. C.J. appealed, alleging abuse of discretion in the modification, but Court would be unable to grant the requested relief because C.J. had already been released from the DOC.

Court rejected argument the appeal is not moot based on possible negative legal consequences because the alleged collateral consequences are either not supported by the law or are speculative. And the issue of C.J.'s placement in DOC is not a matter of great public importance justifying reaching the merits. Held, appeal dismissed.

RELATED CASES: Bell, 1 N.E.3d 190 (Ind. App. 2013) (because C.J. had already been released from his commitment to the DOC, Court dismissed his appeal as moot); Breedlove, 20 N.E.3d 172 (Ind. Ct. App. 2014) (because D has already been released from prison less than a month after Tr. Ct. revoked his placement in community corrections program, whether Tr. Ct. violated his due process rights by revoking his placement without first finding that a violation occurred is moot and appeal is dismissed).

TITLE: Gaither v. Ind. Dep't Correction
INDEX NO.: G.6.c.
CITE: (07-17-12), 971 N.E.2d 690 (Ind. Ct. App. 2012)
SUBJECT: Mootness exceptions applied to ex post facto claim regarding parole condition
HOLDING: The question of whether a parole condition requiring D to not reside within 1000 feet of a school when the law authorizing that condition was not in effect when he committed the offense of child molesting is a question of great public importance. See Irwin R. Evens & Son, Inc. et al. v. Bd. of Indianapolis Airport Authority, et al., 584 N.E.2d 576, 581 (Ind. Ct. App. 1992). Further, it is a question of "capable of repetition but likely to evade review as Ds complete their parole before their cases ever reach the appellate court. See Horseman v. Keller, 841 N.E.2d 164, 170 (Ind. 2006)." Therefore, the Court reviewed the merits of D's claim that the condition of both his parole and probation that barred him from living within 1000 feet of a school violated the prohibition on ex post facto laws. Held, judgment affirmed.

TITLE: In Re Commitment of E.F.

INDEX NO.: G.6.c.

CITE: (6/13/2022), Ind., 188 N.E.3d 464

SUBJECT: Appellate courts should thoughtfully and thoroughly consider whether temporary civil commitment appeal is moot and whether an exception to mootness should apply before dismissing

HOLDING: The Court of Appeals dismissed this temporary civil commitment appeal as moot sua sponte, *citing* T.W. v. St. Vincent Hospital and Healthcare Center, Inc., 121 N.E.3d 1039 (Ind. 2019). The Supreme Court granted transfer to clarify that T.W. does not signal that appellate courts should rarely address the merits of appeals from expired temporary commitment orders. Instead, in a per curiam opinion, the Court held that in an appeal from an expired temporary commitment order, the appellate court should thoughtfully and thoroughly consider whether the case is moot and whether the public-interest exception to mootness should apply. Parties appealing in those cases should avail themselves of the opportunity to raise relevant issues, including any reasonable challenge to mootness or argument that an exception to mootness applies. Held: remanded for the Court of Appeals to consider any arguments the parties may have about mootness and the public-interest exception. Justice Slaughter dissented, believing the public interest exception to mootness is too broad and the appealing party should have to show specific adverse consequences arising from the commitment are likely to affect the patient in the future.

RELATED CASES: In re Commitment of E.F, 209 N.E.3d 1206 (Ind. Ct. App. 2023) (appeal of expired civil commitment order was moot and did not fall within an exception to the mootness doctrine); Commitment of E.F., 179 N.E.3d 1017 (Ind. Ct. App. 2022) (on remand, the Court of Appeals held that the issues the appellant raised involve questions of great public interest and are therefore not moot, but declined to find that temporary commitments are never moot); In Re: Civil Commitment of C.M., 191 N.E.3d 278 (Ind. Ct. App. 2022) (Ct. reviewed expired involuntary commitment on the merits despite mootness, as it presents an issue of great public interest); T.W. v. St. Vincent Hospital and Healthcare Center, Inc., 121 N.E.3d 1039 (Ind. 2019); both appeal and commitment sections

TITLE: Kenner v. State
INDEX NO.: G.6.c.
CITE: (4th Dist. 11/19/84), Ind. App., 470 N.E.2d 1361
SUBJECT: Mootness - D's death abates appeal
HOLDING: Absent any question of general public interest, issues involved in an appeal are rendered moot by appellant's death & the appeal is abated. Bodle v. Lafayette National Bank 202 N.E.2d 184. Criminal proceedings are abated ab initio when D dies while appeal is pending. People v. Mazzone, et al., (Ill. 1978) 383 N.E.2d 947; State v. Blake, (Ohio App. 1977) 371 N.E.2d 843. Here, court recognizes great private concern that D's (a doctor) good reputation be restored, but finds its jurisdiction over appeal died with D. Held, appeal dismissed. Young CONCURS IN RESULT.

TITLE: Larkin v. State
INDEX NO.: G.6.c.
CITE: (9/30/2015), 43 N.E.3d 1281 (Ind. Ct. App. 2015)
SUBJECT: Appeal re disqualifying prosecutor's office dismissed as moot
HOLDING: Court dismissed D's appeal of Tr. Ct.'s denial of his motion to disqualify the LaPorte County's Prosecutor's Office, and his accompanying request to appoint a special prosecutor, because the appeal was moot. Police officers, Bob Szilagyi, the elected prosecutor, and Chief Deputy Prosecutor Robert Neary were present when D spoke to investigators about the death of his wife. During a break, D and his lawyer conferred without knowing that the recording equipment was still on. Thus, D later moved to exclude the entire prosecutor's office and requested a special prosecutor.

The issue is moot because the then-elected prosecutor, Szilagyi, was defeated in the primary by John Espar, who did not listen to D's confidential conversation with his attorney. See Jones v. State, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), *trans. denied*. And because there is no basis to disqualify Espar, there is no basis to disqualify the entire LaPorte County Prosecutor's Office. See Williams v. State, 631 N.E.2d 485, 487 (Ind. 1994) (not necessary to disqualify an entire prosecutor's office where a deputy prosecutor has a conflict of interest).

Note: The Court established that Espar defeated Szilagyi by taking judicial notice of the election results. See Evidence Rule 201(a)(1); see also Harden v. Whipker, 676 N.E.2d 19, 19-20 (Ind. 1997) (election results are subject to judicial notice). Held, appeal dismissed and judgment affirmed.

TITLE: Miller v. State

INDEX NO.: G.6.c.

CITE: (10/28/2014), 19 N.E.3d 779 (Ind. Ct. App. 2014)

SUBJECT: Dismissal of appeal for mootness and lack of standing - "two bites at the proverbial appellate apple" not allowed

HOLDING: Tr. Ct. erred in granting D's Trial Rule 60(B) motion to set aside its previous order, which declined to hold sheriff in contempt for failing to transport him to the Department of Corrections within five days of his sentencing pursuant to Ind. Code 35-38-3-4. Tr. Ct. should have dismissed D's underlying contempt motion for lack of jurisdiction. D lacked standing to bring such a motion because he failed to show he suffered a demonstrable or direct injury from sheriff's failure to fulfill his administrative duty to transport him. See, e.g., Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505 (Ind. 2005).

Moreover, even if D had a private right of action sufficient enough to find that he had standing, his argument was rendered moot when the sheriff transferred D to the DOC. Because D's argument does not meet the public interest exception to mootness, Court dismissed appeal. In footnote, Court reiterated that a motion for relief from judgment under T.R. 60(B) may not be used as a substitute for a direct appeal nor used, as here, to revive an expired attempt to appeal. See Snider v. Gaddis, 413 N.E.2d 322 (Ind. Ct. App. 1980). Held, appeal dismissed.

TITLE: N.J.R. v. State
INDEX NO.: G.6.c.
CITE: (2d Dist. 9/16/82), Ind. App., 439 N.E.2d 725
SUBJECT: Mootness - appeal of juvenile detention
HOLDING: To permit juveniles' detention under unlawful procedures is repugnant to any concept of justice. Here, court rejects state's argument that appeal is moot; "this case presents compelling need for resolution because otherwise the issue would be capable of repetition & yet evade review." Result - detention improper under IC 31-6-4-6.5(b), but no remedy for this child at this time.

RELATED CASES: Mosley, 908 N.E.2d 599 (Ind. 2009) (Re: State's mootness argument, Ct. noted that, unlike Article III of federal constitution, article 7, section 1 of Indiana Constitution does not prohibit Court from issuing "decisions which are, for all practical purposes, "advisory" opinions; whether to adopt Anders procedure has significant implications for appellate practice & procedure, constitutional rights, legal ethics and management of judicial resources); T.B., App., 895 N.E.2d 321 (issues relating to release of juvenile records to media fell under exception to mootness doctrine and was address on the merits despite release of records); Samm, Jr., App., 893 N.E.2d 761 (whether Tr. Ct. court abused its discretion in refusing to reduce bond and whether bond was excessive fell under the exception to the mootness doctrine and was addressed on the merit regardless that D was released on a reduced bond by the time of the appeal); A.D., App., 736 N.E.2d 1274; Lawrance, 579 N.E.2d 32 (Ct. will address merits if case involves questions of great public interest & issues likely to recur).

TITLE: Ryan v. State
INDEX NO.: G.6.c.
CITE: (8/26/2015), 42 N.E.3d 1019 (Ind. Ct. App. 2015)
SUBJECT: Conditions of appeal bond moot
HOLDING: Whether the conditions the Tr. Ct. imposed on D once it released him on an appeal bond were an abuse of discretion became moot once the Indiana Supreme Court reinstated D's convictions and he was returned to incarceration. Also, by failing to initiate an immediate appeal under Appellate Rule 18 to challenge the conditions, D forfeited review of the issue.

After the Court of Appeals reversed D's convictions for sexual misconduct with a minor, D sought an appeal bond with the Tr. Ct., which granted the request but imposed conditions that D found onerous. While D sought and the Tr. Ct. granted relief from two of the conditions, D did not challenge any other conditions, first in the Tr. Ct., and second, in the Court of Appeals. See Ind. Appellate Rule 18.

Once the Supreme Court's decision to reinstate D's convictions was certified, the appeal bond was revoked and "any complaints [D] had about the Tr. Ct.'s judgment on his appeal bond were rendered moot." See Alleyn v. State, 427 N.E.2d 1095, 1100 (Ind. 1981). And by not appealing those conditions pursuant to Appellate Rule 18, D forfeited review of those conditions. Held, judgment affirmed.

TITLE: Sainvil v. State
INDEX NO.: G.6.c.
CITE: (2/16/2016), 51 N.E.3d 337 (Ind. Ct. App. 2016)
SUBJECT: Prosecutorial misconduct argument moot
HOLDING: When appellate court is unable to provide effective relief upon an issue, the issue is deemed moot, and Court will not reverse trial court's determination where absolutely no change in the status quo will result. Breedlove v. State, 20 N.E.3d 172 (Ind. Ct. App. 2014).

Here, D argued that the prosecutor improperly commented on his failure to testify regarding his ownership of gun, and requested that Court reverse his convictions. However, the jury acquitted D of carrying handgun without license charge. Thus, Court cannot provide "effective relief" to D because he was never convicted of the charge that the prosecutor's statement concerned. The statement did not implicate D's other charges and was not a direct comment on his failure to testify. Held, judgment affirmed.

TITLE: Washington v. Harper
INDEX NO.: G.6.c.
CITE: 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)
SUBJECT: Mootness
HOLDING: Issue of whether state may involuntarily administer anti-psychotic drugs to state prison inmate absent judicial hearing with full panoply of adversarial procedural protections not rendered moot by state's discontinuation of such medical treatment. Here, state stopped medicating D based upon state appellate court's determination that involuntary medication required judicial hearing. Case is not moot because no evidence that D has recovered from mental illness, D continues to be held in state prison system, & is subject to transfer at any time to psychiatric ward of medical center. If transferred to psychiatric ward, given D's medical history, absent state appellate court's ruling, it is likely that state would again seek to involuntarily medicate D. Held, case not moot. All justices join.

