X. POST-CONVICTION REMEDIES

TITLE: Tumulty v. State
INDEX NO.: X.
CITE: (5-30-96, Ind.), 666 N.E.2d 394
SUBJECT: Direct appeal from guilty plea not permitted
HOLDING: D may not challenge Tr. Ct.'s acceptance of his guilty plea to habitual offender charge on direct appeal. Weyls v. State, 266 Ind. 301, 362 N.E.2d 481 (1977). Post-Conviction Rule 1 is appropriate remedy for pursuing D's claims. Held, transfer granted, Ct. App. opinion at 647 N.E.2d 361 vacated.

RELATED CASES: Yost, 150 N.E.3d 610 (Ind. Ct. App.) (after entering an open guilty plea to five criminal recklessness convictions, D was prohibited from raising a double jeopardy challenge to the convictions on direct appeal; D clearly received a benefit from his open guilty plea to duplicative charges--i.e., avoiding attempted murder charge); J.W., 113 N.E.3d 1202 (Ind. 2019) (juveniles cannot immediately challenge on direct appeal any errors concerning their agreed adjudication. But because juveniles are not eligible for post-conviction relief, before pursuing their constitutional right to appeal, they must first assert any claims of error concerning their agreed judgment in a request for post-judgment relief filed with the juvenile court; juveniles who seek that relief in post-judgment proceedings have a statutory right to counsel under Indiana Code article 31-32); Brewer, App., 830 N.E.2d 115 (D who claimed that Tr. Ct. violated an express term of his sentencing agreement with State & that his counsel was ineffective for failing to advise D that sentence was in contravention of plea agreement & statutory authority was entitled to post-conviction hearing to present evidence in support of his allegations. Tr. Ct. erred in determining that D should pursue belated direct appeal to challenge sentence imposed on him); Huffman, App., 822 N.E.2d 656 (D cannot challenge a guilty plea to a probation violation by direct appeal, but rather must seek post-conviction relief; see full review at F.1.e); Collins, 817 N.E.2d 230 (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; see full review at X.5.b); Brightman, 758 N.E.2d 41 (D may challenge Tr. Ct.'s denial of his motion to withdraw guilty plea on direct appeal).

X. POST-CONVICTION REMEDIES

X.1. Procedure

TITLE: Baker v. State
INDEX NO.: X.1.
CITE: (3d Dist. 3/30/87), Ind. App., 505 N.E.2d 498
SUBJECT: PCR - eligibility
HOLDING: Tr. Ct. erred in dismissing D's petitions for PCR simply because D had already served sentences. PCR rules do not limit relief to Ds still serving sentence for conviction they seek to attack. Petitions for PCR should be addressed on their merits even if D's sentence has been served. Rader, App., 393 N.E.2d 199. Held, denial of PCR reversed; cause remanded.

TITLE: Bedolla v. State

INDEX NO.: X.1.

CITE: (5/28/19), Ind. Ct. App., 123 N.E.3d 661

SUBJECT: PCR court abused discretion in denying legitimate request to make an offer of proof and foreclosing discovery

HOLDING: Post-conviction court abused its discretion in closing evidence without allowing counsel the opportunity to make a legitimate offer of proof and thus foreclosing enforcement of a valid subpoena to secure a deposition. This offer of proof was related to the petitioner's request to proceed with his attempts to depose an essential witness who may possess evidence of petitioner's actual innocence. Both parties and post-conviction court had originally agreed to the deposition, but at a status conference after an unsuccessful deposition, post-conviction court refused to hear argument from Defendant's counsel to secure the witness's testimony and wrongfully denied her the opportunity to make an offer of proof, even threatening her with contempt. When a judge refuses to hear a party's offer to prove, she not only abdicates the duty to listen, but she calls into question the principle of fundamental fairness, which requires that parties, particularly those bearing the burden of proof, receive every reasonable opportunity to make their case. Hirsch v. State, 697 N.E.2d 37, 43 (Ind. 1997). Held, transfer granted, post-conviction court's order denying Defendant's motion to correct error reversed and remanded to allow deposition of witness. Slaughter, J., concurring in part and dissenting in part, believes the relief awarded to Defendant exceeds the relief he sought or what the trial court's violation warrants.

TITLE: Collins v. State
INDEX NO: X.1.
CITE: (7/25/2014), 14 N.E.3d 80 (Ind. Ct. App 2014)
SUBJECT: Denial of request to issue subpoena to out-of-state resident for PCR hearing affirmed
HOLDING: In post-conviction proceedings, petitioners are entitled to request issuance of subpoenas accompanied by an affidavit stating the reason for calling the witness and the expected testimony. Indiana Post-Conviction Rule 1(9)(b). Here, it was within Tr. Ct.'s discretion to conclude that prosecutor and judge would not provide relevant and probative testimony and to deny D's subpoena request. Tr. Ct. was unable to issue a subpoena to public defender who supervised certified legal intern, because she resided in Florida. There are no provisions for compulsory attendance of out-of-state residents in civil actions. See Indiana Practice Series, Trial Handbook § 16:4. Thus, Tr. Ct.'s denial of request to subpoena public defender was not an abuse of discretion. Held, judgment affirmed.

TITLE: Gibson v. State

INDEX NO.: X.1.

CITE: (5th Dist., 2-28-03), Ind. App., 783 N.E.2d 1287

SUBJECT: Post-conviction relief (PCR) - no waiver where direct appeal dismissed & alleged error was speedy appeal violation

HOLDING: Post-conviction court erred in dismissing D's PCR petition outright without considering merits of claim, even where his direct appeal had been dismissed. D's direct appeal was dismissed without prejudice so that he could pursue habeas corpus relief based on Tr. Ct.'s failure to provide him with adequate record to perfect direct appeal. After habeas corpus petition was dismissed, D filed petition for PCR in lieu of reinstating direct appeal. State argued that D must first file direct appeal before seeking PCR under PCR Rule 1(b), which states that petitioner "should" complete a direct appeal. However, advisement in rule that direct appeal "should" be taken before filing PCR petition is not absolute bar against filing PCR petition first. It is true that PCR petition is not substitute for direct appeal, & electing to forgo direct appeal & filing PCR petition instead may have certain negative procedural ramifications, such as waiver of claims that were known & available at time of trial & appeal & could have been raised in direct appeal. Crank v. State, 502 N.E.2d 1355 (Ind. Ct. App. 1987). Here, D's claim appears to be that he was unable to raise claims of error in timely fashion in direct appeal due to actions of Tr. Ct.'s reporter & clerk, thus denying his right to speedy appeal. Therefore, it appears that waiver for failing to raise claim in direct appeal would not bar speedy appeal claim D advanced in his PCR petition. Held, judgment reversed.

TITLE: Hoskins v. State
INDEX NO.: X.1.
CITE: (3/6/2020), 143 N.E.3d 358 (Ind. Ct. App 2020)
SUBJECT: Direct appeal attacking validity of guilty plea not permitted
HOLDING: A claim that a defendant did not knowingly or intelligently waive his right to counsel in a case disposed of by a guilty plea must be presented in a petition for post-conviction relief, not on direct appeal. Creekmore v. State, 853 N.E.2d 523 (Ind. Ct. App 2006). Here, after pleading guilty to both new criminal charges and to probation violations, Defendant argued on appeal that he did not knowingly or intelligently waive his right to counsel. This was not an attack on trial court's sentencing discretion, but rather the validity of his guilty plea. Court therefore dismissed the appeal without prejudice as to Defendant's ability to present this claim in a petition for post-conviction relief.

TITLE: Hubbell v. State
INDEX NO.: X.1.
CITE: (8/4/2016), 58 N.E.3d 268 (Ind. Ct. App 2015)
SUBJECT: Denial of fair post-conviction hearing - D's inability to obtain direct appeal Record
HOLDING: Post-conviction court denied D a fair hearing by refusing to obtain his direct appeal record from the Supreme Court Clerk. Tr. Ct. sustained prosecutors' objections to D's questioning of public defender, when he referred to court records that were not certified. Rather than obtaining the Record of Proceedings for D, the post-conviction court imposed on him the affirmative duty to get the Record to the PCR Court, despite fact he is indigent, not a licensed lawyer, and is proceeding pro se. There does not appear to be a published procedure that allows D to obtain the Record of Proceedings himself.

"Under these facts, it is difficult to see what more could be expected of Hubbell as he was attempting to present his post-conviction arguments. Until such time as electronic transcripts and records make this issue moot for all petitioners, pro se petitioners need to know how they may ensure the Records of Proceedings from their direct appeals are available for a post-conviction hearing. Held, judgment reversed and remanded.

TITLE: Hummel v. State
INDEX NO.: X.1.
CITE: (9/6/2018), 110 N.E.3d 423 (Ind. Ct. App 2018)
SUBJECT: Special judge in PCR case had authority to modify underlying sentence
HOLDING: Post-conviction court has authority to accept agreements that modify the sentence in the underlying criminal case. Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000), *overruled* on other grounds by State v. Hernandez, 910 N.E.2d 213 (Ind. 2009). The authority vested in the judge presiding over a PCR action must be the same, whether that judge is an elected judge, a judge pro tempore, or a special judge. Here, special judge erred when he *sua sponte* granted his own motion to correct error based on his belief that he did not have authority to accept agreement reached by the State and D to modify D's sentence in exchange for dismissal of his PCR petition. Held, judgment reversed and remanded to re-enter original order enforcing parties' agreement and dismissing PCR petition.

TITLE: Jackson v. State
INDEX NO.: X.1.
CITE: (01-03-12), 958 N.E.2d 1161 (Ind. Ct. App 2012)
SUBJECT: Post-conviction court may reject proffered agreements between D and State
HOLDING: Tr. Ct.s are not required to accept agreements between the parties in post-conviction relief cases. Cases holding that Tr. Ct.s are required to approve agreed judgments' in civil cases are distinguished. While post-conviction relief cases are civil in nature,' they stem from criminal convictions. A post-conviction court has the authority whether to accept an agreement entered between a petitioner and the State in a post-conviction proceeding. Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000), *overruled* on other grounds by State v. Hernandez, 910 N.E.2d 213 (Ind. 2009). Here, post-conviction court granted D's petition for post-conviction relief in part, but had discretion to deny D's request to accept agreement between him and State under which State would agree to setting aside of OWI conviction and HSO enhancement in exchange for D pleading guilty to public intoxication. Held, judgment affirmed.