TITLE: Washington, on his own and behalf of class v. Marion County Prosecutor

INDEX NO.: G.6.c.

CITE: (8/18/2017), 2017 U.S. Dist. LEXIS 132235 (U.S. District Court, S. Ind. 2017)

SUBJECT: "Inherently transitory" mootness exception lets class action challenge to forfeiture statute proceed

HOLDING: Reviewing Washington's class action constitutional challenge to Indiana's forfeiture statute, the District Court held that even though D Marion County had already returned Washington's vehicle to him, the challenge to the statute could proceed because Washington demonstrated that the "inherently transitory" exception to the mootness doctrine applied. The exception says that as long as someone within the class will suffer from the forfeiture, the case may proceed, even if some plaintiff's individual claims are moot. See Olson v. Brown, 594 F.3d 583 (7th Cir. 2010). Held, Ds' motion for summary judgment denied and court reviewed the case on the merits.

G. APPEAL
G.6. Principles of appellate review
G.6.d. Retroactivity (Griffith v Kentucky)

TITLE: Baxter v. State
INDEX NO.: G.6.d.
CITE: (3rd Dist., 12-15-97), Ind. App., 689 N.E.2d 1254
SUBJECT: Retroactivity - "watershed rule" exception
HOLDING: Indiana S. Ct.'s decision in Campbell, 622 N.E.2d 495, which held that Article I, ' 13 of Indiana Constitution prohibits excluding alibi testimony from D himself, does not apply retroactively. Newly declared constitutional rule is retroactively applied to only cases on direct review except when: 1) new rule places certain kinds of primary, private individual conduct beyond power of criminal law-making authority to proscribe, or 2) when new rule requires observance of those procedures that are implicit in concept of ordered liberty & without which likelihood of accurate conviction is seriously diminished. Daniels, 561 N.E.2d 487. Second exception is described as applicable only to "watershed rules" necessary to fundamental fairness of criminal proceeding which must not only improve accuracy, but also alter understanding of bedrock procedural elements essential to fairness of proceeding. Only case in Indiana which found retroactivity warranted under second exception was Brown, App., 587 N.E.2d 693, where Ct. found fundamental error in not instructing jury on specific intent in crime of attempted murder. Here, Campbell was decided approximately five years after D's direct appeals were exhausted. However, unlike Brown, where Ct. was concerned about accuracy of conviction in absence of its holding, Campbell Ct. was concerned about individual right of accused to speak & not accuracy of conviction absent new rule. Thus, new rule announced in Campbell did not apply to D's case. Held, judgment affirmed in part, reversed in part.

RELATED CASES: Jacobs, 835 N.E.2d 485 (holding in Ross, 729 N.E.2d 113 that a misdemeanor handgun charge enhanced to a felony could not be further enhanced by use of general habitual offender statute, applies in post-conviction proceedings to persons whose cases were resolved prior to that holding).

TITLE: Beard v. Banks
INDEX NO.: G.6.d.
CITE: 542 U.S.406, 124 S.Ct. 2504, 59 L.Ed.2d 494 (2004)
SUBJECT: Mills not retroactive
HOLDING: In Mills v. Maryland, 486 U.S. 367 (1988) the U.S. Supreme Court held invalid a capital sentencing scheme that required jurors to disregard mitigating circumstances unless they were found unanimously. In Beard v. Banks, the Court held that Mills v. Maryland is not retroactive to cases already final on direct review.

TITLE: Boyle v. State
INDEX NO.: G.6.d.
CITE: (4th Dist.; 07-31-06), Ind. App., 851 N.E.2d 996
SUBJECT: Blakely error available to D who had ability to file belated appeal when Blakely decided

HOLDING: D was permitted to pursue, via a belated appeal, a Blakely challenge to his sentence from a 1995 guilty plea with a sentencing cap. Some delay in requesting permission to file a belated appeal can be attributable to prior uncertainty in the law rather than D's lack of diligence. Kling, 837 N.E.2d 502, 509. On November 9, 2004, the Indiana S.Ct. held that the "proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Indiana Post-Conviction Rule 2, belated notice of appeal]." Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004).

In 1995 D pled guilty to burglary, criminal deviate conduct & attempted rape with a sentencing cap. In 1997, D filed a *pro se* petition for P-C relief. Less than one month after Collins was decided, D filed a motion to withdraw petition for post-conviction relief in order to pursue a belated appeal. D acted diligently in pursuing his belated appeal. Further, D did not receive a significant benefit from his plea that would preclude him from challenging the aggravators or the appropriateness of his sentence because D's plea did not call for a fixed sentence.

Moreover, Blakely applies retroactively when the D's case is not yet final when Blakely was decided. Gutermuth, App., 848 N.E.2d 716. Because the availability of a belated appeal via Post-Conviction rule 2(a) had not yet been exhausted when Blakely was announced, Blakely applies retroactively to the D's case. Held, sentence reversed & remanded; Friedlander. J., dissenting, would follow reasoning in Robbins, App., 839 N.E.2d 1196, which held that Blakely does not apply retroactively to D who has the ability to appeal via Post-Conviction Rule 2(1).

RELATED CASES: Baysinger, App., 854 N.E.2d 1211 (Blakely applies retroactively to those cases being heard via a belated notice of appeal; Vaidik, J., concurring in result but disagreeing as to retroactive application).

TITLE: Butler v. McKellar
INDEX NO.: G.6.d.
CITE: 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)
SUBJECT: Exceptions to "new rule" prohibition of retroactive application of federal habeas
HOLDING: "New rules" will not generally be applied or announced in cases on collateral review. Teague v. Lane (1989), 489 U.S. __, 109 S.Ct. 1060, 103 L.Ed.2d 334. Exceptions apply & new rules will be applied retroactively to cases on collateral review where: (1) rule places "certain kinds of primary private individual conduct beyond power of criminal law making power to proscribe," or (2) rule requires observance of those procedures that are implicit in concept of ordered liberty. Teague. Here, court determined rule in Arizona v. Roberson (1988), 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (5th Amend. bars police initiated interrogation after D invokes right to counsel in separate investigation) constitutes "new rule" not dictated by decision in Edwards v. Arizona (1981), 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (5th Amend bars police initiated interrogation after D invokes right to counsel in same investigation). First exception "clearly inapplicable;" proscribed conduct here is capital murder which is not prohibited by Roberson rule. Second exception applies to new procedures without which likelihood of accurate conviction is seriously diminished exception inapplicable because violation of Roberson would not seriously diminish likelihood of obtaining accurate determination & may, in fact, increase that likelihood. Held, Roberson established new rule & no exception exists to prohibition on retroactive application. Brennan, joined by Marshall, Blackmun & Stevens, DISSENTING.

TITLE: Chaidez v. United States
INDEX NO.: G.6.d.
CITE: (2/20/2013), 133 S. Ct. 1103 (U.S. 2013)
SUBJECT: Padilla announced new rule so not applied retroactively
HOLDING: In holding that counsel must advise a client about the potential negative immigration consequences of pleading guilty, Padilla v. Kentucky, 130 S.Ct. 1473 (2010), created a new rule of criminal procedure. Thus, under Teague v. Lane, 489 U.S. 288 (1989), Padilla is not applied retroactively to cases already final on direct review. Here, in 2004, Chaidez pled guilty to mail fraud. In 2009, immigration officials began steps to deport her. To avoid deportation, she filed a petition for writ of coram nobis, claiming counsel failed to advise her about the possible immigration consequences of a plea. The District Court vacated her conviction, but the 7th Circuit reversed and reinstated it.

Padilla clearly created a new rule of criminal procedure, despite the dissent's claim that it merely applied Strickland to a different factual situation. Padilla did much more. It asked if Strickland should even apply in a situation where collateral consequences of a plea were at issue. Held, cert. granted, 7th Circuit affirmed, District Court reversed. Kagan, J., joined by Roberts, C.J., and Scalia, Kennedy, Breyer, and Alito, J.J.; Sotomayor, J., dissenting, joined by Ginsburg, J.

TITLE: Danforth v. Minnesota
INDEX NO.: G.6.d.
CITE: 552 U.S. ____, 128 S.Ct. 1029, 169 L.Ed2d 859 (2008)
SUBJECT: Crawford not retroactive although States can interpret differently
HOLDING: Court held that Teague v. Lane, 489 U.S. 288 (1989) does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. Court was reviewing a decision by the Minnesota Supreme Court that found that Crawford v. Washington, 541 U.S. 36 (2004) as a "new rule" in relation to evaluating the reliability of testimonial statements in criminal cases did not have retroactive effect and that state courts were not free to give a decision of the U.S. Supreme Court announcing a new constitutional rule of criminal procedure broader retroactive application than that given by the U.S. Supreme Court. Court agreed that Crawford announced a new rule under Teague and that on federal habeas review could not be applied retroactively as it neither placed certain primary individual conduct beyond the States' power to proscribe nor was it a "watershed" rule of criminal procedure. However, neither Linkletter v. Walker, 381 U.S. 618 (1965) nor Teague explicitly or implicitly constrained the States' authority to provide remedies for a broader range of constitutional violations than are redressable on federal habeas. Since Teague is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts. The federal interest in uniformity in the application of federal law does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. Roberts, C.J., filed a dissenting opinion, in which Kennedy, J., joined.

TITLE: Fosha v. State
INDEX NO.: G.6.d.
CITE: (5-23-01), Ind., 747 N.E.2d 549
SUBJECT: Retroactivity - belated appeals
HOLDING: New rules of criminal procedure are not retroactive to convictions & sentences that have become final before new rule was created. State v. Mohler, 694 N.E.2d 1129 (Ind. 1998). Determinative point in time when D's convictions & sentences become final is based on whether praecipe for appeal is filed within allotted thirty-day period. Where, as here, D receives permission to file belated direct appeal pursuant to Post-Conviction Rule 2, it shall be treated for all purposes as if filed within prescribed period. Ind. Post-Conviction Rule 2(1). Thus, rule that precludes retroactive application of new criminal rules to collateral proceedings does not apply to direct appeals brought pursuant to Post-Conviction Rule 2. In this case, Ct. considered D's claim that his convictions of murder & conspiracy to commit murder violate actual evidence test for considering violations of Indiana Double Jeopardy Clause set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). Held, murder & carrying handgun without license convictions affirmed, conspiracy to commit murder conviction vacated.

RELATED CASES: Gutermuth, 868 N.E.2d 427 (to extent Fosha holds that belated appeals constitute "direct review" for purposes of retroactivity analysis in Griffith, it is overruled); Rbbins, App., 839 N.E.2d 1196 (Ct. rejected Blakely challenge as untimely where D filed belated appeal from his 1999 convictions for child molesting after Blakely was announced; D's direct appeal was filed after Blakely was decided, thus it was not "pending"); Sullivan, App., 836 N.E.2d 1031 (because D was given permission to file a belated direct appeal, he may rely on Blakely v. Washington, 542 U.S. 296 (2004), even though he was sentenced more than five years before it was decided because his case was not yet final when Blakely was decided).