TITLE: Jones v. State
INDEX NO.: X.1.
CITE: (6-3-03), Ind., 789 N.E.2d 478
SUBJECT: Post-conviction relief not available in city Cts.
HOLDING: Post-conviction petitions may not be filed in city & town Cts. Upon filing of request with county clerk within fifteen days of being sentenced in city or town Ct., Ds are automatically entitled to trial de novo in circuit or superior Ct. Ind. Trial de Novo Rule 3(B)(1). A person who invokes right to trial de novo & is nonetheless convicted is entitled to pursue post-conviction relief in respect of that conviction. Given liberality of Indiana's approach to trial de novo & difficulty of litigating a post-conviction claim in Cts. that are not Cts. of record, post-conviction relief is not available. Held, transfer granted, remanded to City Ct. with direction to dismiss.

Note: Because there is no specific provision in Indiana Trial De Novo Rules for belated trial de novo from misdemeanor conviction, consider invoking T.R. 60(B).

RELATED CASES: Freshwater, App., 834 N.E.2d 1133 (D's T.R. 60(B) motion in city court was inadequate to justify relief; "conspicuously missing" from motion was any justification for the 12-year delay in seeking relief & explanation as to how this delay was reasonable under T.R. 60(B)(8)).

TITLE: Kirby v. State
INDEX NO.: X.1.
CITE: (4/27/2018),____NE2d _____(Ind. 2018)
SUBJECT: Ex post facto challenge to collateral consequence of conviction cannot be raised in post-conviction proceedings
HOLDING: Post-conviction relief is generally available only from a conviction or sentence, not from a collateral consequence. Ind. Post-Conviction Rule 1(1); Kling v. State, 837 N.E.2d 502 (Ind. 2005). Here, D pled guilty in 2010 to one count of Class D felony child solicitation, leading to a 10-year sex-offender registration and an 18-month sentence, suspended to probation. D's probation conditions made schools off-limits, but he was granted explicit permission to enter school property so he could attend his son's school activities. But in 2015, Ind. Code § 35-42-4-14(b) made it a Level 6 felony for a "serious sex offender" like D to knowingly or intentionally enter school property. D challenged this restriction by filing post-conviction relief, alleging he did not "knowingly" plead guilty because he didn't know at the time of his plea that he would later be barred from school property. He also alleged that the new statute was an unconstitutional ex post facto law because it added punishment to an already-committed crime. Court of Appeals agreed with D that the statute's school-entry restriction is unconstitutional as applied to him. On transfer, the Indiana Supreme Court held that because the school-entry restriction is a statutory collateral consequence of D's conviction but not part of his conviction or sentence, post-conviction proceedings are the wrong vehicle for his ex post facto claim. Instead, the claim should be raised through a declaratory-judgment action pursuant to Ind. Code § 34-14-1-2. Held, transfer granted, Court of Appeals opinion at 83 N.E.3d 1237 vacated, denial of post-conviction relief affirmed without reaching merits of D's ex post facto claim.

TITLE: Page v. State
INDEX NO.: X.1.
CITE: (1st Dist. 1/12/88), Ind. App., 517 N.E.2d 427
SUBJECT: PCR hearing - D's absence
HOLDING: PCR Ct. did not abuse discretion by refusing to allow D to attend PCR hearing. Right to be present during all critical stages requires only that D be present during trial. Gallagher, App., 466 N.E.2d 1382. Even if exclusion is wrongful, D must show prejudice. Childers, App., 408 N.E.2d 1284. Nearly 5 months before hearing, PCR Ct. informed parties it did not intend to have D returned, but would accept depositions, transcripts, or affidavits in lieu of D's oral testimony. D's affidavit was admitted without objection, & state conceded facts were not in dispute. D does not show why his presence was needed. Dillon 108 N.E.2d 881; Carman 196 N.E. 78. Held, no abuse of discretion.

TITLE: Shaw v. State

INDEX NO.: X.1.

CITE: (08/21/19), Ind. S. Ct., 130 N.E.3d 91

SUBJECT: May file petition for post-conviction relief after remand for new trial, new sentencing, or new appeal obtained from federal habeas proceeding

HOLDING: Per Curiam. After Defendant's murder conviction was affirmed on direct appeal, he filed a petition for post-conviction relief (PCR) alleging ineffective assistance of appellate counsel, which was denied. Defendant then filed a writ of habeas corpus, which was denied by the District court but vacated by the Seventh Circuit Court of Appeals, which remanded to issue a writ of habeas corpus unless the State of Indiana granted Defendant a new appeal. After unsuccessfully filing a second direct appeal, Defendant filed another (new) PCR petition alleging that his appellate attorney in the new direct appeal was ineffective. The trial court dismissed the new PCR petition as an unauthorized successive PCR petition under Indiana Post-Conviction Rule 1(12). The Court of Appeals affirmed the dismissal in a memoradum opinion. On transfer, the Indiana Supreme Court held that a PCR petition that addresses only the proceeding on remand is not a successive petition under Indiana Post-Conviction Rule 1(12) and as long as the new petition raises only the issues emerging from the second direct appeal, Defendant is authorized to file the new petition for post-conviction relief.

TITLE: Williams v. State
INDEX NO.: X.1.
CITE: (3rd Dist., 9-29-99), Ind., 716 N.E.2d 897
SUBJECT: Failure to rule on petition for post-conviction relief (PCR) - "lazy judge" rule
HOLDING: Ind. T.R. 53.2, which applies to petitions for PCR, sets 90-day limit for Tr. Ct. to hold case under advisement & issue final ruling. Proper remedy for challenging denial of "lazy judge" motion under this rule is to seek writ of mandate from Indiana S. Ct. to compel clerk to give notice & disqualify judge. State ex rel. Ind. Suburban Sewers, Inc. v. Hanson, 260 Ind. 47, 296 N.E.2d 660 (1973). In this case, on transfer, Ct. agreed with Ct. App. that D was estopped from claiming that post-conviction Ct. lost jurisdiction to rule on his PCR petition, because D waited until unfavorable judgment denying him PCR instead of seeking writ of mandate after clerk failed to withdraw case from Tr. Ct. for noncompliance with T.R. 53.2. Post-conviction Ct. never lost jurisdiction to rule on D's petition. However, Ct. disagreed that laches barred D's post- conviction claims. Held, transfer granted, opinion of Ct. App. at 699 N.E.2d 1151 vacated, & remanded to post-conviction Ct. because State failed to establish by preponderance of evidence that D unreasonably delayed in seeking relief.

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.a. Petition

TITLE: Brown v. State
INDEX NO.: X.1.a.
CITE: (2d Dist. 12/22/83), Ind. App., 458 N.E.2d 245
SUBJECT: PCR petition - effect of failure to verify
HOLDING: State waived want of verification by failing to object at earliest possible opportunity. (Citations omitted). Verification is not necessary to confer subject-matter jurisdiction. Shelor, 386 N.E.2d 690 & Owen 338 N.E.2d 715 (Tr. Ct's. must return unverified petitions for verification, suggesting verification is matter of particular case jurisdiction). Ct. notes Thompson 389 N.E.2d 274 (suggesting verification is necessary before Tr. Ct. gains jurisdiction over PCR petition) but chooses to follow Shelor & Owen. Held, verification issue waived; denial of PCR reversed on other grounds.

RELATED CASES: Barnes, App., 496 N.E.2d 816 (Crim L 998(21); because D's prior 2 PCR petitions were not properly verified, Tr. Ct.'s ruling on their merits did not bar D from pursuing new issue (validity of guilty plea) in third petition; state failed to submit brief & Ct. applies "less stringent standard of review with respect to showing reversible error;" held denial of PCR reversed & cause remanded).

TITLE: Evolga v. State
INDEX NO.: X.1.a.
CITE: (5th Dist., 11-25-98), Ind. App., 701 N.E.2d 1256
SUBJECT: Erroneous refusal to allow filing of petition for post-conviction relief (PCR)
HOLDING: Tr. Ct. erred by refusing to allow filing of petition for PCR when D had previously waived his right to direct appeal & had appealed Tr. Ct.'s denial of his motion for jail time credit. Ind. Post-Conviction Rule 1(1)(a) allows any person convicted of or sentenced for crime to institute at any time proceeding for PCR. Only time that P-C.R. 1 provides that filing may be denied is where second or successive petition is filed & petitioner is entitled to no relief. P-C.R. § 1(12)(b). Although D had tried to file PCR once before, Tr. Ct. had not allowed its filing, & never considered any of issues raised in D's petition. If Tr. Ct. determines that D has not raised any issues which were not available at time of direct appeal, then it must follow procedures set forth in post-conviction rules in denying D's petition. Held, reversed & remanded.

RELATED CASES: Evolga, App., 722 N.E.2d 370 (Tr. Ct. erred in summarily denying D's petition for PCR without evidentiary hearing; Tr. Ct.'s assessment that none of D's issues constituted fundamental error & that he was procedurally barred from asserting them was incorrect).

TITLE: Fentress v. State
INDEX NO.: X.1.a.
CITE: (1st Dist. 2/13/86) Ind. App., 488 N.E.2d 1158
SUBJECT: PCR - petition; motion to withdraw
HOLDING: Interlocutory appeal. Tr. Ct. did not err in denying Ds' motions to withdraw PCR petitions without prejudice. Here, Ds filed pro se PCR petitions. State P.D. was appointed & moved to withdraw. In one case, state answered. In other, Ct. finds D is parole absconder & not entitled to prosecute appeal. PC 1, Section 4 provides Ct. may grant leave to withdraw petition. PC 1, Section 5 provides rules/statutes applicable to civil proceedings are available to parties. Ct. discusses TR 41(A) & finds D's motion to withdraw does not comport with rule. Ct. notes D has absolute right to amend PCR petition by interlineation at any time prior to judgment. Neely, 382 N.E.2d 714. Neely also provides for conditional right to withdraw petition, which Tr. Ct. may grant absent overriding prejudice to state. Ct. finds D has failed to demonstrate any prejudice in the denial of motion to withdraw. Held, judgment affirmed. Ratliff CONCURS, finding PC 1, Section 4(c) bestows discretion upon Tr. Ct. & D has shown no abuse.

TITLE: Johnson v. State
INDEX NO.: X.1.a.
CITE: (3rd Dist., 8-26-96), Ind. App., 670 N.E.2d 59
SUBJECT: Erroneous denial of successive PCR petition
HOLDING: Post-conviction Ct. erred in denying D's successive petition for post-conviction relief. D filed his successive petition in 1989, which was dismissed in 1995, because D failed to file successive petition with clerk of Indiana S. Ct. Ind. Post-Conviction Rule 1(12), which became effective in 1990, requires leave of either Indiana S. Ct. or Ct. App. before filing successive petition in Tr. Ct. Ct. noted that retroactive application of P-C.R. 1(12) to D was improper. Tolson v. State, 439 N.E.2d 454 (Ind. 1986). Held, reversed & remanded.

TITLE: Pirant v. State

INDEX NO.: X.1.a.

CITE: (1/31/2019), 119 N.E.3d 178 (Ind. Ct. App. 2019)

SUBJECT: D must raise collateral challenge to convictions through post-conviction proceedings, not Trial Rule 60(B) motion

HOLDING: After being waived to adult court, juvenile pled guilty to murder and attempted murder. After unsuccessfully filing for post-conviction relief in 2011, D moved to vacate his convictions pursuant to Trial Rule 60(B)(6), alleging that counsel provided ineffective assistance during the waiver hearing. Court held that when post-conviction relief has been litigated, a successive petition for post-conviction relief is the correct procedure to challenge ineffective assistance of counsel claims and not a Trial Rule 60(B) motion. Held, denial of motion to set aside convictions pursuant to Trial Rule 60(B) affirmed.

TITLE: Rose v. State
INDEX NO.: X.1.a.
CITE: (2/28/2019), 120 N.E.3d 262 (Ind. Ct. App. 2019)
SUBJECT: Pro se litigant held to same standards as an attorney at post-conviction relief proceeding
HOLDING: Pro se litigant failed to call his prior attorney as a witness at his post-conviction relief hearing even though the attorney was subpoenaed and in the courtroom. At the close of evidence, the pro se litigant realized his mistake but Tr. Ct. held it was too late. Court of Appeals finds that pro se litigant is held to same standards as an attorney and Tr. Ct. did not need to make exception when he erred in not calling witness. Court rejected petitioner's argument that he was denied an evidentiary hearing or that the PCR court "failed to provide [him] with a procedurally fair hearing." Even without trial counsel's testimony, the PCR court addressed the evidence of ineffective assistance of counsel presented at the PCR hearing. Additionally, the Tr. Ct.'s findings of fact and conclusions of law, although not overly specific, were sufficient.

TITLE: Tapia v. State

INDEX NO.: X.1.a.

CITE: (8-20-01), Ind., 753 N.E.2d 581

SUBJECT: Motion to withdraw petition for post-conviction relief (PCR) without prejudice - abuse of discretion standard

HOLDING: Tr. Ct. did not abuse its discretion in denying D's pro-se motion to withdraw without prejudice his petition for PCR. Post-conviction Rule 1(4)(C) provides that at any time prior to entry of judgment, Tr. Ct. may grant leave to withdraw petition. Rule also provides that any amendment sought less than sixty days before hearing on post-conviction petition must be by leave of Ct. Here, two weeks before hearing, D filed motion for continuance & sought leave of Ct. to amend his PCR petition. However, request was denied as untimely. D then sought to withdraw his petition without prejudice, which was also denied.

Plain language of Rule 1(4)(C) compels Ct. to review Tr. Ct.'s actions under abuse of discretion standard. Employing this standard gives Tr. Ct. ability to curtail attempts by petitioners seeking PCR to delay final judgment on their petitions. In this case, Tr. Ct.'s refusal to allow D to withdraw his petition was not clearly against logic & effect of facts & circumstances before Ct. D made little effort to explain what he would gain by delaying hearing in a four-year-old case. Held, transfer granted, Ct. App.' opinion at 734 N.E.2d 307 vacated, denial of PCR affirmed.

RELATED CASES: Thomas, 965 N.E.2d 70 (Ind. Ct. App. 2012) (no abuse of discretion by denying D's petition to withdraw where D wanted to delay proceedings in order to determine whether new evidence would be produced at co-D's upcoming retrial); Mitchell, 946 N.E.2d 640 (Ind. Ct. App. 2011) (Tr. Ct. did not abuse discretion in denying motion to withdraw post-conviction petition without prejudice where reason for withdrawal was to get more time to file proposed findings of facts and conclusions of law); Tucker, 786 N.E.2d 710 (Tr. Ct. abused its discretion in refusing to permit D to withdraw his petition for PCR without prejudice; no showing of substantial prejudice to State or psychological hardship on victims of crime in permitting withdrawals without prejudice); Tinker, App., 805 N.E.2d 1284 (no error in dismissing D's PCR petition with prejudice after he requested dismissal of petition without prejudice where D did not adequately explain why his previous time to prepare for his hearing was inadequate & he failed to display the due diligence found in Tucker); Ford, App., 755 N.E.2d 1138 (no error in denying D's motions for continuance & to withdraw petition).

TITLE: Van Meter v. State
INDEX NO.: X.1.a.
CITE: (6-1-95), Ind., 650 N.E.2d 1138
SUBJECT: TR 60(B) motions cannot be used in lieu of PCR petition
HOLDING: Where petition for post-conviction relief is available, D may not collaterally attack conviction through Trial Rule 60(B) motion for relief from judgment. After conviction & sentence, D filed pro se motion pursuant to Ind. Trial Rule 60(B)(3), claiming that he had newly discovered evidence that State fabricated evidence against him. Ct. held that D clearly could have sought relief from alleged fraud on part of State under P-C.R. 1(1)(a)(4). Held, transfer granted, Tr. Ct. & Ct. App. memorandum decision affirmed.

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.b. Change of judge

TITLE: Chamness v. State
INDEX NO.: X.1.b.
CITE: (4/27/83) Ind., 447 N.E.2d 1086
SUBJECT: PCR - change of judge
HOLDING: Denial of D's motion for change of judge in PCR proceeding was not error because D failed to show good cause for late filing of request. PC 1, Section 4(b) provides for automatic change of judge if D files affidavit (stating that judge has personal bias or prejudice against D) within 10 days of filing PCR petition. Here indigent D filed pro se PCR petition 3/8/82. A copy was sent to State Public Defender. On 3/29/82, Public Defender requested continuance of PCR hearing. The hearing occurred on 5/13/82. On that date, D by counsel filed change of judge motion. PC 1, Section 4(b) provides that for good cause shown, D may file motion after 10-day period. Ct. finds D failed to show good cause. Held, no error.

RELATED CASES: Lombardo, 499 N.E.2d 1075 (Crim L 998(1,4); where motion for change of judge was timely filed & complied with form required by PC 1, Section 4(b), Tr. Ct. was obligated to grant motion & did not have jurisdiction to act further on PCR petition itself; held, remanded with instructions to grant motion for change of judge); Perry, App., 492 N.E.2d 57 (Judges 51(1,3); D was not entitled to automatic change of judge; PC 1, Section 4(b), rather than TR 76(5) controls).

TITLE: Jackson v. State
INDEX NO.: X.1.b.
CITE: (4th Dist., 11-21-94), Ind. App., 643 N.E.2d 905
SUBJECT: Denial of motion for change of judge
HOLDING: Post-conviction Ct. did not err in denying D's motion for change of judge. PCR rule 1(4)(b) does not require automatic right to COJ in PCR proceedings, State ex rel. Whitehead v. Madison County Circuit Ct., Ind., 626 N.E.2d 802. D's affidavit asserted belief that PC judge was biased against him because judge had previously been county's chief probation officer when D was on probation as juvenile, & in that capacity he had signed petition to revoke D's probation. Ct. agreed with PC Ct.'s finding that D's juvenile probation revocation was unrelated to present conviction, relying on Rankin v. State, Ind., 563 N.E.2d 533, & Bentley v. State, Ind., 414 N.E.2d 573.

RELATED CASES: Barclay, App., 679 N.E.2d 163 (fact that judge accepted guilty plea without adequate factual basis does not support rational inference of bias or prejudice).

TITLE: Johnson v. State
INDEX NO.: X.1.b.
CITE: (4th Dist., 08-11-05), Ind. App., 832 N.E.2d 985
SUBJECT: PCR - special judge properly appointed under C.R. 13
HOLDING: Manner in which special judge was appointed for post-conviction relief proceeding was not erroneous. The selection of a special judge in criminal cases is governed by Indiana Criminal Rule 13. Ct. looked to C.R. 13(c)), which provides for counties with fewer than four judges & instructs to follow the alternate assignment list required under the local rules by C.R. 2.2. The county's local rule included a rotating system among the three Ct.s. All the Ct.'s judges had excluded themselves at some point, which normally would have meant the case would be transferred to another county. However, in the interim of all the disqualifications, a new judge was elected to the originating Ct. & the case was reassigned to her prior to being moved out of county. Based on the circumstances in the case, Ct. did not construe the local rule as requiring assignment to the other county's judge if a regular judge is available in the originating county who has not presided over the case.

Ct. also found that Tr. Ct. had jurisdiction to assign a new judge despite a pending appeal on Tr. Ct.'s denial of Petitioner's Motion for Change of Judge. As a general rule, once an appeal is perfected the Tr. Ct. loses subject matter jurisdiction. Ind. App. Rule 3(A). Tr. Ct. reassigned case to different judge three times while appeal was pending. However, judge, who eventually presided over PCR, was appointed as special judge after appeal opinion had been certified & Ct. found no problem with this appointment. Ct. also found several issues raised as to Tr. Ct. refusing to issue subpoenas, Petitioner's presentation of newly discovered evidence, & of ineffectiveness of trial & appellate counsel as either waived for failing to present cognizant argument or not being raised in PCR Ct. or as being properly decided at trial & not prejudicial. Held, judgment affirmed.

TITLE: State ex rel. Whitehead v. Madison Cir. Ct.
INDEX NO.: X.1.b.
CITE: (12-29-93), Ind., 626 N.E.2d 802
SUBJECT: Post-Conviction Relief (PCR) - Change of Judge (COJ)
HOLDING: PCR Rule 1(4)(b) does not create automatic right to COJ in PCR proceedings. Rule requires that judge examine affidavit in support of COJ, treat historical facts recited therein as true, & then determine whether facts support rational inference of bias or prejudice of judge. Ct. found language used in State ex rel. Rondon v. Lake Superior Ct., 569 N.E.2d 635, was interpreted too broadly, & instead relied on Justice DeBruler's dissent in that decision. Ct. also noted structure & substance of rule was similar to that used in federal Cts. & directed counsel to federal decisions to use in approaching requests for COJ in PCR proceedings. Held, because there is no automatic right to COJ in PCR proceedings just because filing requirements of rule have been met, Tr. Ct. acted properly in setting matter for hearing.