TITLE: Graham v. Collins
INDEX NO.: G.6.d.
CITE: 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993)
SUBJECT: Federal habeas - retroactivity; new rule
HOLDING: Because 8th amend. precedent prevailing at time petitioner's murder conviction and death sentence became final would not have dictated result petitioner seeks now, result would constitute new rule and cannot be announced on federal habeas review. Petitioner sought federal habeas relief, claiming that "special issues" sentencing scheme in effect at his trial did not permit sentencing jury to give effect to his mitigating evidence, including his youth, his abusive childhood, and his redeeming character traits. While habeas proceedings were pending, U.S.S.Ct. decided Penry v. Lynaugh (1989), 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, which held that "special issues" scheme had not allowed evidence of mental retardation and abusive childhood to be given mitigating effect, and which further held that this ruling was not "new rule" and could therefore be announced on federal habeas review under Teague v. Lane. En banc Fifth Circuit Court of Appeals reviewed petitioner's case in light of Penry, but held that his claim must be rejected on authority of Jurek v. Texas (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, an early post-Furman case in which Texas' special issues scheme was upheld. In Jurek, similar mitigating evidence had been presented, and U.S.S.Ct. held that special issues scheme adequately narrowed class of death-eligible murders and also adequately permitted sentencer to consider mitigating evidence. U.S.S.Ct. here agrees with Fifth Circuit that, in light of Jurek, reasonable jurists hearing petitioner's claim at time his conviction became final would not have reached conclusion he seeks here, and thus conclusion he seeks would be new rule barred by Teague. According to majority, Penry was unique case, because special issues scheme allowed jury to consider mental health not just as mitigation, but as aggravation, in that it could be seen to indicate future dangerousness. No such problem existed in petitioner's case.

TITLE: Griffith v. Kentucky
INDEX NO.: G.6.d.
CITE: 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)
SUBJECT: Retroactivity - "clear break" exception overruled
HOLDING: A decision of U.S. S.Ct. generally will be applied retroactively to all cases which are not yet final. U.S. v. Johnson (1982), 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202. However, if new rule was "clear break" with prior precedent, the new rule would not be applied retroactively either to cases pending on direct appeal or to cases on collateral attack. U.S. v. Johnson, supra. Court now rejects "clear break exception" because it requires case specific analysis which is inappropriate for cases pending on direct review & because it effectively results in disparate treatment of similarly situated Ds. Held, new rules announced via case law are to be applied retroactively to all cases, state or federal, which are not yet final with no exception for cases in which the new rule constitutes a clear break with the past. A case is final when judgment of conviction has been rendered, the availability of appeal exhausted & the time for a cert. petition has either elapsed or the petition has been finally denied. Holding of Batson v. KY (See card at D.9.d.5) applies to cases not yet final. Powell, CONCURS; Rehnquist, C.J., White, joined by O'Connor, DISSENTS.

TITLE: Gutermuth v. State
INDEX NO.: G.6.d.
CITE: (06-20-07), Ind., 868 N.E.2d 427
SUBJECT: Blakely does not apply retroactively to belated appeals
HOLDING: Post-Conviction Rule 2 permits belated appeals for Ds found to be without fault & diligent in seeking relief. A belated appeal of a sentence entered before a new constitutional rule of criminal procedure was announced is not governed by the new rule but is subject to the law that would have governed a timely appeal. Specifically, belated appeals of sentences entered before Blakely v. Washington, 542 U.S. 296 (2004) are not subject to the holding in that case.

A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. Griffith v. Kentucky, 479 U.S. 314 (1987). Distinguishing/overruling Fosha v. State, 747 N.E.2d 549 (Ind. 2001), Ct. held that belated appeals, regardless of whether initiated before or after a new rule of criminal procedure is announced are neither "pending on direct review" nor "not yet final" for purposes of Griffith. The parties to a belated appeal should not receive a different result because new law has been handed down that would not have been available if a timely appeal had been taken. If they have been found faultless & diligent, they should not be penalized for filing a belated appeal. But they also should not be rewarded for their delay. Allowing a Blakely claim that would have been unavailable in a timely appeal would do just that.

Regarding issue of "finality," Ct. concluded that a D's case becomes "final" for purposes of retroactivity when the time for filing a timely direct appeal has expired. In Griffith, U.S. S.Ct. contemplated a conventional appeal in describing when a case becomes "final." Although Griffith permits anyone in appellate process to benefit from the new rule, it did not abolish standard requirements that the issue have been preserved at trial & raised on appeal. Held, transfer granted, Ct. App.' opinion on this issue at 848 N.E.2d 716 vacated, judgment affirmed.

See also: Boyle, 868 N.E.2d 435.

RELATED CASES: Marbley-El, 929 N.E.2d 194 (Ind. 2010) (because D committed his crime after legislature enacted advisory sentencing statutes, Blakely does not apply & Tr. Ct. correctly did not advise him that he was entitled to a jury determination of factors that led to his six-year sentence); Rogers, App., 878 N.E.2d 269 (Blakely is not retroactive for Post-Conviction Rule 2 belated appeals; this case involved Indiana Post-Conviction Rule 2(3) & a belated appeal of a sentence entered after Blakely. Even if Blakely applies to belated appeal of re-sentence entered after Blakely was decided, Tr. Ct. in this case would have imposed same sentence)

TITLE: Jacobs v. State
INDEX NO.: G.6.d.
CITE: (10-13-05), Ind., 835 N.E.2d 485
SUBJECT: Ross rule on double enhancement applies retroactively on collateral review
HOLDING: Holding in Ross, 729 N.E.2d 113, that a misdemeanor handgun charge enhanced to a felony could not be further enhanced by use of general HOstatute, applies in post-conviction proceedings to persons whose cases were resolved prior to that holding. New rules of criminal procedure do not apply to cases which have become final before new rule was announced, unless new rule: 1) places certain kinds of primary, private individual conduct beyond power of criminal lawmaking authority to proscribe, or 2) is watershed rule of criminal procedure that implicates fundamental fairness of criminal proceedings. Daniels, 561 N.E.2d 487. *Citing* Bousley, 523 U.S. 614 (1998), D argued that Daniels analysis does not apply where Ct. interprets relevant sections of criminal code, & substantive rules generally apply retroactively to cases on collateral review. In context of post-conviction relief, substantive rules should be considered those that either define criminal behavior itself, or define the penalties applicable to that behavior. Ct. concluded that its decision in Ross falls more fittingly into substantive rule category, i.e., that general habitual offender statute had not been intended to punish a particular form of criminal activity in a particular manner. Thus, Ross should be applied retroactively. Held, transfer granted, Ct. App.' opinion on other issues summarily affirmed, post-conviction Ct. ordered to vacate habitual offender conviction. See also: Jones, 835 N.E.2d 1002 (D's voluntary guilty plea to HO enhancement did not automatically preclude post-conviction relief when there has been a change in substantive law; further, D did not waive claim by failing to plead a new issue through rehearing or transfer; however, on remand State may seek to reposition general HO finding to any one of other felonies that D was convicted of in same proceeding).

TITLE: Membres v. State

INDEX NO.: G.6.d.

CITE: (06-27-08), Ind., 889 N.E.2d 265

SUBJECT: Exclusionary rule - new rule of state criminal procedure only applies to searches conducted after rule was announced

HOLDING: Indiana Supreme Court's decision in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005), requiring articulable reasonable suspicion prior to a trash search, is a new rule of state criminal procedure that does not affect the reliability of the fact-finding process, and thus is not to be applied retroactively. Federal law does not govern retroactivity of a new rule of criminal procedure that derives from the state constitution. In determining whether to apply new rules of state criminal procedure retroactively, the court is to consider the purpose to be served by the new standards, the extent of the reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. Enlow v. State, 303 N.E.2d 658 (Ind. 1973).

Here, D's trash was searched based on a tip from a known informant that he was "pretty sure" that D was selling "large quantities" of marijuana from his home. At the time of the search, the law was that trash searches must be reasonable under the totality of circumstances. See Moran v. State, 644 N.E.2d 536 (Ind. 1994). Two weeks after the trash search, the Supreme Court in Litchfield specifically held that reasonableness requires articulable reasonable suspicion. The Litchfield rule is designed to deter random intrusions into the privacy of all citizens. Retroactive application of that rule would not advance its purpose for the obvious reason that deterrence can operate only prospectively. Thus, the law at the time of the search is to apply unless D raised a claim substantially similar to Litchfield pre-Litchfield, which he did not. Because the trash search was at least reasonable under the law at the time of the search, i.e., Moran, the Tr. Ct. properly denied the motion to suppress. Held, transfer granted, Court of Appeals' opinion at 851 N.E.2d 990 (Ind. Ct. App. 2006) overruled, and judgment of Tr. Ct. denying motion to suppress and granting State's motion for turnover order affirmed; Sullivan, J., dissenting on basis that Enlow, upon which the majority relies, has been overruled and that judicial integrity, as well as deterrence, is a purpose of the exclusionary rule; Rucker, J., dissenting in part on basis that Litchfield should apply retroactively, but concurring on basis that there was articulable reasonable suspicion for the trash search.

RELATED CASES: Henderson, 953 N.E.2d 639 (Ind. Ct. App. 2011) (Arizona v. Gant (at Z.3.a) is not retroactive...); Belvedere, 889 N.E.2d 286 (because trash search occurred pre-Litchfield, it is to be analyzed under the reasonableness standard of Moran; here, a confidential informant's tips, accompanied by the running of D's plate corroborating where he lived, was sufficient to search his trash; Sullivan and Rucker, JJ., dissenting); Bowles, 891 N.E.2d 130 (although Ct. in Membres held that a D who raised a claim substantially similar to Litchfield prior to Litchfield should get the benefit of Litchfield, D's claim that his trash search violated Article I, Section 11 was not substantially similar to Litchfield's claim because it was based on the officer entering his private property and not the lack of reasonable suspicion; held, trash search reasonable under Moran; Sullivan and Rucker, JJ., dissenting).

TITLE: Rowley v. State
INDEX NO.: G.6.d.
CITE: (10/16/85), Ind., 483 N.E.2d 1078
SUBJECT: Retroactivity
HOLDING: Tr. Ct. erred in refusing to apply Strong 435 N.E.2d 969 retroactively. Strong held that evidence derived from hypnotically entranced witness is inherently unreliable as not having probative value & is inadmissible. Here, witness gave sketchy description of robber at scene. Description after hypnosis was detailed. Other evidence against D was weak. Criteria for deciding retroactivity in given case: (1) purpose served by new standards; (2) extent of law enforcement's reliance on old standards; (3) effect on administration of justice if new standard is applied retroactively. US v. Johnson (1982), 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202; Stovall v. Denno (1967), 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199; Enlow 303 N.E.2d 658. If purpose is to minimize use of untrustworthy evidence/enhance reliability of convictions, then retroactive application is given, regardless of strength of #2 & #3. Williams v. US (1971), 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388. Held, denial of second PCR petition reversed.

RELATED CASES: Moore, 409 N.E.2d 1181 (rule of U.S. Supreme Court in Breed, 421 U.S. 519, that adjudicatory hearing to determine whether juvenile committed act which constitutes criminal act, and later waiver to and prosecution in adult criminal court is violation of double jeopardy clause, is not retroactive application and, hence, cannot be relied upon by juvenile as authority that procedure utilized in case prior to decision violated double jeopardy); Solem, 465 U.S. 638 (complete retroactive effect is warranted where new judicial rule is directly designed to enhance reliability of criminal trials rather than when rule has only tangential relation to truth-finding at trial); Teague, 489 U.S. 288 (two exceptions to non-retroactivity of new rules: rules which place certain kinds of primary, private individual conduct beyond power of criminal law-making authority to proscribe and those which require observance of procedures that are implicit in concept of ordered liberty and without which likelihood of accurate conviction is seriously diminished). Pavey 498 N.E.2d 1195 (by correcting prior law which denied D right to offer voluntary intoxication defense, Terry 465 N.E.2d 1085 decision (card at L.1.e) corrected flaw directly/persuasively affecting fact-finding process/determination of D's guilt innocence, & is entitled to retroactive application); Bryant, App., 446 N.E.2d 364 retroactive application of court decision construing credit time statute does not constitute ex post facto law denying D due process); Yates v. Aiken (1988), U.S., 108 S.Ct. 534, 98 L.Ed.2d 546 (State court cannot refuse to apply rule of federal constitutional law retroactively where establishing that rule was merely application of previously established rule).