TITLE: Weatherford v. State
INDEX NO.: X.1.b.
CITE: (9/22/87), Ind., 512 N.E.2d 862
SUBJECT: PCR - special judge; judge from previous panel
HOLDING: Special judge appointed to hear PCR petition was not disqualified because he had been named on a previous panel. D argues that TR 79(11) bars appointment of special judge who has been named on previous panel. Here, PCR judge was named on panel when Tr. judge disqualified herself following mistrial. However, PC action is not same case for purposes of TR 79(11). PC hearing is quasi civil hearing totally separate & distinct from original criminal trial. Sufana 381 N.E.2d 475. Consequently fact that PCR judge had been named on panel in original criminal case does not bar appointment as special judge in PC action.

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.c. State's answer

TITLE: State v. Fair
INDEX NO.: X.1.c.
CITE: (6/28/83) Ind., 450 N.E.2d 66
SUBJECT: PCR - state's answer; evidence in support of claim for relief; prior response suffices
HOLDING: Tr. Ct. erred in granting D's PCR petition where record of PCR proceedings shows no presentation of evidence by D. PC 1, Section 5; AR 7.2(A). Where state's answers to first 2 PCR petitions contained general denials to allegations also stated in final & properly filed PCR petition, Tr. Ct. erred in summary disposition in D's favor. Lloyd 383 N.E.2d 1048. Here, state failed to appear at hearing. State's answers to D's original petitions (filed by Richard Lee Owen & ordered stricken by Ind. S. Ct.) sufficed to alert judge as to genuine issue of material fact, thus summary disposition was improper. Held, grant of PCR reversed. DISSENT by Prentice contends majority opinion "turns rules of appellate review upside down." State, not D, bears burden in appealing PCR Ct.'s judgment. State has not shown summary disposition was inappropriate.

TITLE: Stoner v. State
INDEX NO.: X.1.c.
CITE: (2d Dist. 4/29/87) Ind. App., 506 N.E.2d 837
SUBJECT: PCR - state's answer; effect of late filing
HOLDING: Tr. Ct. did not err in failing to summarily grant D's PCR petition when state failed to timely answer petition. Because state did not file motion for enlargement of time to answer petition, D is correct that state's failure to timely answer his petition required factual averments contained therein to be deemed admitted. TR 8(D). However, only facts alleged in petition for PCR are deemed admitted when state fails to file responsive pleading as required by PC 1, Section 4(a). Purcell, App., 330 N.E.2d 779. Conclusions of law contained in petition are not established as being correct merely by state's failure to respond. Held, denial of PCR reversed & remanded on other grounds.

RELATED CASES: Landis, App., 726 N.E.2d 801 (although State filed late pleading with affirmative defense of res judicata, State could still assert res judicata because purpose of P-CR1, §4(a) to advise petitioner of defenses was satisfied); Kirk, 632 N.E.2d 776 (although State's answer to successive PCR petition was untimely, PCR court properly summarily dismissed petition without referral to public defender under PCR Rule 1(4)(e) because successive petition is not treated as initial petition subject to requirements of PCR Rule 1(2)); Murphy 477 N.E.2d 266 (Ct. finds no surprise caused by state's late filing of response, allegedly caused by delay in receipt of D's petition, *citing* Lottie 444 N.E.2d 306 & Likens, App., 378 N.E.2d 24).

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.d. Burden of proof (PC 1, 5)

TITLE: Harris v. State
INDEX NO.: X.1.d.
CITE: (7/13/82) Ind., 437 N.E.2d 44
SUBJECT: PCR - burden of proof (PC 1, Section 5)
HOLDING: In proceeding for post-conviction relief, D must establish grounds for relief by a preponderance of evidence. PC 1, Section 5. Judge hearing petition is sole judge of weight of evidence & credibility of witnesses. Turman 392 N.E.2d 483. On appeal from adverse judgment, D must show evidence as whole was such that it leads unerringly & unmistakably to decision in his favor. Sotelo 408 N.E.2d 1215. Here, evidence supported judge's finding that any failure to fully apprise D of possible guilty plea discussions would not have affected result since prosecutor's testimony indicated intent to try case. Held, PCR properly denied.

RELATED CASES: Powers, 617 N.E.2d 545, *overruled* on other grounds as noted in Jaramillo, 823 N.E.2d 1187 (Ct. granted transfer and reversed Powers, App., 611 N.E.2d 172, dealing with burden of proof in PCR to show IAC. Ct. found D didn't show counsel ineffective in failing to challenge sufficiency of evidence establishing habitual status, because if there is documentary evidence to support existence of prior offenses, oral evidence is sufficient to prove sequencing of offenses and identity. Even if there had been timely objection to evidence, it would still have been admissible, and therefore it was not ineffective assistance of appellate counsel to fail to raise ineffective assistance issue.)

TITLE: Mitchell v. State
INDEX NO.: X.1.d.
CITE: (04-06-11), 946 N.E.2d 640 (Ind. Ct. App. 2011)
SUBJECT: Absent trial transcript or request for judicial notice, post-conviction burden not met
HOLDING: Post-conviction court did not err in finding D failed to sustain his burden of proof on his claims of ineffective assistance of trial and appellate counsel because he did not offer the original trial transcript into evidence and did not ask the court to take judicial notice of the original transcript.

Whether a D received ineffective assistance of counsel is a fact-sensitive issue requiring review of the original trial record. See Taylor v. State, 882 N.E.2d 777 (Ind. Ct. App. 2008). It is practically impossible to gauge the performance of trial counsel without the trial record, as we have no way of knowing what questions counsel asked, what objections he leveled, or what arguments he presented. Tapia v. State, 753 N.E.2d 581, 587 n.10 (Ind. 2001); see also Helton v. State, 907 N.E.2d 1020, 1024 (Ind. 2009). Thus, the original trial transcript must be entered into evidence at the post-conviction hearing just like any other exhibit. See State v. Hicks, 525 N.E.2d 316, 317 (Ind. 1988). Alternatively, amended Evidence Rule 201(b)(5) allows a post-conviction court to judicially notice the transcript from the underlying criminal proceedings to assess counsel's performance.

Here, D did not offer his trial record into evidence and did not ask the court to take judicial notice of the record. Further, the court did not judicially notice the record *sua sponte*. Nor did D call witnesses or introduce other evidence during the post-conviction proceedings. D's claims were fact sensitive. He claimed trial counsel was ineffective for failing to seek a mistrial after introduction of allegedly improper testimony and that appellate counsel failed to raise claims of double jeopardy, prosecutorial misconduct, and ineffective assistance of trial counsel. "These were fact-sensitive allegations requiring examination of the trial record for purposes of assessing deficient performance and prejudice. For the foregoing reasons, we cannot say the post-conviction court erred in finding that [D] failed to meet his burden of proof on his ineffective assistance claims." Held, judgment affirmed.

RELATED CASES: Graham, 947 N.E.2d 962 (Ind. Ct. App 2011) (if PCR court takes judicial notice of other court records in ruling upon a PCR petition, those records should be made part of the PCR record; but PCR court is not required to go searching for records in support of either party's position or become an advocate or investigator for either party).

TITLE: State v. Cleland
INDEX NO.: X.1.d.
CITE: (5/7/85) Ind., 477 N.E.2d 537
SUBJECT: PCR - pleadings constitute evidence
HOLDING: 4th Dist. erroneously decided new question of law when it held (471 N.E.2d 722) that D's petitions did not constitute competent evidence to establish his claims for PCR. 4th Dist. relied upon general rule that averments in pleadings are considered self-serving declarations & as such are not admissible evidence. Ct. finds PCR petitions are affidavits, not ordinary pleadings. PC 1, Section 5 provides affidavits may be received as evidence. Here, Tr. Ct. clearly considered petitions to be evidence; state made no objection. See Haskett, App., 327 N.E.2d 612. Neither side presented any other evidence; state relied on laches. Held, 4th Dist. decision vacated; Tr. Ct. judgment granting D's PCR petition affirmed. Pivarnik, joined by Givan, DISSENTS.

RELATED CASES: Sanders, 596 N.E.2d 225 (Cleland opinion must be confined to circumstances of that case and cannot be extended to stand for proposition that verified pleading admitted into evidence for limited purpose, and not for truth of matters stated therein, may constitute evidence of facts alleged in such pleading).

TITLE: State v. Lime
INDEX NO.: X.1.d.
CITE: (4th Dist., 08-30-93), Ind. App., 619 N.E.2d 601
SUBJECT: Post-Conviction Relief (PCR) Petition & transcript sufficient
HOLDING: Where failure to advise of Boykin rights was involved, verified PCR petition alleging inadequate advisement, plus transcript not formally entered into evidence, were sufficient to sustain burden of proof (BOP) & PCR Ct. did not err in granting petition. Petitioner filed petitions alleging failures to advise of Boykin rights in two previous pleas. At PCR hearing he did not testify & rested on verified petitions. Transcripts of guilty plea hearings were argued about, discussed, & considered as evidence by all parties, but were not admitted in evidence. PCR Ct. granted both petitions, finding no evidence in record to show D was ever advised of right to jury trial, to confront & cross-examine witnesses, & to avoid self-incrimination.

In State v. Cleland, 477 N.E.2d 537, Ct. held petitions under oath were really affidavits & could be considered as evidence, absent timely objection by State. Additionally, fact petitions were not formally entered into evidence did not preclude their consideration under facts of case. Although in State v. Sanders, 596 N.E.2d 225, S. Ct. found Tr. Ct. erroneously considered petition as if it had been admitted into evidence for truth of its allegations, there petition was introduced for limited purpose & not for truth of matters contained therein.

Here, Ct. concluded that as in Cleland, petitions could be considered as evidence because they were not submitted for limited purpose, all parties considered them to be evidence, & State did not object. Although PCR Ct. cannot take judicial notice of transcript from original proceedings except under exceptional circumstances, here all parties treated them as though they were evidence & Ct. found it would be manifestly unjust to petitioner to reverse PCR Ct. on that ground. Because Boykin rights were involved, failure to advise D required vacation of conviction without showing of prejudice.

RELATED CASES: Graham, 947 N.E.2d 962 (Ind. Ct. App 2011) (if PCR court takes judicial notice of other court records in ruling upon a PCR petition, those records should be made part of the PCR record; but PCR court is not required to go searching for records in support of either party's position or become an advocate or investigator for either party); Evans, App., 809 N.E.2d 338 (unlike petitioner in Lime, D did not advise post- conviction Ct. that he was resting upon his petition; thus, post-conviction Ct. did not err in not considering D's petition for PCR as evidence).

TITLE: Weatherford v. State
INDEX NO.: X.1.d.
CITE: (08-31-93), Ind., 619 N.E.2d 915
SUBJECT: Post-Conviction Relief (PCR) burden of proof (BOP) - Habitual Offender (HO) sequencing
HOLDING: In challenging HO enhancement in PCR, D must show that previous convictions did not in fact occur in required order reversing decision at 597 N.E.2d 17, finding Ct. App. had wrongly allocated BOP. PCR procedures do not afford Ds "super appeal," & in PCR, petitioners bear burden of establishing grounds for relief by preponderance of evidence. There are differences in HO issues raised on direct appeal as opposed to PCR.

To enhance sentence by HO finding under older statute, Ind. Code 35-8-8-1, State had to prove D was twice convicted, sentenced & imprisoned for felony. He had to have been imprisoned on first sentence prior to commission of second & imprisoned on second prior to commission of instant offense. Under review on direct appeal, issues of improper sequencing or inadequate proof have been treated as fundamental error, requiring vacation of HO adjudication. Under review on PCR proceedings, however, relief is granted only where evidence clearly demonstrates commission/conviction/sentencing are not in proper order.

D was found HO based on 1960 conviction, three 1965 convictions, & 1971 firearms conviction. PCR challenge related to proof of date of commission of federal offense. Evidence was not inconsistent with PCR Ct.'s denial of petition. D could not prevail simply by putting State to proof as though at trial or on direct appeal but had to demonstrate that convictions did not in fact occur in required order, DeBruler, J., dissenting.

RELATED CASES: Jones, App., 819 N.E.2d 877 (distinguishing Weatherford, Ct. affirmed vacation of HO conviction to which D had pleaded guilty, where D subsequently had one of underlying convictions to HO determination set aside); Bryant, App., 760 N.E.2d 1141 (D's guilty plea to habitual count had no effect in this case because D demonstrated that underlying convictions for HO enhancement were out of sequence); Phelps, App., 743 N.E.2d 762 (fn 3; Ct. refused to address Weatherford claim when State raised it for first time on appeal); Brown, App., 712 N.E.2d 503 (Ct. rejected argument that Weatherford should not apply to D who pled guilty before Wetherford was decided); Thomas, App., 652 N.E.2d 550 (Ct. rejected D's argument that Weatherford should not apply to cases involving guilty pleas); Lingler, 644 N.E.2d 131 (D failed to show that previous convictions did not in fact occur in required order, & claim may not be couched in terms of ineffective assistance of counsel).

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.e. Evidentiary hearing/ summary disposition

TITLE: Abercrombie v. State
INDEX NO.: X.1.e.
CITE: (2d Dist. 9/14/89), Ind. App., 543 N.E.2d 407
SUBJECT: Evidentiary hearing - second prong of White
HOLDING: Tr. Ct. erred in summarily denying D's PCR petition because affidavit stating that D would not have pled guilty with proper advisement was "conclusory." D filed PCR petition, asserting that Tr. Ct. failed to advise him of potential consecutive sentences. To prevail on defective advisement claim, D must show: 1) Tr. Ct. failed to give required advisement; & 2) had D received proper advisement, he would not have pled guilty. White, 497 N.E.2d 893. D met first condition. However, Tr. Ct. determined that, as matter of law, D's affidavit was insufficient to support second condition because it was "largely conclusory". Issue is what D would have done if properly advised. What any D would have done is basic fact that can be proved only by assertion of what alternative conduct would have been. Alternative conduct may be corroborated by extrinsic facts but cannot be proved by them. Therefore, although D's affidavit was conclusory, Tr. Ct. erred in determining it was facially insufficient to meet burden of proof. Held, reversed & remanded for evidentiary hearing.

RELATED CASES: Harrison, 585 N.E.2d 662 (petitioner's assertion in second post-conviction petition that he would have insisted on jury trial and not plead guilty if he had known that Court had discretionary power to enter judgment on theft charges as class A misdemeanor did not raise material issue of fact as to voluntariness of his guilty plea).

TITLE: Allen v. State
INDEX NO.: X.1.e.
CITE: (1st Dist., 2-11-03), Ind. App., 791 N.E.2d 748
SUBJECT: Summary disposition of post-conviction petition - standard of review
HOLDING: Post-Conviction Rule 1, section 4 contains two subsections indicating that a Ct. may deny a petition without a hearing. Section 4(f) allows Tr. Ct. to deny petition without further proceedings if pleadings conclusively show that petitioner is entitled to no relief. To avoid dismissal of petition under section 4(f), D has burden only to plead facts that raise an issue of possible merit. Clayton v. State, 673 N.E.2d 783 (Ind. Ct. App 1996).

Under plain language of section 4(g), Tr. Ct. may grant summary disposition after a motion by either party & after considering pleadings & other evidence submitted. A grant of summary disposition under this section is erroneous unless "there is no genuine issue of material fact & the moving party is entitled to judgment as a matter of law."

Here, Tr. Ct. erred in disposing of D's claim of ineffective assistance of counsel under section 4(f). Whether counsel provided effective assistance is evidentiary question, & an issue of possible merit. State's denial of claim was insufficient to invalidate D's petition. Held, judgment affirmed in part, reversed in part & remanded for further proceedings on D's claim that he received ineffective assistance of counsel.

RELATED CASES: Binkley, 993 N.E.2d 645 (Ind. Ct. App 2013) (court erred in summarily denying PCR petition alleging that counsel was ineffective, which is usually a fact-sensitive issue that must be heard); Kelly, 952 N.E.2d 297 (Ind. Ct. App 2011).

TITLE: Bailey v. State
INDEX NO.: X.1.e.
CITE: (4/27/83) Ind., 447 N.E.2d 1088
SUBJECT: PCR - summary disposition of pro se petition
HOLDING: Tr. Ct. erred in summarily denying PCR petition because there was a factual issue requiring an evidentiary hearing. Ferrier, 385 N.E.2d 422; Frazier, 335 N.E.2d 623. Here, indigent D filed pro se PCR petition 3/24/82 alleging insufficient evidence to support Class A robbery because non-victim did not receive serious bodily injury. Hill, 424 N.E.2d 999; Clay, 416 N.E.2d 842. Hill & Clay were decided after D's direct appeal & *clarified* elements of Class A robbery (bodily injury to victim or serious bodily injury to any other person). PCR hearing scheduled 4/28/82. On 4/13, state filed answer & motion for summary disposition raising waiver (failure to raise issue in direct appeal). On 4/15, Public Defender moved for continuance to consult with D & review trial transcript. On 4/21, Tr. Ct. denied continuance & granted summary disposition. Ct. finds whether clarification in law is sufficient to overcome waiver is a factual issue requiring an evidentiary hearing (PC 1, Section 4(e, f)). Held, reversed & remanded. DISSENT by Givan would affirm summary denial of PCR.

RELATED CASES: McClure, 71 N.E.3d 845 (Ind. Ct. App 2017) (summary denial of D's PC petition was proper where by failing to submit supporting affidavit per trial court's instructions, D presented no evidence to support his claims.); Truitt, App., 853 N.E.2d 504 (Post-conviction court erred in denying D's petition for post-conviction relief without a hearing on the merits of his IAC claims); Russell 510 N.E.2d 1339 (Tr. Ct. erred in granting state's motion for summary disposition 22 days after D filed pro se PCR petition; such time was insufficient to allow State Public Defender to prepare & to comply with PC Rules, *citing* Bailey).

TITLE: Caruthers v. State
INDEX NO.: X.1.e
CITE: (7/29/2016), 58 N.E.3d 207 (Ind. Ct. App 2015)
SUBJECT: Hearing required before dismissing PCR petition for failure to prosecute
HOLDING: Trial Rule 41(E) required Tr. Ct. to hold a hearing before it summarily dismissed D's PCR petition for failure to prosecute. See Rumfelt v. Himes, 438 N.E.2d 980 (Ind. 1982). The rule requires more than just scheduling a hearing.

Here, D filed a pro se petition for post-conviction relief in 2010. A public defender entered an appearance, then withdrew it in 2013. D did not take further action, and Tr. Ct. *sua sponte* set a hearing to dismiss for May, 2015. D filed motions for discovery and transcripts in April 2015. Before the hearing,D filed a motion asking the court not to close his case. There were multiple mechanisms that were available to Tr. Ct. to address D's motions, such as arranging a telephone conference or directing D to submit his case by affidavit. However, Tr. Ct. dismissed his action without holding a hearing as required by Trial Rule 41(E). Held, judgment reversed and remanded for either a T.R. 41(E) hearing or reinstatement of D's action.

TITLE: Clayton v. State
INDEX NO.: X.1.e.
CITE: (4th Dist., 11-27-96), 673 N.E.2d 783 (Ind. Ct. App. 1996)
SUBJECT: Erroneous summary disposition of pro se petition for PCR
HOLDING: Post-conviction Ct. erred in its *sua sponte* summary denial of D's petition for PCR. P-C Ct. may summarily deny petition for PCR if pleadings conclusively show that petitioner is entitled to no relief. Ind. Post-Conviction Rule 1, Sec. 4(f). D argued that his petition for PCR raised questions of material fact pertaining to his trial counsel's failure to advise him of BMV's administrative suspension of his driver's license. Where, as here, ineffective assistance of counsel is alleged, & facts pled raise issue of possible merit, summary disposition of PCR petition is erroneous. Gann, App., 550 N.E.2d 803. Further, P-C Ct.'s failure to make specific findings of fact & conclusions of law on all issues presented, as required by P-C.R. 1, Sec. 6, was additional reason for remand. Ct. also held that summary denial of D's petition was proper on issue pertaining to lack of Tr. Ct. advisement regarding one-year suspension for refusal to submit to chemical test. Held, reversed & remanded for evidentiary hearing & subsequent findings & conclusions on ineffective assistance of counsel issue; Chezem, J., concurring & dissenting.