TITLE: Schriro v. Summerlin

INDEX NO.: G.6.d.

CITE: 542 U.S. 348, 124 S.Ct. 2519, 159 L. Ed2d 442 (2004)

SUBJECT: Ring is not retroactive

HOLDING: In Apprendi v. New Jersey, 530 U.S. 466 (2000), the U.S. Supreme Court held that any fact, other than the fact of a prior conviction, used to subject a criminal D to greater possible punishment at sentencing, must be alleged in the charging information and proven to a jury beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584 (2002) Court held that Apprendi applies to aggravating circumstances in capital cases. In Schriro v. Summerlin the Court held that Ring is not retroactive to cases already final on direct appeal.

TITLE: Simmons v. Kapture
INDEX NO.: G.6.d.
CITE: 474 F.3d 869 (6th Cir. 2007); vacated and remanded en banc by 516 F.3d 450
SUBJECT: Halbert v. Michigan did not establish new rule regarding appointed counsel right
HOLDING: The Sixth Circuit Court of Appeals held that Halbert v. Michigan, 545 U.S. 605 (2005), clarifying the right to appointed counsel on a discretionary appeal did not announce a "new" rule of criminal procedure and thus, under Teague v. Lane, 489 U.S. 288 (1988), the rule applies retroactively on collateral review.

Halbert held that "the Due Process and Equal Protection Clauses require the appointment of counsel for Ds, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeal." The case was prompted by Michigan's attempt to save money on counsel appointments by making first-level appeals discretionary in cases involving plea-based convictions and then denying counsel to Ds seeking leave to appeal such convictions. The Court held that Halbert merely applied the rule first established in Douglas v. California, 372 U.S. 353 (1963), that a state must provide appointed counsel for indigent Ds in a first-level appeal from a conviction. Therefore, Petitioner in this case, who argued that Michigan should have provided him appointed counsel to represent him in the appellate process, was entitled to relief. A dissent was entered arguing that Halbert announced a new rule.

See also Talley v. State, 2007 S.C. LEXIS 19 (decided January 22, 2007) holding that Alabama v. Shelton, 535 U.S. 654 (2002), which established that the constitutional right to counsel extends to a D who receives a suspended sentence that may result in the actual deprivation of his liberty, announced a new "watershed" rule of criminal procedure that applies retroactively to cases that were final when it was announced.

TITLE: State v. Mohler
INDEX NO.: G.6.d.
CITE: (5-6-98), Ind., 694 N.E.2d 1129
SUBJECT: Double jeopardy - controlled substance excise tax (CSET); no retroactive application
HOLDING: Rule announced in Bryant, 660 N.E.2d 290, does not apply retroactively to cases on collateral review. In Bryant, Ct. held that because CSET constitutes criminal punishment, Double Jeopardy Clause bars criminal prosecution for underlying drug offense after tax has been assessed. New rules of criminal procedure do not apply to cases which have become final before new rule was announced, unless new rule: 1) places certain kinds of primary, private individual conduct beyond power of criminal lawmaking authority to proscribe, or prohibits certain category of punishment for class of Ds due to their status or offense; & 2) is watershed rule of criminal procedure central to accurate determination of innocence or guilt. Daniels, 561 N.E.2d 487; Teague v. Lane, 109 S.Ct. 1061 (1989). Ct. held that D was not entitled to retroactive benefit of Bryant rule because rule does not immunize primary conduct from overall, or any specific, criminal punishment. Drug possession & dealing offenses for which D was convicted remained illegal after Bryant. Further, Bryant rule does not define specific class of Ds by their status or offense as required by Penry v. Lynaugh, 492 U.S. 302 (1989), but rather by punishment they received. If specific class of Ds under Penry is defined as all those receiving newly proscribed punishment, then all those receiving newly proscribed punishment are entitled to benefit of new rule. This circular approach allows exception to swallow general rule, resulting in retroactive application of almost every new rule. Both finality & efficient administration of justice -- the rationale for nonretroactivity -- would be undermined if not destroyed. Neither new rules enforcing Double Jeopardy Clause, without more, nor new rule enunciated in Bryant at issue here, fall within Penry exception. Held, transfer granted, Ct. of Appeals' opinion at 679 N.E.2d 170 vacated, & petition for post-conviction relief denied.

G. APPEAL

G.6. Principles of appellate review

G.6.e. Res judicata

TITLE: Annes v. State
INDEX NO.: G.6.e.
CITE: (6-10-03), Ind., 689 N.E.2d 953
SUBJECT: Res judicata barred D's claim despite lack of appellate judgment
HOLDING: In successive post-conviction case, D claimed that his guilty plea was not knowing, voluntary, & intelligent because Tr. Ct. did not advise him of his right to confront & cross examine opposing witnesses. However, D did not pursue appeal of denial of this claim which he raised in first petition for post-conviction relief. D argued that he was entitled to re- litigate claim already decided against him because issue had never been considered by an appellate Ct. Ct. disagreed & held that D failed to establish any recognized ground for avoiding doctrine of res judicata.

Res judicata bars later suit when earlier suit resulted in final judgment on merits, was based on proper jurisdiction & involved same cause of action & same parties as later suit. Indiana Dept. of Environmental Management v. Conard, 614 N.E.2d 916 (Ind. 1993). That Tr. Ct.'s judgment was not appealed is of no moment. Whether judgment of original post-conviction Ct. was erroneous or not, Ct. was not persuaded that outcome was manifestly unjust in this case. D & State worked out a favorable plea agreement in thirty-year old drug case, & prosecutor & Tr. Ct. afforded D multiple opportunities to avoid conviction & punishment. Held, transfer granted, Ct. App.' opinion vacated, denial of post-conviction relief affirmed.

TITLE: Arthur v. State
INDEX NO.: G.6.e.
CITE: (3/22/96), Ind., 663 N.E.2d 529
SUBJECT: Principles of appellate review -- res judicata
HOLDING: Issue which previously has been raised & determined adverse to appellant's position is barred by doctrine of res judicata. Additionally, Ind.Post-Conviction Rule 1(8) requires that all grounds for relief be raised in original petition, & such grounds may not be basis for subsequent petition. Here, Indiana S.Ct. affirmed D's conviction of attempted murder. Tr. Ct. denied D's first petition for post-conviction relief (PCR), Ct. App. affirmed denial & S.Ct. denied transfer. On second petition for PCR, Ct. App. reversed & remanded, & S.Ct. granted transfer to determine whether principles of res judicata barred subsequent review of issue presented on prior appeal. Although Ct. may revisit prior decision, it should be loath to do so in absence of extraordinary circumstances such as where initial decision was clearly erroneous & would work manifest injustice. Here, res judicata barred D's successive petition for PCR on issue of adequacy of jury instructions for attempted murder. Ct. App.' prior decision on issue was not clearly erroneous, & S.Ct. had found on previous direct appeal that there was sufficient evidence of each element of offense of attempted murder. Held, conviction affirmed; DeBruler, J., dissenting.

RELATED CASES: Becker, 992 N.E.2d 697 (Ind. 2013) (principles of res judicata barred State from relitigating D's SOR requirements; see full review, this section); Moody, App., 749 N.E.2d 65 (res judicata barred D from relitigating his claim of IAC on post-conviction appeal); Maxey, 596 N.E.2d 908 (petitioner for post-conviction relief cannot escape effect of claim preclusion merely by using different language to phrase issue & define alleged error).

TITLE: Becker v. State
INDEX NO.: G.6.e.
CITE: (8/22/2013), 992 N.E.2d 697 (Ind. 2013)
SUBJECT: Res judicata barred State's attempt to increase D's Sex Offender Registration requirements
HOLDING: Indiana Supreme Court reversed 2011 granting of State's motion to correct error.

The State, through the DOC, intervened to challenge an earlier 2011 agreed order by which State acknowledged D had satisfied his sex offender registration (SOR) duties. DOC intervened because just two weeks after the agreed order, Lemmon v. Harris, 949 N.E.2d 803 (2011), ruled that the heightened registration requirements for sexually violent predators did not violate prohibition on ex post facto laws. Thus, Tr. Ct. ruled that requiring D to abide by heightened registration requirements did not violate ex post facto prohibition.

However, the effect of this ruling was to vacate Tr. Ct.'s 2008 ruling that the heightened registration requirements were, in fact, ex post facto as to D. The prosecutor did not appeal this 2008 ruling.

Court acknowledged that in light of Lemmon, Tr. Ct.'s 2008 ruling was erroneous. However, because the prosecutor and the DOC were in privity with respect to D's SOR obligations, principles of res judicata barred DOC from relitigating D's registration duties. Thus, DOC was bound by the 2008 order. Held, judgment reversed.

TITLE: Hopkins v. State

INDEX NO.: G.6.e.

CITE: (2nd Dist., 6-13-02), Ind. App., 769 N.E.2d 702

SUBJECT: Manifest injustice exception to law of case doctrine - must bring claim in post-conviction relief (PCR) proceeding

HOLDING: Law of case doctrine mandates that appellate Ct.'s determination of legal issue binds both Tr. Ct. & appellate Ct. in any subsequent appeal involving same case & relevantly similar facts. State v. Huffman, 643 N.E.2d 899 (Ind. 1994). Notwithstanding this doctrine, Ct. has option of reconsidering earlier cases in extraordinary circumstances such as where initial decision was clearly erroneous & would work manifest injustice. Id. Ct. cannot consider Huffman exception to law of case doctrine where D has not first pursued exception in PCR proceeding.

Here, D & his brother were convicted of attempted murder, but his brother's conviction was reversed due to erroneous attempted murder/accomplice liability instruction. Hopkins, 759 N.E.2d 633. D raised same argument regarding instruction in direct appeal & present appeal which stemmed from resentencing remand. D argued that Ct. should apply Huffman exception to law of case doctrine, which would allow Ct. to correct clearly erroneous decision or anything that would work manifest injustice. Id. D relied on Turner, App., 751 N.E.2d 726, where Huffman exception was applied under similar circumstances. Ct. distinguished Turner by noting that D in that case raised issue in PCR petition. Ct. has never considered application of Huffman exception without it first being presented to lower Ct. through whatever procedural mechanism was appropriate. Likewise, D here would be entitled to review of issue by appellate Ct. upon denial of PCR petition by post-conviction Ct. Held, conviction affirmed.

RELATED CASES: Hopkins, 782 N.E.2d 988 (on transfer, Ct. agreed with Ct. App.' conclusion that law of case doctrine bars D's claim, but nonetheless addressed merits in interests of judicial economy & found that D would not be entitled to relief in post-conviction proceeding).

TITLE: I.J. v. State
INDEX NO.: G.6.e.
CITE: (01/13/2022), 178 N.E.3d 798 (Ind. 2022)
SUBJECT: Juvenile's interlocutory appeal challenging placement order dismissed as moot
HOLDING: In a Per Curiam opinion, the Indiana Supreme Court dismissed as moot a juvenile's appeal challenging her placement at a residential treatment facility, vacating a Court of Appeals' that may not "correctly advise[] courts regarding competency related treatment before Indiana Code Chapter 31-37-26 (addressing competency in the delinquency context) takes effect on December 31, 2022." The juvenile court ordered 14-year-old I.J. to be detained at a residential treatment facility while she received competency restoration services following numerous acts of domestic battery and criminal recklessness she committed against her mom. The State had filed petitions alleging I.J. was delinquent, but the trial court found her incompetent to have those petitions adjudicated and ordered that she receive competency-restoration services at the Youth Opportunity Center, where she remained for 63 days.

But the appeal became moot because I.J. had been released from YOC before the Court of Appeals could review her petition to accept jurisdiction over the interlocutory appeal and the delinquency petitions were dismissed without objection. "While moot appeals ordinarily are dismissed, Indiana recognizes an exception that may be invoked when the appeal involves a question of great public importance that is likely to recur. … When appellate courts invoke this exception, it results in 'decisions which are, for all practical purposes, advisory opinions.' "… Held, transfer granted, Court of Appeals' opinion at 175 N.E.3d 837 vacated, appeal dismissed as moot.

TITLE: Love v. State
INDEX NO.: G.6.e.
CITE: (11/26/2014), 22 N.E.3d 663 (Ind. Ct. App. 2014)
SUBJECT: Denial of habeas corpus - res judicata
HOLDING: Tr. Ct. did not err by denying D's writ of state habeas corpus, which was an attempt to relitigate the legality of his arrest. This claim has been resolved against D numerous times and is barred by the doctrine of res judicata. In the event D continues to challenge his conviction at Tr. Ct. level, Supreme Court opinion in Zavodnik v. Harper, 17 N.E.3d 259 (Ind. 2014), may be a helpful resource in imposing reasonable restrictions on any abusive litigant, including those who proceed pro se. Held, judgment affirmed.

TITLE: Maciaszek v. State
INDEX NO.: G.6.e.
CITE: (11/8/2018), 113 N.E.3d 788 (Ind. Ct. App. 2018)
SUBJECT: Law of case doctrine barred Tr. Ct. from imposing consecutive sentence on remand
HOLDING: Generally, the law of the case doctrine binds the court on appeal in any subsequent appeal, whether the earlier decision was right or wrong. Notwithstanding this doctrine, appellate courts may reconsider earlier cases in extraordinary circumstances such as where the earlier decision was clearly erroneous and would work a manifest injustice.

Here, in Maciaszek v. State, 75 N.E.3d 1089 (Ind. Ct. App. 2017), Court noted that because Tr. Ct.'s judgment of conviction did not specify whether D's Indiana sentence was to run concurrently or consecutively to his New Hampshire sentence, the sentences were to be served concurrently. On remand, after granting D's credit time, Tr. Ct. abused its discretion in ordering consecutive sentences after Court of Appeals unambiguously held they were to run concurrently. Despite difference of opinion among panel as to whether prior decision in this case was in error, there were no new facts that materially affected the Court's prior decision. It would also work a hardship on D and result in a manifest injustice if the Court failed to apply law of the case doctrine in this case. Held, judgment reversed. Bradford, J., dissenting, believes that application of law of the case doctrine results in the imposition of an illegal sentence and that application of a lawful consecutive (albeit longer) sentence will not result in a manifest injustice to D.

TITLE: Montgomery v. State

INDEX NO.: G.6.e.

CITE: (8/4/2016), 58 N.E.3d 279 (Ind. Ct. App. 2015)

SUBJECT: Res judicata did not bar probation revocation following revocation of D's placement in community transition program

HOLDING: Doctrine of res judicata did not bar Tr. Ct.'s revocation of D's probation after previously revoking his placement in a community transition program. The matter at issue before Tr. Ct. during probation revocation proceeding (i.e., D's placement on probation) was simply not the same matter in issue before court during revocation proceedings on his placement in the transition program. Placement on probation and placement in community transition program are not one and the same, and court's consideration of those options is not mutually exclusive. Rather, those options are two of many tools in Tr. Ct.'s toolbox for court's use in administration and supervision of a D's sentence, over which the court has continuing jurisdiction. Held, judgment affirmed.

TITLE: Parker v. State
INDEX NO.: G.6.e.
CITE: (2nd Dist., 7-16-98), Ind. App., 697 N.E.2d 1265
SUBJECT: Principles of appellate review - law of case
HOLDING: Law of case doctrine did not bar consideration of search & seizure issue previously decided on interlocutory appeal. Doctrine mandates that appellate court's determination of legal issue binds both Tr. Ct. & Ct. on appeal in any subsequent appeal involving same case & relevantly similar facts. Huffman, 643 N.E.2d 899. Doctrine's purpose is to minimize unnecessary relitigation of legal issues once they have been resolved by appellate Ct. Id. When additional information distinguishes case factually from case decided in first appeal, law of case doctrine does not apply. Estate of Martin v. Consolidated Rail Corp., App., 667 N.E.2d 219. Here, police officer's testimony at trial provided information contrary to that available at interlocutory appeal. At suppression hearing, officer testified that he immediately determined presence of cocaine, which Ct. App. on interlocutory review determined was sufficient for Tr. Ct. to conclude that requirements of "plain feel" doctrine had been satisfied. However, officer's testimony at trial was that he "merely suspected" object found in D's pocket was narcotics. Law of case doctrine did not apply because evidence at trial differed from that at suppression hearing & was not available on interlocutory review. Held, conviction reversed.

RELATED CASES: Wells, 2 N.E.2d 123 (Ind. Ct. App. 2013) (where facts at trial did not differ from those considered on interlocutory appeal, the Court of Appeals refused to reconsider its holding on interlocutory appeal under the law of the case doctrine).

TITLE: Sanders v. State

INDEX NO.: G.6.e.

CITE: (2nd Dist., 3-16-05), Ind. App., 823 N.E.2d 1214, aff'd & rev'd on other grounds 840 N.E.2d 319

SUBJECT: Erroneous imposition of investigative costs - law of case

HOLDING: After Ct. App. reversed order granting State's motion for release/application of D's funds for investigative costs because it was not timely filed, Tr. Ct. on remand erroneously granted State's second petition for reimbursement of investigative costs. Although State's second request was characterized as one for "investigative costs," it clearly was an action for reimbursement of law enforcement costs pursuant to Ind. Code 34-24-1-3 & was substantively the same as State's earlier motion. Ct. previously held that earlier motion was not timely filed under Ind. Code 34-24-1-3(a) because the State's request was not brought within 180 days of seizure. Ct.'s previous holding is now the law of the case & binding on all parties & the Tr. Ct. Becker v. State, 719 N.E.2d 858 (Ind. Ct. App. 1999). Law of case doctrine provides that an appellate Ct.'s determination of a legal issue is binding on Tr. Ct. on remand & on appellate Ct. in any subsequent appeal in same case & involving substantially same facts. Id. What was improper on direct appeal is still improper & recaptioning of a petition cannot & does not change the relief requested in the petition. Held, judgment reversed.

TITLE: Saunders v. State
INDEX NO.: G.6.e.
CITE: (4th Dist., 8-29-03), Ind. App., 794 N.E.2d 523
SUBJECT: Post-conviction relief claim based on Beno barred by res judicata
HOLDING: In Saunders v. State, 584 N.E.2d 729 (Ind. 1992), Ct. held that Tr. Ct.'s decision to order D's dealing in cocaine counts to run consecutive to conspiracy counts rendered D's sentence manifestly unreasonable & reduced D's sentence from 140 years to 70 years. In his petition for post-conviction relief, D relied on Beno v. State, 581 N.E.2d 922 (Ind. 1991), decided while his case was pending on transfer, & argued that because his conviction for two counts of dealing in cocaine arose from same ten-day, state-sponsored sting operation, which utilized same confidential informant, it was inappropriate for Tr. Ct. to order his two dealing counts to be served consecutively.

Ct. did not address applicability of Beno to this case, because issue was barred by res judicata. On direct appeal, D not only challenged reasonableness of his sentence but specifically challenged reasonableness of his consecutive sentences. Fact that D now claims his sentence is inappropriate for a different reason than he argued on direct appeal does not negate preclusive effect of earlier adjudication for res judicata purposes. In light of fact 1) that S.Ct. found Tr. Ct.'s decision to run dealing & conspiracy counts consecutively to one another was unreasonable rather than illegal; 2) that S.Ct. specifically noted that aggravating circumstances of D's conviction warranted imposition of consecutive sentences, & 3) that it was a three-to-two decision just to reduce D's sentence from 140 to 70 years, Ct. concluded that alleged applicability of Beno to D's direct appeal would have still resulted in a 70-year sentence. Thus, there is nothing manifestly unjust about application of res judicata to D's second claim concerning appropriateness of his sentence. Held, denial of post-conviction relief affirmed.

TITLE: State v. Barnett
INDEX NO.: G.6.e.
CITE: (8/25/2021), Ind. Ct. App., 176 N.E.3d 542
SUBJECT: Issue preclusion prevented prosecutor from relitigating alleged victim's age after full and fair opportunity to litigate issue in related proceeding in another county
HOLDING: Trial court did not abuse its discretion by giving preclusive effect to the Marion County Probate Court's 2012 age-change order and the March 7, 2017, order reaffirming same, thus preventing the State from relitigating the alleged victim's age; and the trial court did not err in dismissing multiple counts against the defendants because the charges were filed outside of the five-year statute of limitations period.

Defendants were charged with multiple counts of neglect of a dependent and filed Motions to Dismiss on the grounds of res judicata, collateral estoppel and the statute of limitations. After the trial court granted the Motion to Dismiss, in part, the State filed an interlocutory appeal.

The charges stem from when Defendants (at the time of the charges husband and wife), living in Hamilton County, adopted through a Hamilton County court a person (adoptee) born with a form of dwarfism called diastrophic dysplasia. After adoption, the adoptee began to demonstrate threatening behavior and Defendants began to believe adoptee was older than her date of birth suggested. Defendants petitioned a Probate Court in Marion County to change adoptee's birth year. The petition to change her date of birth was granted by the Probate court and adoptee was then deemed an adult. After the birthdate was changed, Defendants moved the adoptee to an apartment in Tippecanoe County and assisted her in obtaining disability benefits. However, DCS attempted to open a CHINS proceeding, alleging the adoptee was a child who had been abandoned. The CHINS petition was dismissed, finding it lacked jurisdiction because the adoptee was judicially determined to be an adult. Next, a prosecutor from Marion County filed an appearance in the Probate age-change case, appearing on behalf of adult protective services. Although the State entered its appearance, it did not appear at a hearing to vacate the age-change. At the hearing, evidence was presented, and the age-change was affirmed.

Two-and -a-half years later, the Tippecanoe County Prosecutor's office filed multiple charges of neglect against Defendants. The State argued the Marion County Probate court's name change order should not have been given effect because adoptee's age was already determined by a court in Hamilton County at the adoption proceeding. The Court of Appeals found the adoption court was not required to determine adoptee's age and when Defendant's petitioned to change the birth date, they did not move to set aside the adoption and the petition for age-change was not, as the State alleged, an impermissible collateral attack on the adoption. The Court of Appeals found the State was precluded from raising issues regarding the age-change and was bound by principles of res judicata because the State had entered an appearance and had the opportunity to appear at the age-change probate hearing years before. Finally, the Court of Appeals found Trial court did not err in finding that some of the charges should be dismissed because they were filed outside the limits of the statute of limitations and Defendants did not commit any act to conceal the alleged crime.

TITLE: Turner v. State
INDEX NO.: G.6.e.
CITE: (5th Dist., 6-18-01), Ind. App., 751 N.E.2d 726
SUBJECT: Res Judicata does not apply where manifest injustice results
HOLDING: Notwithstanding doctrine of res judicata, Ct. has option of reconsidering earlier cases in extraordinary circumstances such as where initial decision was clearly erroneous & would work manifest injustice. State v. Huffman, 643 N.E.2d 899 (Ind. 1994). Here, in direct appeal of murder & attempted murder convictions, Ct. App. rejected D's argument that Tr. Ct. erred in refusing to instruct jury on lesser-included offenses of reckless homicide & criminal recklessness. Although evidence cited in original opinion was sufficient to support murder conviction, that conclusion is not compelled. As in Sharkey v. State, 672 N.E.2d 937 (Ind. Ct. App. 1996), D's testimony denying his intent to kill, compared with other evidence, showed serious evidentiary dispute concerning D's intent. Thus, reckless homicide & criminal recklessness instructions should have been given. Held, denial of post-conviction relief reversed.