RELATED CASES: Kinman, 152 N.E.3d 1060 (Ind. S. Ct. 2020) (remand necessary where Tr. Ct. erroneously failed to include in its summary order any findings or conclusions on the issues D raised in his de facto petition for PCR); Osmanov, 40 N.E.3d 904 (Ind. Ct. App 2015) (Tr. Ct. erred by *sua sponte* summarily denying PCR petition; fact that Tr. Ct. took judicial notice of guilty plea hearing that was not part of PCR record illustrates Tr. Ct. applied incorrect standard and considered facts); Kuhn, App., 901 N.E.2d 10 (Post-Conviction Ct. erred in conducting evidentiary hearing on D's ineffectiveness of trial counsel claims in D's absence; D was entitled to an opportunity to present evidence in support of his claims); Tyson, App., 868 N.E.2d 855 (distinguishing Clayton, 673 N.E.2d 783, Ct. noted that D's allegation of ineffective assistance of counsel was unsupported by fact & was nothing more than a conclusory allegation); Evolga, App., 722 N.E.2d 370 (Tr. Ct. erred in summarily denying D's petition for PCR without evidentiary hearing; Tr. Ct.'s assessment that none of D's issues constituted fundamental error & that he was procedurally barred from asserting them was incorrect); Lloyd, App., 717 N.E.2d 895 (summary denial of PCR petition proper where D failed to adduce any argument which, if taken as true, would have produced different result in trial and/or established ineffective trial counsel).

TITLE: Colvin v. State
INDEX NO.: X.1.e.
CITE: (11/30/82) Ind., 441 N.E.2d 1353
SUBJECT: PCR - hearing
HOLDING: Hearing required on PCR petition only when issue of material fact presented. Hearing is unnecessary when allegations conclusively demonstrate petitioner is not entitled to relief. Baker, 355 N.E.2d 251. Here, D filed pro se PCR petition contending U.S. Cts. have no jurisdiction over him because he is a citizen of New Afrika by birth & remains such by choice. Tr. Ct. dismissed petition without hearing. D argues because distant ancestors were brought to America in slavery, he is like one forcefully abducted from another jurisdiction & thus may not be tried in the receiving jurisdiction. (Cites omitted.) Ct. finds even if D's argument is accepted as true, even an alien residing in this country is subject to its laws while within its border. 45 Am. Jur. 2d, Int'l Law Section 81. Held, no error in summary dismissal of PCR petition.

RELATED CASES: Albright, 463 N.E.2d 270 (vacating fourth district opinion at 459 N.E.2d 76).

TITLE: Eller v. State
INDEX NO.: X.1.e.
CITE: (8-8-01), Ind. App., 757 N.E.2d 141
SUBJECT: Summary disposition improper where D is clearly indigent
HOLDING: Where it is clear that post-conviction relief (PCR) petitioner is likely indigent & has requested referral of petition to State Public Defender, omission of an indigency affidavit does not strip him of right to referral & review of case by State Public Defender. Here, D's petition was not referred to State Public Defender & was summarily denied nine days after it was filed. Right to counsel of indigent prisoners pursuing PCR, although not constitutional in dimension, is provided for under certain circumstances by Ind. Code 33-1-7-2(a) & P-C.R. 1(9)(a). In Sanders v. State, 401 N.E.2d 694 (Ind. 1980), where S. Ct. reversed trial Ct.'s summarily denial of PCR petition, there was clear proof of indigency, but no express request for appointment of State Public Defender. Here, D, unlike Sanders, did not include affidavit of indigency, but he did explicitly request referral of petition to State Public Defender. Further, indigent status was clear based on his pretrial representation by public defender & his current incarceration in Department of Corrections for forty years. Held, judgment reversed.

TITLE: Ford v. State
INDEX NO.: X.1.e.
CITE: (3rd Dist., 08-03-93), Ind. App., 618 N.E.2d 36
SUBJECT: Post-Conviction Relief (PCR) hearing not required & collateral attack not permitted
HOLDING: PCR Ct. did not err in denying petition without hearing because issues raised did not constitute material issues of fact. On third day of D's trial for rape, intimidation, confinement & theft, D entered guilty plea to rape & intimidation, & other charges were dismissed. In PCR petition he alleged error in denial of pre-trial motions for continuance & to test competency of victim, sufficiency of factual basis for plea, & that plea was unknowing & involuntary. PCR Ct. denied petition without hearing. On appeal, D alleged same errors & that PCR Ct. erred in denying petition without hearing.

By pleading guilty, D foreclosed any challenge to errors in ruling on pre-trial motions. Collateral attacks on convictions are limited in PCR proceedings by Ind. Code 35-35-1-4(c), & challenges to pre-trial rulings are not matters that can be raised in PCR petition. PCR Ct. is required to hold hearing on petitions only when issue of material fact is presented in petition. Because pre-trial rulings could not be attacked, they did not raise material issue. Although D also challenged factual basis for plea, no facts were pled that raised material issue because D admitted factual basis was present. Lastly, D alleged that in presentence report & at sentencing, he denied guilt, making plea unknowing & involuntary. This allegation also failed to raise material issue because statement of innocence after acceptance of plea does not amount to protestation of innocence requiring that plea be set aside, Mayberry, App., 542 N.E.2d 1359, *trans. denied*.

TITLE: Fortson v. State
INDEX NO.: X.1.e.
CITE: (8/7/87) Ind., 510 N.E.2d 1369
SUBJECT: PCR - summary disposition; effect of pro se filing
HOLDING: Tr. Ct. did not err in summarily denying D's PCR petition 3 months after State Public Defender (SPD) entered her appearance. Here, D filed pro se petition on 9/14. State filed response to petition 5 days later, rebutting allegations contained in petition & requesting that petition be denied without hearing. On 9/24, D responded to state's answer. Next day, state filed supplemental response. SPD filed appearance on 10/5. Tr. Ct. summarily denied petition on 1/10. SPD filed motion to correct error & attached affidavit that case load prevented opportunity to review D's case for possible amendment of petition. Although Ct. recognizes SPD's substantial case load & inevitability of delay due to volume of cases, Ct. cites 2 reasons in support of summary dismissal. (1) Responsive pleadings by state specifically requested petition be denied without hearing, alerting SPD to imminent possibility of summary dismissal. Some action on part of SPD was required to prevent summary denial. (2) Pro se filing of PCR petition carries natural adverse consequences by starting time restrictions of PC 1, thereby limiting time available to SPD to consider potential claims. Held, denial of PCR affirmed.

RELATED CASES: Gann, App., 550 N.E.2d 803 (summary denial one day after pro se filing is denial of meaningful assistance of counsel).

TITLE: Fuquay v. State
INDEX NO.: X.1.e.
CITE: (1st Dist., 12-30-97), Ind. App., 689 N.E.2d 484
SUBJECT: Post-conviction remedies - evidentiary hearing through affidavits
HOLDING: Post-conviction Ct. did not err in denying pro se petitioner's request for evidentiary hearing & subsequently dismissing petition for post-conviction relief due to petitioner's failure to file affidavit. When petitioner elects to proceed pro se, post-conviction Ct. may exercise its discretion to order cause submitted upon affidavit. P-C.R. 1, 9(b). Pro se petitioner who requests issuance of subpoena for witness at evidentiary hearing shall specifically state by affidavit reason witness' testimony is required & substance of witness' expected testimony. If Ct. does not rule upon motion to reconsider within five days, motion is deemed denied & does not delay any proceedings associated with case. Ind. T.R. 53.4(A). Here, because pro se petitioner filed motion for evidentiary hearing after Ct. had granted State's motion to proceed by affidavit, petitioner's motion was motion to reconsider. In petitioner's motion to reconsider, petitioner contended he needed trial counsel's testimony to prove counsel was ineffective; however, petitioner failed to state what he expected counsel's testimony to be & did not attempt to support his claim through other sources. Thus, evidentiary hearing would not have aided petitioner because he was not entitled to have counsel testify & filing of motion to reconsider did not extend time to file affidavits. Held, dismissal of petition for post-conviction relief affirmed.

RELATED CASES: Hamner, App., 739 N.E.2d 157 (D did not waive issue of Tr. Ct.'s denial of his request for evidentiary hearing based on his failure to explain substance of his trial attorney's testimony; P-C.R 1 □9 allows for evidentiary hearing to first be set & then petitioner submit affidavit dealing with witnesses; Ct. never set evidentiary hearing); Smith, App., 822 N.E.2d 193 (no error in denying D an evidentiary hearing; Hamner confused & erroneously applied standards to a denial of a PCR petition under Rule 1 (4)(f) to Rule 1(9)(b); necessity of evidentiary hearing is best left to PCR Ct.'s discretion).

TITLE: Holliness v. State
INDEX NO.: X.1.e.
CITE: (8/25/86) Ind., 496 N.E.2d 1281
SUBJECT: PCR - summary denial before State PD amends pro se petition
HOLDING: On rehearing. Tr. Ct. erred in summarily dismissing D's pro se petition 61 days after State PD entered appearance. D contends he was denied due process of law, right to effective assistance of PCR counsel, & opportunity to present all trial errors as basis for relief, in contravention of PC 1, Sections 1, 4, 9. Ct. accepts State PD's contention that dismissal after 61 days is unreasonable in light of time required to interview client, read appellate record, interview trial & appellate attorneys, & investigate legal & factual matters to determine if petition should be amended. Proper procedure for dismissal after PD has made appearance, but before amended petition has been filed, is to order D to show cause why petition should not be dismissed, pursuant to TR 41(E). Held, remanded for further proceedings. Ct.'s earlier opinion at 494 N.E.2d 305 impliedly vacated.

RELATED CASES: Taylor, App., 662 N.E.2d 647 (disposal of PCR petition without first issuing show cause order pursuant to T.R. 41(E) proper because petition denied rather than dismissed); Perigo, App., 646 N.E.2d 372 (error in summarily dismissing PCR petition; no record of withdrawal of counsel as is required under P-C.R.1(9)(c), & nothing in record to explain reasons/circumstances surrounding D's failure to act on petition); Stoner, App., 506 N.E.2d 837 (State PD's failure to enter appearance on behalf of D after appointment to his case did not warrant summary dismissal); Colvin, App., 501 N.E.2d 1149 (error in summarily dismissing PCR petition 6 months after State PD entered appearance; nothing in PCR rules specifies time limit within which petition must be amended; proper course was to issue order to show cause why petition should not be dismissed; concurrence noted concern about confusion between denial of petition under PC 1, §4(e) & dismissal of petition under TR 41(E)).

TITLE: Joseph v. State
INDEX NO.: X.1.e.
CITE: (1st Dist., 11-23-92), Ind. App., 603 N.E.2d 873
SUBJECT: Post-Conviction Relief (PCR) summary denial improper
HOLDING: It was error for PCR Ct. to deny D's petition on factually sensitive issue, either on merits or on basis of laches, without first holding evidentiary hearing on petition. Twelve years after plea, D filed pro se PCR petition alleging his waiver of counsel was not knowing, voluntary & intelligent, along with request for public defender (PD) & affidavit of indigency. Petition was forwarded to PD's office next day, but day after PD entered appearance PCR Ct. summarily denied petition, finding waiver of counsel was knowing & intelligent, & that relief was also precluded by laches. It was error to summarily deny petition so soon after referral to PD because PD must be afforded time to investigate & amend petition. This error did not require reversal, because D did not show necessary prejudice from Ct.'s action. Ct. did find reversal necessary, however, because waiver of counsel issue raised in petition was factually sensitive & could not be properly determined without evidentiary hearing. Ct. also noted reversal was mandated because when State raises affirmative defense of laches to PCR, D is entitled to evidentiary hearing on that issue. Gregory, 463 N.E.2d 464. Held, reversed & remanded for evidentiary hearing on merits of waiver of counsel issue & defense of laches.