RELATED CASES: Parrett, App., 800 N.E.2d 620 (rejecting State's arguments of waiver & res judicata, Ct. noted that it was duty bound to correct illegal sentence even though it was product of plea agreement); Hopkins, App., 769 N.E.2d 702 (manifest injustice exception also applies to law of case doctrine, but D must first pursue exception in PCR proceeding; see full review, this section).

TITLE: Weaver v. State
INDEX NO.: G.6.e.
CITE: (1st Dist.; 3-29-00), Ind. App., 725 N.E.2d 945
SUBJECT: Res judicata does not apply to correction of erroneous sentence
HOLDING: Tr. Ct. erred in denying D's motion for pretrial credit time based on principles of res judicata. Ind. Code 35-50-6-3 sets forth in no uncertain terms that person confined awaiting trial or sentencing is statutorily entitled to one day of credit for each day he is so confined; therefore, pre-sentence jail time credit is matter of statutory right, not matter of judicial discretion. Also, it is well settled that where person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for separate crimes, Ind. Code 35-50-6-3 entitles him to receive credit time applied against each separate term. Bryant, App., 446 N.E.2d 364. Here, D was ordered to serve concurrent terms for separate crimes, but Tr. Ct. failed to give him pretrial credit on one of charges. When D asked Ct. to reconsider, Ct. summarily denied motion based on res judicata. Because Ct. has duty to correct illegal sentence at any time, Tr. Ct. should have addressed motion & granted credit time. Ct. held that any time D whose liberty has been restricted through imprisonment or confinement requests Tr. Ct. to reconsider its previous award of jail time credit, & D's motion in this regard identifies sufficient factual basis for his eligibility, Ct. must address merits of such motion. Held, judgment reversed.

G. APPEAL

G.6. Principles of appellate review

G.6.h. Invited error

TITLE: Cole v. State
INDEX NO.: G.6.h.
CITE: (4/15/2015), 28 N.E.3d 1126 (Ind. Ct. App. 2015)
SUBJECT: D invited any error to jury admonition given during trial
HOLDING: In battery and strangulation prosecution, D waived any claim of error regarding Tr. Ct.'s admonition to jury over statements he made during his testimony. D did not tender a preliminary instruction on self-defense but raised the defense during trial. A motion in limine prohibited evidence of prior allegations of violence by the victim, but D referred to his own statement that he had warned the victim never to touch him or his family again. When a juror asked who the victim had touched before, Tr. Ct. drafted an admonition with instruction on self-defense and clarification that if victim had unlawfully touched a member of D's family, that is not a defense to the current charges. D specifically had no objection to the court's admonition.

On appeal, D argued the admonition served as a jury instruction and should not have been given in the middle of the trial; evidence of Phillips' prior acts was admissible, and the jury should have been allowed to consider them regarding his self-defense claim.

Court did not address these arguments because D waived them for appellate review by affirmatively stating he had "no objection" to the admonition. D invited any alleged fundamental error by agreeing to the admonition. Kingery v. State, 659 N.E.2d 490 (Ind. 1995). State also presented sufficient evidence to rebut D's self-defense claim, because D was the initial aggressor and then re-engaged with the victim. Held, judgment affirmed.

RELATED CASES: Anderson, 141 N.E.3d 862 (Ind. Ct. App. 2020) (Tr. Ct.'s delay in sentencing D resulted from the plain terms of his own plea agreement and any error in the delay was invited and not available for appellate review).

TITLE: Durden v. State
INDEX NO.: G.6.h.
CITE: (6/20/2018), 99 N.E.3d 645 (Ind. 2018)
SUBJECT: Defective juror-removal procedure was structural error but D invited the error
HOLDING: Even though trial court committed "structural error" in how it removed and replaced a juror, D's attorney invited the error, so D is not entitled to a new trial.

D was charged with murder and eight drug-related offenses. Once jury deliberations began, Juror 12 asked to be excused. In deciding whether to grant her request, the trial court did not follow the requirements of Riggs v. State, 809 N.E.2d 322 (Ind. 2004). Riggs requires a trial court to determine, on the record, that removal "is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties[']right to a trial by jury." Id. at 327–28. The court must also: (1) avoid questions that affect the juror's judgment, in case he or she continues to serve; and (2) in the event of removal, take steps to minimize any prejudicial impact removal may have had on the remaining jurors. Id. at 329. Based on these omissions, the Court of Appeals ruled D was entitled to a new trial. Structural error is error that affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Ds enjoy a constitutional right to an impartial jury; that right "is a structural guarantee," Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring), and its "infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 668 (1987). Structural error also results if "the precise effect of the violation cannot be ascertained" from the record. Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

Here, the trial court committed structural error by not following Riggs. The error affected the framework within which the trial proceeded, and the precise effect of the error cannot be determined because the trial court did not "demonstrate, through a carefully developed record, that removal was "necessary for the integrity of the process.'" Riggs, 809 N.E.2d at 327. However, by agreeing to the trial court's procedure, D invited the error. It is not true, as D contends, that there are no circumstances where structural error permits anything other than reversal. There is "no reason to exempt 'structural errors'" from the invited-error doctrine. United States v. Gaya, 647 F.3d 634, 640 (7th Cir. 2011); Ex parte Thuesen, No. WR-81584-01, 2018 WL 1179875, at *5 (Tex. Crim. App. Mar. 7, 2018) ("This Court and other courts often apply the doctrine of invited error to rule against Ds on a wide variety of matters, including errors that might amount to fundamental or structural errors.").

Further, D did far more than simply fail to object to the procedure. His attorney expressly declined "any caveats" or special instructions for the jury and repeatedly assured the court of his approval of the procedure employed. Based on the record, "we can only conclude that [D] decided to engage in a rational, albeit unsuccessful, trial strategy. Any other conclusion runs contrary to our 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' at trial. Strickland v. Washington, 466 U.S. 668, 689 (1984)." Held, transfer granted, Court of Appeals opinion at 83 N.E.3d 1232 vacated, and judgment affirmed.

TITLE: Miller v. State
INDEX NO.: G.6.h.
CITE: (06/29/2022), Ind., 188 N.E.3d 871
SUBJECT: Invited error precludes relief on direct appeal even if error is fundamental.
HOLDING: Defendant was arrested following a traffic stop. Defendant had heroin, methamphetamine, and a handgun in his possession. As a result, he was charged with six offenses, including unlawful possession of a firearm by a serious violent felon in violation of Indiana Code § 35-47-4-5(c). He was also alleged to be a habitual offender under I.C. 35-50-2-8. At trial Defendant was found guilty of all charges, the state moved to dismiss the serious violent felon charge, telling the trial court it had not proven the armed robbery that was alleged. The trial court granted the motion and Defendant admitted his status as a habitual offender and was sentenced to 49 years. Defendant appealed, arguing Preliminary Instruction 18 was fundamental error because it informed the jury about his prior felony conviction. He also argued the traffic stop violated his Fourth Amendment rights and the trial court should have struck a prospective juror for cause. The Court of Appeals reversed finding Preliminary Instruction 18 was fundamental error because it informed the jury that Defendant had a prior conviction. The Court of Appeals held the invited-error doctrine did not preclude relief. On transfer, a split Supreme Court affirmed the trial court, rejecting Defendant's challenges to Preliminary Instruction 18, the lawfulness of the stop and the trial court's refusal to strike a juror for cause. The majority concluded Defendant invited any error that arose from Preliminary Instruction 18, because trial counsel had made an explicit strategic decision and stated the instruction looked correct. The Justices noted Miller can challenge his counsel's strategy through a post-conviction relief petition alleging ineffective assistance of counsel. Even though the error may be fundamental error, invited error precludes review. On the question of whether Defendant was lawfully stopped, the Court found the detective had observed two traffic violations before pulling the Defendant over, so there was sufficient evidence. Regarding the juror, the Supreme Court concluded Defendant did not comply with the exhaustion rule, by first attempting to use a peremptory challenge and therefore the review of the trial court's refusal to strike the juror for cause was precluded from review. Justice Massa wrote the opinion joined by JJ. David, Slaughter and Goff. Chief Justice Rush concurred in part and dissented in part. CJ Rush wrote that she would have reviewed the fundamental error claim on the jury instruction but concurred with the majority on all other respects. CJ Rush stated "… Our invited-error doctrine serves an important purpose," ... "But we must be careful not to let it transform into a 'rigid and undeviating judicially declared practice,' serving only to defeat — not promote — the ends of justice. Here, with a record lacking any indicia of a reasonable basis for counsel's assent to Preliminary Instruction 18, we should carefully review Miller's claim for fundamental error."

TITLE: Wright v. State
INDEX NO.: G.6.h.
CITE: (06-07-05), Ind., 828 N.E.2d 904
SUBJECT: Invited error - merger of offenses as result of State's suggestion
HOLDING: On appeal, State could not claim that merger of D's theft conviction into his burglary conviction was error, because Tr. Ct. merged offenses at State's suggestion. Record indicated that State invited the Tr. Ct. to merge convictions & that Tr. Ct. did so upon State's recommendation. Thus, State may not now claim that this merger is erroneous. Doctrine of invited error is grounded in estoppel. Witte v. Murphy, 820 N.E.2d 128 (Ind. 2005). Under this doctrine, a party may not take advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct. Held, transfer granted, Ct. App.' decision on this issue at 801 N.E.2d 742 vacated, judgment affirmed.

RELATED CASES: Barnett, 24 N.E.3d 1013 (Ind. Ct. App. 2015) (D invited any possible statutory or constitutional violation that could have occurred by waiving his right to jury trial as to facts underlying firearm sentencing enhancement; see full review at D.5.a or E.4.c); Baugh, 933 N.E.2d 1277 (Ind. 2010) (where D's attorney asked Tr. Ct. to review only the charging information and mental health professionals' written reports to decide if D was SVP, stating "I think the Court has to make that determination based upon the charge that he's been convicted and the doctors' reports, and I would leave that up to the Court," the error of not requiring in-court testimony from the experts was invited and thus waived); Kelnhofer, App., 857 N.E.2d 1022 (D, who wrote judge a letter requesting maximum possible sentence for a probation revocation, could not challenge sentence as inappropriate on appeal).

G. APPEAL

G.7. Remedies on appeal

TITLE: State v. Kleman

INDEX NO.: G.7.

CITE: (2/13/87), Ind., 503 N.E.2d 895

SUBJECT: Remedies on appeal - in general

HOLDING: On transfer. Court vacates that portion of 3d Dist. opinion at 491 N.E.2d 585 holding that, in granting D's MCE, Tr. Ct. was limited to granting new trial & could not enter new judgment of lesser offense not presented to jury. Here, D was convicted of murder & criminal recklessness. Tr. Ct. set aside conviction & entered new conviction & sentence for voluntary manslaughter. When Tr. Ct. uses fact-finding authority of "13th juror" principle, it is limited to granting new trial. Moore 403 N.E.2d 335. Under "review" or "prima facie evidence" approach court shall enter judgment if it determines verdict is clearly erroneous as contrary to or not supported by evidence. TR 59(J)(7). Tr. Ct. utilized latter standard. Its substitution of conviction for manslaughter does not rest upon application of "13th juror" principle. Court cites other cases in which it has upheld modification of conviction to lesser included offense. Hutchinson 225 N.E.2d 828; Ritchie 189 N.E.2d 575; Dickens 295 N.E.2d 613. It does not matter whether jury was instructed on lesser included offense; court finds offense was necessarily included. Held, manslaughter conviction upheld.

G. APPEAL

G.7. Remedies on appeal

G.7.b. Remand

TITLE: Cooley v. State
INDEX NO.: G.7.b.
CITE: (2nd Dist., 09-21-94), Ind. App., 640 N.E.2d 433
SUBJECT: Erroneous "resentencing" on remand for conviction vacation
HOLDING: Tr. Ct. erred, on remand, when it held resentencing hearing rather than just vacating conviction, & when it "repositioned" D's habitual offender (HO) enhancement. D was originally convicted of three offenses, class B felony, class D felony, & class A misdemeanor. Class D felony conviction was enhanced by 30 years because of HO finding. On appeal, in memorandum decision, Ct. reversed class D felony conviction as lesser included offense of class B felony & ordered Tr. Ct. to vacate that conviction. Tr. Ct. first vacated conviction as ordered, but subsequently held resentencing hearing on other two convictions, "repositioning" HO enhancement to enhance misdemeanor sentence. Tr. Ct. erred both in failing to follow remand instructions by attempting resentencing after vacating conviction, & by erroneously "repositioning" HO enhancement. When cause was remanded for vacation of one conviction, other convictions were "in all other things affirmed." Once Tr. Ct. vacated conviction as ordered, its duty was done, & it should not have expanded on instructions. Additionally, HO enhancement could not have been attached to misdemeanor, as done by Tr. Ct. Although State now requested Ct. remand cause again so HO enhancement could be imposed on remaining felony conviction, Ct. refused to do so because it would require it to speculate & render advisory opinion on proceedings that might or might not take place in future. Held, remanded with instructions to enter judgment on misdemeanor with sentence not to exceed one year, & to order this sentence served concurrently with previously entered 20-year sentence on B felony.

TITLE: Richardson v. State
INDEX NO.: G.7.b.
CITE: (1st Dist. 12/23/85), Ind. App., 486 N.E.2d 1058
SUBJECT: Remedies on appeal - remand
HOLDING: D is not entitled to discharge where new trial is ordered to rectify trial error. Irons 397 N.E.2d 603. Here, standards for handwriting comparison were not adequately proven; therefore, Ds' conviction for forgery was reversed. Ds argue evidence was insufficient to convict them; thus, double jeopardy bars retrial. Court finds evidence presented was more than adequate to support verdict. Evidence was not inadmissible per se but was inadmissible because not properly proven/authenticated. Court finds no bar to retrial. Held, remanded for new trial.

G. APPEAL

G.7. Remedies on appeal

G.7.c. Modification of conviction/sentence

TITLE: Coppock v. State
INDEX NO.: G.7.c.
CITE: (7/31/85), Ind., 480 N.E.2d 941
SUBJECT: Remedies appeal - modification of conviction
HOLDING: Tr. Ct. did not commit reversible error when it sentenced D for Class B felony pursuant to verdict after erroneously entering judgment for Class C felonies. Here, court finds error one of form. Belcher, App., 319 N.E.2d 658. AR 15(E) deems such errors amended in court of appeal. Although judgment was incorrectly entered, D was not prejudiced, as he was correctly charged, found guilty as charged & sentenced accordingly. Held, error deemed corrected to conform to verdict.

RELATED CASES: Woodcox, 30 N.E.3d 748 (Ind. Ct. App. 2015) (despite clerical error in judgment of conviction, D was actually convicted of Class A felony rather than B felony rape; it is an error of form rather than substance; see full review at E.13.b); Gilliam 508 N.E.2d 1270 (see card at K.4.c); State v. Kleman, 503 N.E.2d 895 (see card at G.7); Johnson 490 N.E.2d 333 (although verdict was contrary to law, D suffered no apparent prejudice from discrepancy between charging instrument (Robbery-Bodily Injury) & jury finding (Robbery-Serious Bodily Injury); court finds remand for correction of conviction to Robbery-Bodily Injury is proper remedy); Peek, App., 454 N.E.2d 450 (modification of conviction from Class C felony battery to Class A misdemeanor was proper); Castle, App., 476 N.E.2d 522 (Tr. Ct. properly modified conviction from possession of marijuana, a Class D felony, to possession, a Class A misdemeanor, where D raised error in Motion to Correct Error & guilt of commission of Class A misdemeanor was established by jury); Martin, App., 470 N.E.2d 733 (court corrects judgment of conviction to reflect terms of plea agreement where D pled guilty to crime charged but Tr. Ct. erroneously entered conviction upon crime not charged, *citing* AR 15(N); Ritchie 189 N.E.2d 575 & McFarland, App., 384 N.E.2d 1104); Harwei, App., 459 N.E.2d 52 (court modifies theft conviction to attempted theft; card at K.4.r).

TITLE: Hobbs v. State
INDEX NO.: G.7.c.
CITE: (12/23/20), Ind. Ct. App., 161 N.E.3d 380
SUBJECT: Following grant of PCR, trial court had authority to order consecutive sentences
HOLDING: Following grant of Defendant's petition for post-conviction relief and remand for new sentencing hearing, trial court had authority to order his sentence to run consecutively to his sentences in the other causes and that it did not violate ex post facto prohibitions. In 1994, Defendant was convicted and sentenced to an aggregate 120 years for rape, criminal deviate conduct and burglary. He unsuccessfully challenged his convictions and sentence on direct appeal, but successfully claimed on post-conviction that his appellate counsel provided ineffective assistance by failing to argue on direct appeal that Defendant should have been sentenced under a newly amended version of I.C. 35-50-1-2(a). On remand, trial court resentenced Defendant to an aggregate term of 45 years but ordered his sentence to run consecutive to his sentences in two other causes. On appeal, Defendant argued that the trial court did not have authority to change the part of the original sentencing order requiring his sentence to be served concurrent with the sentences in the other causes because that aspect of the order was not illegal, and the trial court was permitted on remand to change only the illegal portion of his sentence.

Distinguishing Lane v. State, 727 N.E.2d 454 (Ind. Ct. App. 2000), Court disagreed, noting that trial court was merely following the mandate of the postconviction court to resentence Defendant pursuant to the amended version of I.C. 35-50-1-2(a). The Court *cited* Gootee v. State, 942 N.E.2d 111 (Ind. Ct. App. 2011), Greer v. State, 680 N.E.2d 526 (Ind. 1997) and Coble v. State, 523 N.E.2d 228 (Ind. 1988), as cases that illustrate the dimensions of the trial court's authority to resentence on remand. There was no ex post facto violation here because Defendant's crimes in this case received no punishment in addition to what was permitted under the prior version of subsection (a).

TITLE: Wendling v. State
INDEX NO.: G.7.c.
CITE: (7/23/86), Ind., 495 N.E.2d 192
SUBJECT: Remedies on appeal - modification of sentence
HOLDING: Tr. Ct. was without jurisdiction to resentence D contrary to Ind. S. Ct.'s mandate in Wendling 465 N.E.2d 169. Here, case was remanded with instructions to enhance 5-year sentence by 30 years for habitual, rather than imposing separate sentences. Tr. Ct. instead sentenced D to 8 years after finding underlying felonies were not in proper sequence. Court's mandate was binding on Tr. Ct. Matter of Lemond 413 N.E.2d 228. If D wishes to attack habitual determination, he may file PCR petition. Held, remanded with order to impose 35-year sentence.

RELATED CASES: Lane, App., 727 N.E.2d 454 (Tr. Ct. erred in failing to follow remand order; it had no authority to modify presumptive sentence after final judgment had been entered by re- evaluating aggravating & mitigating factors); Jordan, App., 631 N.E.2d 537 (Where appellate Ct. ordered that D receive new trial, Tr. Ct. erred in merely entering judgment, conducting sentencing hearing, & resentencing D. Tr. Ct.'s do not have authority to disregard mandates of reviewing Ct.'s. If Tr. Ct.'s refuse to comply with such orders, in full or in part & intentionally or by mistake, aggrieved parties can seek writs of mandate to enforce orders, Skendzel v. Marshall, 330 N.E.2d 747.)

G. APPEAL

G.8. Petition for rehearing (AR 11)

TITLE: Cunningham v. State

INDEX NO.: G.8.

CITE: (1st Dist. 7/27/82), Ind. App., 438 N.E.2d 308

SUBJECT: Petition for rehearing - request for ruling on sufficiency

HOLDING: In motion for rehearing, D contends that if evidence is insufficient to support the prior conviction of DUI (an issue not ruled on because of reversal on basis of inadequacy of personal waiver of jury trial), he would be placed in jeopardy a second time by the granting of a new trial. Court rules adversely to D on merits of insufficiency claim. Held, D may be retried.

TITLE: Creekmore v. State
INDEX NO.: G.8.
CITE: (3rd Dist., 12-13-06), Ind. App., 858 N.E.2d 230
SUBJECT: Raising new argument on rehearing- collection fee for bad check
HOLDING: On rehearing, Ct. App. clarified that imposition of a fee for collection of a dishonored check is not impermissible. Petition for rehearing in the Ct. App. must rely on the same theory as that advanced in the original brief. Here, the State argues, for the first time in its Petition for Rehearing, that the imposition of a prosecutor's fee for the money spent processing a bad check was statutorily authorized under Ind. Code 35-1-3-2, which states that "the policy of the State is to grant units all the powers that they need for the effective operation of government as to local affairs." The County was a "unit" under Ind. Code 35-1-2-23, & was authorized to collect a fee for processing dishonored checks pursuant to Kosciusko County, Ind., General Ordinance No. 95-4. Because State did not assert this theory in its original brief, the Petition for Rehearing is denied. However, Ct. clarified that although a prosecutor's collection fee is not authorized pursuant to Ind. Code 33-37-4-1, such a fee may be imposed where it is otherwise authorized by, e.g., the Indiana Home Rule statute or a valid county ordinance. Held, Petition for Rehearing from opinion at 853 N.E.2d 523 (Ind. Ct. App. 2006) denied.

G. APPEAL

G.9. Petition for transfer (AR 11)

TITLE: Lee v. State
INDEX NO.: G.9.
CITE: (11/5/2015), 43 N.E.3d 1271 (Ind. 2015)
SUBJECT: Belated petition to transfer granted to avoid "serious injustice" - identically situated D in same case
HOLDING: In Young v. State, 30 N.E.3d 719 (Ind. 2015), Court found fundamental error and reversed Ds' convictions because they were denied due process right to fair notice of the attempted aggravated batttery charge for which they were convicted. Here, D faces opposite results than her son and Young on the very same issue originating from the very same trial. To avoid that serious injustice, Court exercised its discretion to grant D's belated petition to transfer and reversed her conviction as well, consistent with Young. Held, belated petition to transfer granted, conviction reversed and remanded with instructions to enter a judgment of acquittal.

TITLE: Pinkston v. State
INDEX NO.: G.9.
CITE: (3d Dist. 6/12/85), Ind. App., 479 N.E.2d 79
SUBJECT: Petition for transfer
HOLDING: D's failure to seek transfer upon adverse ruling on second petition for rehearing bars presentation of issue on appeal following remand. Here, D petitioned for rehearing following Twyman decision (laches). Court granted petition & remanded for evidentiary hearing on laches. D filed petition to reconsider & limit remand to evidence state presented at initial evidentiary hearing, which appellate court denied. Held, issue waived.

TITLE: Thorpe v. State
INDEX NO.: G.9.
CITE: (12-22-97), Ind., 689 N.E.2d 441
SUBJECT: Petition to transfer - statement in writing from Ct. App.
HOLDING: Error upon which petition to transfer may be based includes failure by Ct. App. to give statement in writing on each substantial question arising on record & argued by parties. Indiana Appellate Rule 11(B)(2)(e). Here, Ct. App. held that review of certain issues had been waived, but did not explain why these allegations of error did not constitute "fundamental error." D argued as grounds for transfer that this constituted failure to give statement in writing on each substantial question arising in record & argued by parties. Ct. held that finding by Ct. App. of failure to preserve issue for review constitutes statement in writing as contemplated by Appellate Rule 11(B)(2)(e), notwithstanding any claim of "fundamental error." Held, D's petition to transfer denied, State's petition to transfer granted & remanded to Ct. App.