RELATED CASES: Taylor, App., 662 N.E.2d 647 (PCR Ct. did not err in summarily denying D's petition two & one-half years after State Public Defender had entered appearance where there was sufficient time for public defender to investigate case & amend D's pro se petition. D failed to show what public defender's investigation would have shown or how public defender would have amended petition).

TITLE: Laboa v. State
INDEX NO.: X.1.e.
CITE: (08-15-19), Ind. Ct. App., 131 N.E.3d 660
SUBJECT: Erroneous summary denial of PCR petition
HOLDING: Proper procedures must be followed when addressing pro se PCR filings, no matter how dubious the claims. Here, trial court erred in summarily denying Defendant's petition for PCR *sua sponte* without holding an evidentiary hearing as contemplated by P-C.R. 1(5). Although P-C.R. 1(9) allows post-conviction court to order the cause submitted by affidavit when the petitioner is pro se, that did not happen here. Fact that Defendant submitted several affidavits to the court when he filed (and then amended) his petition is not equivalent to ordering the parties to proceed upon affidavit. And because post-conviction court stated it had considered the pleadings *and* affidavits submitted by Defendant, it did not decide the case pursuant to P-C.R. 1(4)(f) (allowing summary denial when pleadings conclusively show that petitioner is entitled to no relief). Held, judgment reversed and remanded with instructions to either order the cause to be submitted by affidavit, allowing Defendant time to gather and submit affidavits he feels are relevant to his allegations, or hold an evidentiary hearing.

TITLE: McClure v. State
INDEX NO.: X.1.e.
CITE: (2/24/2017), 71 N.E.3d 845 (Ind. Ct. App 2017)
SUBJECT: Summary denial of PCR petition affirmed
HOLDING: Post-conviction trial court properly granted the State's motion for summary judgment because Defendant presented no evidence to support his claims. Defendant had pled guilty to robbery resulting in serious bodily injury, a Class A felony, and to being an habitual offender. He later filed a petition for post-conviction relief, alleging the trial court committed fundamental error accepting the plea without a factual basis and that trial counsel was ineffective for advising Defendant to plead guilty to being an habitual offender. Because Defendant was pro se, the trial court ordered the cause submitted upon affidavit. See Ind.Post-Conviction Rule 1(9). Because Defendant failed to submit an affidavit, he presented no evidence to support his claims. Held, summary denial of Defendant's petition for post-conviction relief affirmed.

TITLE: Medlock v. State
INDEX NO.: X.1.e.
CITE: (1st Dist. 12/19/89), Ind. App., 547 N.E.2d 884
SUBJECT: PCR - voluntariness of guilty plea; failure to issue subpoenas to D's witnesses
HOLDING: Failure to issue subpoenas to D's witnesses was reversible error where their testimony at PCR hearing may have had impact on issue of whether D's guilty plea was voluntary. D pled guilty to both state & federal charges arising from financial transactions, & now challenges voluntariness of state plea. D properly requested subpoenas for 2 witnesses for his PCR hearing, but clerk failed to issue them. D asserts that witnesses would have testified that they promised him that federal sentence would be 5 years, concurrent with state sentence, & that he could serve sentence in federal custody. Record shows that D read & signed state plea agreement, which included sentencing recommendation of 6-year executed term to be served in state custody. D's attorney on federal charge testified that he informed D that federal judge could not order concurrent sentences, & that state sentence would be served in state custody. At guilty plea hearing, D responded that he understood sentencing recommendation, it was complete & accurate, & no other promises had been made to him. Generally, in face of such unequivocal record, D will likely not be able to prevail on claim that plea was induced by unfulfilled promises. LaFave, Criminal Procedure, Sec. 202. However, one federal Ct. has allowed habeas corpus petitioner to present evidence to substantiate similar claim. US v. Unger, (CA8 1981), 665 F.2d 251. Same result should prevail here. Proper forum for determining voluntariness of plea is Tr. Ct., & D should have opportunity to present witnesses there. Held, reversed & remanded for new PCR hearing, with subpoenas granted.

RELATED CASES: Roberts, 203 N.E.3d 1087 (Ind. Ct. App. 2023) (after Petitioner's request to subpoena witnesses granted but subpoenas not issued, it was error for the post-conviction hearing to proceed without the necessary witnesses).

TITLE: Sherwood v. State
INDEX NO.: X.1.e.
CITE: (9/13/83) Ind., 453 N.E.2d 187
SUBJECT: PCR - summary disposition; allegation of ineffective assistance of counsel
HOLDING: Tr. Ct. erred in summarily denying D's PCR petition which raised competency of counsel (D alleged his attorney advised him he would be committed to a hospital facility). Here, Ct. rejects state's contention that D made no allegation as to existence of question of law re adequacy of counsel, finding 2 sentences in D's pro se PCR petition were adequate to raise issue. Competency of counsel is an evidentiary question (Tooley, 297 N.E.2d 856) which must be determined at an evidentiary hearing unless the state's answer admits D's factual allegations. State denied D's allegations; this was sufficient to invoke need to hold evidentiary hearing, regardless of how unlikely it seems D could produce evidence to support claim. Ferrier, 385 N.E.2d 422; Frazier, 335 N.E.2d 623; Tooley. Held, denial of PCR reversed.

RELATED CASES: Gann, App., 550 N.E.2d 803.

TITLE: Shoulders v. State
INDEX NO.: X.1.e.
CITE: (5/4/84) Ind., 462 N.E.2d 1034
SUBJECT: PCR - hearing following default judgment
HOLDING: PCR Ct. did not err in requiring D to present evidence on his petition after it had granted his motion for default judgment. TR 55(B). Effect of default judgment is that facts as alleged in petition are deemed admitted. See State v. Fair, 450 N.E.2d 66; Purcell, App., 330 N.E.2d 779. However, Ct. must determine whether as matter of law facts as alleged in petition entitle D to relief. Fair; Lloyd 383 N.E.2d 1048. D failed to meet burden of proof on issues raised in PCR petition (not notified of arrest, newly discovered evidence, ineffective assistance). Held, no error in denial of PCR.

TITLE: State v. Fair
INDEX NO.: X.1.e.
CITE: (6/28/83) Ind., 450 N.E.2d 66
SUBJECT: PCR - evidentiary hearing/summary disposition; state's prior response suffices
HOLDING: Tr. Ct. erred in granting D's PCR petition where record of PCR proceedings shows no presentation of evidence by D. PC 1, Section 5; AR 7.2(A). Where state's answers to first 2 PCR petitions contained general denials to allegations also stated in final & properly filed PCR petition, Tr. Ct. erred in summary disposition in D's favor. Lloyd 383 N.E.2d 1048. Here, state failed to appear at hearing. State's answers to D's original petitions (filed by Richard Lee Owen & ordered stricken by Ind. S. Ct.) sufficed to alert judge as to genuine issue of material fact, thus summary disposition was improper. Held, grant of PCR reversed. DISSENT by Prentice contends majority opinion "turns rules of appellate review upside down." State, not D, bears burden in appealing PCR Ct.'s judgment. State has not shown summary disposition was inappropriate.

TITLE: State v. Gonzalez-Vazquez
INDEX NO.: X.1.e.
CITE: (3/27/2013), 984 N.E.2d 704 (Ind. Ct. App 2013)
SUBJECT: T.R. 6(E) extension for response to motion served by mail applies to summary judgment responses
HOLDING: Post-conviction court erred in rejecting State's response to D's motion for summary judgment as untimely. Post-conviction court erroneously concluded that three-day extension allowed by T.R. 6(E) for responses to motions served by mail does not apply to post-conviction proceedings. Held, reversed and remanded for further post-conviction proceedings.

TITLE: State v. Gonzalez-Vazquez
INDEX NO.: X.1.e.
CITE: (3/27/2013), 984 N.E.2d 704 (Ind. Ct. App 2013)
SUBJECT: Trial Rule 56 deadlines for summary judgment responses apply to P.C.R. cases
HOLDING: Addressing an issue that may arise on remand, the Court ruled that T.R. 56 deadlines for responses to a P.C.R. petitioner's motion for summary judgment do apply to P.C.R. proceedings. The State argued the deadlines should not apply because "significant prosecutions could be undone without any basis simply because a prosecutor's office fails to respond in thirty days."

"The summary judgment procedure that is available under Indiana Post-Conviction Rule 1(4)(g) is the same as under Trial Rule 56(C)." Hough v. State, 690 N.E.2d 267, 269 (Ind. 1997). Moreover, "we do not anticipate that a motion for summary judgment could often be granted to the . . . petitioner by default." Bald assertions of ineffective assistance are inadequate to make a prima facie showing or prejudice. Held, reversed and remanded for further post-conviction proceedings.

TITLE: Tyson v. State
INDEX NO.: X.1.e.
CITE: (2nd Dist., 12-20-93), Ind. App., 626 N.E.2d 482
SUBJECT: Summary denial of Post-Conviction Relief (PCR) error
HOLDING: Summary denial of D's PCR petition alleging State violated Brady v. Maryland (1963), 373 U.S. 83, by failing to disclose exculpatory evidence was improper, & D was entitled to hearing on issue. In petition, D alleged State was aware of full scope of relationship of complaining witness (CW) & her family with their lawyer, including contemplation of civil action against D, & failed to provide information to defense. Although State responded that allegation was without any discernible factual basis; to summarily deny petition, Tr. Ct. must find that taking allegations as true, petitioner is not entitled to relief.

In discovery, D had requested "all material or information within the State's possession or control which...tends to impeach the credibility of any witness in this matter." U.S. S. Ct. has found obligation under Brady applies to impeachment as well as exculpatory evidence, U.S. v. Bagley (1985), 473 U.S. 667, but that failure to disclose such evidence requires reversal only if there is reasonable probability it would result in different result at trial. Ct. found that whether State knew of alleged financial motives of CW, whether it failed to disclose information concerning same, & whether there is reasonable probability disclosure would have made difference in jury's verdict, were all questions of fact that could not be answered by appellate Ct. Therefore, D was entitled to evidentiary hearing where he would have burden of proving those facts, & Tr. Ct. erred in summarily denying petition on this issue. Held, affirmed in part, & reversed on this issue.