G. APPEAL

G.10. Misdemeanor appeals/city court

TITLE: Azhar v. State
INDEX NO.: G.10.
CITE: 712 N.E.2d 1018 (Ind. Ct. App. 1999)
SUBJECT: Appeals - city Ct.; different contempt citation
HOLDING: Superior Ct. properly denied appellant's Request for Trial De Novo of her citation for direct criminal contempt in city Ct. When appealing determination of direct criminal contempt, appellant must follow procedure set out in Ind. Code 34-4-7-7 (1993) (now Ind. Code 34-47-2-4 & Ind. Code 35-47-2-5). Indiana Rules for Trial De Novo only apply following: 1) civil judgment in city Ct.; 2) misdemeanor trial in city or town Ct.; or 3) infraction or ordinance violation judgment in city or town Ct. Here, appellant was in city Ct. challenging speeding ticket when judge found appellant in contempt of Ct. & placed her in jail for one-half hour. Because city Ct.'s ruling declaring appellant guilty of contempt was not judgment upon merits & did not constitute adjudication of rights, contempt citation did not fall within Rules of Trial De Novo & should have been appealed pursuant to Ind. Code 34-4-7-7 (now Ind. Code 34-47-2-4 & Ind. Code 35-47-2-5). Thus, Superior Ct. did not have jurisdiction to review City Ct.'s finding of direct criminal contempt. Held, denial of Trial De Novo affirmed.

Note: Opinion should not be used to condone actions of City Ct. judge. Ct. notes that although judges are given discretion, that discretion can be abused.

TITLE: Straley v. Faulkner
INDEX NO.: G.10.
CITE: (2d Dist. 9/3/85), Ind. App., 482 N.E.2d 471
SUBJECT: Appeals from city court - procedure
HOLDING: Court erred in finding it had no affirmative duty to transport or transmit any City Court documents to Clerk of Wells Circuit Court in connection with appeal/trial de novo. Here, Ds were found guilty of DWI, sentenced & released pending appeal. Four days later, Ds filed notices of intent to appeal & filed "appeal bonds." When appeals were not "perfected" within 45 days of their convictions, Ds were ordered to appear in city court. Court finds State ex rel. Ladd v. Walters (1928), 200 Ind. 235, interpreting Ind. Code 35-1-13-3, dispositive of issue. On similar facts, Ind. S. Ct. concluded that it is incumbent upon city court to prepare & certify transcript on appeal & also to transmit it, together with other necessary papers & documents to circuit court. Court finds Ds complied with statutory mandate to cause necessary papers, documents, & transcripts to be filed. Responsibility for preparation & filing of papers with circuit court did fall on city court judge. Held, judgment of Tr. Ct. reversed; cause remanded.

G. APPEAL

G.11. Briefwriting (AR 8.2, 8.3, 8.4 and 9)

TITLE: Ferrell v. State

INDEX NO.: G.11.

CITE: (10/24/95), Ind. App., 656 N.E.2d 839

SUBJECT: Perfecting appeal -- failure of appellee to file brief lowers standard of review

HOLDING: Juvenile was adjudicated delinquent for carrying handgun without license & criminal recklessness. D appealed claiming that evidence was not sufficient to support delinquent acts. State waived its right to file appellate brief in this matter & Ct. held that therefore less stringent standard of review applied. Appellant need only establish prima facie error to win reversal when appellee fails to file brief. Costas, 552 N.E.2d 459. Held, affirmed in part & reversed in part.

G. APPEAL

G.12. Oral argument (AR 10)

TITLE: Brown v. State

INDEX NO.: G.12.

CITE: (9/28/64), Ind., 201 N.E.2d 281

SUBJECT: Appeals -- procedure for requesting oral argument

HOLDING: D was convicted of murder. On appeal, D asked for oral argument by way of brief. On last page of D's brief, under typed signature of his attorneys, was statement: "The Appellant respectfully requests Oral Argument." This request does not conform to S. Ct. Rule 2- 21 (now Ind. App. R. 10), which requires filing of separate petition in writing within time allowed for filing briefs in order to have oral argument. This statement at bottom of appellant's brief cannot be considered "separate petition." Therefore, Ct.'s opinion was properly written without oral argument being heard. Held, conviction affirmed.

G. APPEAL

G.13. Unpublished opinions/ requests for publication (AR 15(A))

TITLE: State v. Black

INDEX NO.: G.13.

CITE: (9/27/78), Ind. App., 380 N.E.2d 1261

SUBJECT: Appeals -- use of unpublished federal court decisions

HOLDING: Ds were charged with violation of ordinance regulating massage parlors. Ds filed motions to dismiss, which were sustained by Tr. Ct. State appealed, & Ds argued that State should not have been allowed to cite as authority in Tr. Ct. or in Ct. App. unpublished order of United States Ct. App. for Seventh Circuit. Order affirmed dismissal of case wherein constitutionality of same ordinance was challenged & upheld. Ds claim that because order of Seventh Circuit cannot be cited in Federal Court, it also should not be cited in state Ct. Ct. held that absolute ban in Indiana Ct.'s on reference to unpublished U.S. Ct. decisions is unwarranted. More prudent course would be to allow Tr. Ct., or appellate Ct., wide discretion in its determination of weight, if any, to be given to these orders. Such orders may or may not be dispositive of particular issues in given case. Accordingly, determination of which orders are relevant to particular case will have to be made on case-by-case basis. Here, Ct. declined to accept unpublished order as dispositive or as persuasive on propositions decided therein. Held, judgment reversed on other grounds.

G. APPEALS

G.15 Federal Appeals (federal habeas, see Q.2)

TITLE: Mohawk Industries, Inc. v. Carpenter

INDEX NO.: G.15.

CITE: (U.S.), (12-08-09), 130 S. Ct. 599

SUBJECT: Disclosure orders about attorney-client privilege cannot qualify for immediate appeal

HOLDING: Resolving a split among the courts of appeals, Court held that an order requiring the disclosure of information protected (arguably) by the attorney–client privilege is not immediately appealable under the collateral order doctrine. The collateral order doctrine allows for the immediate appellate review of an order that fulfills three criteria: first, the order must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the case; and third, the order must be effectively unreviewable were a party to wait for the final judgment in a case. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Concluding, as did the Eleventh Circuit, that an order requiring the disclosure of allegedly privileged information can manageably be reviewed on appeal from a final judgment, Court held that the collateral order doctrine does not allow the immediate appeal of such an order. Held, Eleventh Circuit decision at 541 F.3d 1048 affirmed; Thomas, J., CONCURRING in part and concurring in judgment.

G. APPEAL

G.16. U.S. Supreme Court

TITLE: In re Demos

INDEX NO.: G.16

CITE: (500 U.S. 16, 111 S. Ct. 1569, 114 L.Ed.2d 20 (1991)

SUBJECT: In forma pauperis - penalties for excessive filings

HOLDING: Pro se litigant abused system by filing cert. petition habeas corpus petition & mandate petition in U.S. S. Ct., all seeking relief from single order of lower court. Petitioner has filed 32 in forma pauperis filings since beginning of October 1988 Term, many of which challenged sanctions imposed by lower courts in response to frivolous filings. Court therefore denies petition to proceed in forma pauperis in two petitions for extraordinary relief & all future petitions for extraordinary relief. If petitioner wishes to have petitions for extraordinary relief considered, he must tender filing fee & comply with rules for non-indigent filings. Marshall, joined by Blackmun & Stevens DISSENTING. (Court fails to cite statute or rule giving it authority to impose such ban & "reinforce[s] in the hearts & minds of our society's less fortunate members the unsettling message that their pleas are not welcome here.")

NOTE: The same day this case was decided, Court amended S. Ct. Rule 39.8 to authorize denial of a motion to proceed in forma pauperis if Court determines petition for writ of certiorari, jurisdictional statement, or petition for extraordinary writ is "frivolous" or "malicious". In re Amend. to Rule 39 (4/29/91) 111 S. Ct. 1572, 500 U.S. 13.

G. APPEAL

G.16. U.S. Supreme Court

G.16.b. Certiorari (Sup. Ct. R. 17 to 23)

TITLE: Hohn v. U.S.

INDEX NO.: G.16.b.

CITE: 524 U.S. 236, 118 S. Ct. 1969, 141 L.Ed.2d 242 (1998)

SUBJECT: Habeas Corpus -- U.S. S. Ct. Jurisdiction to Review

HOLDING: U.S. Supreme Court has certiorari jurisdiction under 28 U.S.C. 1254(1) to review federal appellate panel or judge's denial of unsuccessful federal habeas petitioner's application for certificate of appealability. House v. Mayo, 324 U.S. 42 (1945), which held that Court lacked cert. jurisdiction to review denial of certificate necessary for appeal under former habeas statute, is overruled. Scalia, Rehnquist, O'Connor, and Thomas, JJ., DISSENT.

TITLE: Mississippi v. Turner
INDEX NO.: G.16.b.
CITE: 498 U.S. 1360, 111 S. Ct. 1032, 112 L.Ed.2d 1172 (1991)
SUBJECT: Extensions for filing cert. petitions-good cause
HOLDING: Cert. petitions are due to be filed within 90 days after entry of judgment by state ct. of last resort. S. Ct. Rule 13.1. Time may be extended "for good cause shown" by period not to exceed 60 days. S. Ct. Rule 13.2. Here, state requested extension request of 30 days based upon "state budgetary cuts." Circuit Justice Scalia finds overextended caseload does not establish good cause. "Like any other litigant, the State of Mississippi must choose between hiring more attorneys & taking fewer appeals. Its budget allocations cannot, & I am sure, were not expected to, alter this court's filing requirements." Extension denied.

NOTE: Opinion by Scalia alone as circuit court justice for 5th circuit. Indiana's circuit justice is Stevens. Case is of no precedential value in Indiana but may indicate trend in Court for which counsel should be aware.

TITLE: Madden v. Texas
INDEX NO.: G.16.b.
CITE: 498 U.S. 1301, 111 S. Ct. 902, 112 L.Ed.2d 1026 (1991)
SUBJECT: Extensions for filing cert. petitions-good cause
HOLDING: Cert. petitions are due to be filed within 90 days after entry of judgment by state ct. of last resort. Time may be extended "for good cause shown" for period not to exceed 60 days, but extensions are not favored. Extension applications which are received less than 10 days before filing date will not be granted "except in the most extraordinary circumstances." Here, extension requests received by Court 10 days before due date. In A-626 extension requested because counsel had never before prepared cert. petition & required assistance of TX Resource Center (TRC). In remaining cases extensions requested due to withdrawal of appellate counsel & inability of TRC to locate replacement counsel. In one of those cases TRC atty. indicated he would file petition but due to death of his father he required extension. All cases are capital. Circuit Justice Scalia finds grounds do not establish "good cause." All attorneys would benefit from additional time & consultation. Other grounds are insufficient because these is no indication of basis for appellate counsel's withdrawal nor that it was a reasonably unforeseeable occurrence. Atty's father's death may in some cases constitute good cause, but here atty. did not state he had been working diligently on petition & death prevented completion-there is no indication why some other TRC atty. could not complete this last minute task nor why it was left to last minute. Extension in A-626 denied due in part to scheduled execution date. Thirty-day extensions granted in remaining cases, but Scalia cautions he will not grant such extensions in future. **NOTE:** Opinion by Scalia alone as circuit court justice for 5th circuit. Indiana's circuit justice is Stevens. Case is of no precedential value in Indiana but may indicate trend in Court for which counsel should be aware.