RELATED CASES: Dickens, 997 N.E.2d 56 (Ind. Ct. App 2013) (because national experts' misgivings about reliability of bullet comparative analysis would not likely have changed result of first trial, failure to disclose information did not constitute a Brady violation entitling D to new trial); Robertson, App., 687 N.E.2d 223 (erroneous dismissal of PCR petition on basis of failure to prosecute).

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.f. Proof of prior proceedings

TITLE: Clay v. State
INDEX NO.: X.1.f.
CITE: (2d Dist. 1/18/89), Ind. App., 532 N.E.2d 1204
SUBJECT: Guilty pleas - record unavailable; Pre-Boykin cases
HOLDING: Unavailability of trial record & impossibility of reconstructing same does not relieve D of burden of showing there would have been different result had he been properly advised of nature of penalty & had there been an adequate factual basis. D pleaded guilty to felony charge under Offenses Against Property Act, 1963 (Spec. Sess.) Ind. Acts, Ch. 10, in 1964, after being charged with burglary. D challenges guilty plea on grounds he was not advised of his Boykin rights, he was misadvised that offense was misdemeanor, & factual basis was lacking for offense. Boykin v. AL (1969), 395 U.S. 1709, is not given retroactive application. Campbell 321 N.E.2d 560; Conley 384 N.E.2d 803, 809, n.1. D here must show prejudice if he is to prevail on grounds pre-Boykin plea was involuntary. White 497 N.E.2d 893; Disney 441 N.E.2d 489. D has failed to do so. That record is unavailable & impossible to reconstruct does not relieve D of burden of showing there would have been different result. Id.; White, *supra*. Affirmed.

TITLE: Corder v. State
INDEX NO.: X.1.f.
CITE: (4th Dist. 5/21/87) Ind. App., 516 N.E.2d 71
SUBJECT: Guilty plea - reconstruction of record impossible
HOLDING: Tr. Ct. erred in denying D's petition for PCR. Here, D presented uncontested evidence showing record & transcript of guilty plea hearing no longer existed, & impossibility of reconstruction because all parties present at hearing were either deceased or could not remember details of proceedings. Boykin v. AL (1969), 369 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274, requires advisements on the record; without such record, Ct. cannot imply D was advised of his constitutional & statutory rights. Loss of record or transcript of guilty plea hearing does not, per se, require guilty plea to be vacated. Zimmerman 436 N.E.2d 1087; Gallagher 410 N.E.2d 1290. Vacation of guilty plea is proper only when delay in seeking relief is deemed reasonable. Gallagher If record is unavailable, D must attempt to reconstruct record pursuant to AR 7.2(a)(3)(c), if possible. Zimmerman. Here, state raised laches, asserting D's delay probably caused evidence to be destroyed under routine procedure followed by police department. Such assertion is insufficient to show laches. Lacy 491 N.E.2d 520; Canter, App., 496 N.E.2d 823; see also Twyman 459 N.E.2d 705 (card at X.5.e). Held, denial of PCR reversed.

RELATED CASES: Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show D waived right to counsel was insufficient to grant PCR; court must examine other evidence in record, which here, did not establish that D met his burden to show he did not waive right to counsel); Hall, 849 N.E.2d 466 (petitioner alleging he was not advised of Boykin rights in guilty plea from which he is no longer serving sentence is not entitled to relief solely because guilty plea transcript is lost & cannot be reconstructed); Hall, App., 812 N.E.2d 102 (D showed that record could not be reconstructed, & State did not argue laches).

TITLE: Curry v. State
INDEX NO.: X.1.f.
CITE: (12-4-96), Ind., 674 N.E.2d 160
SUBJECT: Guilty plea - D must attempt to reconstruct record or demonstrate impossibility
HOLDING: Tr. Ct. did not err in denying D's petition for post-conviction relief (PCR) thirteen years after guilty plea hearing on misdemeanor charge. Prior to accepting guilty plea, Tr. Ct. must determine that plea is voluntarily made by requiring D to make informed waiver of Fifth Amendment privilege against compulsory self-incrimination & Sixth Amendment rights to jury trial & confrontation. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). Proof that D was informed of rights may be provided by record of proceedings or, if record unavailable, by reconstruction thereof under Appellate Rule 7.2. Under Rule, party may prepare statement of pertinent proceedings from best available means, including personal recollection. If statements or conduct of trial judge are in controversy, statement must be supported by sworn affidavit. Loss of record or transcript of guilty plea requires vacation of plea & new trial only where D demonstrates that reconstruction of record is impossible. Zimmerman, 436 N.E.2d 1087. Here, D alleged that Tr. Ct. failed to advise him of constitutional rights before accepting his guilty plea. Tapes of proceedings had long since been destroyed, & D argued that reconstruction was impossible. Distinguishing Corder, App., 516 N.E.2d 71 & Wilburn, App., 499 N.E.2d 1173. Ct. found that D did not establish that all persons present at guilty plea hearing had died or could not remember details of guilty plea hearing. D testified at PCR hearing that trial judge did not advise him of constitutional rights, & Ct. found that this assertion could have been basis for affidavit to reconstruct record. Further, D acknowledged that neither probation officer, deputy prosecutor nor other persons potentially present at guilty plea hearing had been contacted to determine if they had memory or notes regarding hearing. Ct. found that D failed to reconstruct record pursuant to Appellate Rule 7.2 or prove impossibility thereof. Held, transfer granted, denial of post-conviction relief affirmed.

TITLE: Hall v. State
INDEX NO.: X.1.f.
CITE: (06-20-06), Ind., 849 N.E.2d 466
SUBJECT: Guilty plea -- advisements; burden of proof to show advisement of Boykin rights not given
HOLDING: A petitioner who pursues a claim for post-conviction relief challenging a plea of guilty on the ground that he was not advised of his Boykin rights is not entitled to relief solely because the guilty plea record is lost & cannot be reconstructed. Rather, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to relief. The Ct. reads Parke v. Raley, 506 U.S. 20 (1992), to hold that presumption of regularity afforded to final judgments permits a burden-shifting rule that makes it more difficult for Ds to challenge their guilty pleas many years after the fact in proceedings that are separate & distinct from underlying criminal proceedings. Thus, it is constitutional to require the D to prove that he was not given his Boykin rights, even when the transcript of the proceedings is unavailable, assuming no allegation that the unavailability was caused by governmental misconduct.

Here, D filed a petition for post-conviction relief from a 1983 guilty plea alleging he was not informed of his Boykin rights. At a hearing, judge testified that although he had no recollection of advising D of his Boykin rights, he was aware that Boykin advisements were required & had no knowledge of a proceeding in which he failed to give Boykin. D's attorney at guilty plea hearing testified that trial judge always included Boykin rights, & prosecutor testified he was concerned to ensure Tr. Ct. gave proper advisements. D never testified that he was not properly advised. Thus, D failed to prove, beyond a preponderance of evidence, that he was not advised of Boykin rights. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 102 vacated, judgment affirmed. Zimmerman v. State, 436 N.E.2d 1087 (Ind. 1982), expressly *overruled*.

RELATED CASES: Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show D waived right to counsel was insufficient to grant PCR; court must examine other evidence in record, which here, did not establish that D met his burden to show he did not waive right to counsel); Damron, App., 915 N.E.2d 189 (Tr. Ct's policy of destroying tapes of guilty plea hearings after 10 years, although in contravention of Indiana Crim. R. 10, did not constitute misconduct; further, D presented no evidence that he was not informed of his Boykin rights at time of his guilty plea).

TITLE: Phelps v. State
INDEX NO.: X.1.f.
CITE: (4th Dist.; 1-31-01), Ind. App., 743 N.E.2d 762
SUBJECT: Post-conviction relief - inadequate record
HOLDING: D's appellate counsel was not ineffective for failing to raise issue of sufficiency of habitual offender determination. Whether item has been admitted into evidence so that it can be considered by trier of fact in arriving at its verdict must be determined from facts & circumstances of each case. Essential test is whether trier of fact was free to consider item in making its findings. Carey v. State, 389 N.E.2d 357 (Ind. Ct. App 1979). Here, State's exhibits established commission, conviction & sentencing dates of D's underlying felonies. Although record revealed that prosecutor admitted exhibits into trial & that Tr. Ct. told prosecutor to read exhibits to jury, record did not indicate that prosecutor read exhibits to jury. However, post- conviction Ct. can presume from facts that prosecutor followed Tr. Ct.'s instructions. Held, denial of post-conviction relief affirmed; Sharpnack, J., dissenting on basis that where record does not provide that jury received exhibit, Ct. must presume that jury did not.

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.g. Amendments

TITLE: Bailey v. State
INDEX NO.: X.1.g.
CITE: (4/27/83) Ind., 447 N.E.2d 1088
SUBJECT: PCR - amendments; continuance
HOLDING: Tr. Ct. erred in denying continuance; D was prejudiced because his counsel was denied adequate time to review record & amend PCR petition. Here, D filed pro se PCR petition on 3/24/82. PCR hearing scheduled 4/28/82. On 4/13, state filed answer & motion for summary disposition raising waiver. On 4/15, Public Defender moved for continuance to consult with D & review trial transcript. On 4/21, Tr. Ct. denied continuance & granted summary disposition. PC 1, Section 9 provides State Public Defender shall serve as counsel for indigent PCR petitioner, shall confer with D & ascertain all grounds for PCR, amending petition if necessary. Ct. holds by being denied adequate time to amend petition, D may be prejudiced (PC 1, Section 8 requires D to raise all available grounds for relief in original petition). Held, reversed & remanded. DISSENT by Givan would affirm summary denial of PCR.

RELATED CASES: Owens, App., 500 N.E.2d 756 (Crim L 998(14); Tr. Ct. erred in refusing to permit D to amend petition after hearing, but prior to entry of judgment; REMEDY: Ct. reviews issue presented by amendment); Pinkston, App., 479 N.E.2d 79 (Crim L 1192; D does not have right to amend petition at any time; here, final judgment was entered by Tr. Ct. prior to appeal to & remand by Ct. App. (for evidentiary hearing on laches); held, no error in denial of request to amend petition).

TITLE: Lewis v. State
INDEX NO.: X.1.g.
CITE: (3d Dist. 07/22/92), Ind. App., 595 N.E.2d 753
SUBJECT: Amendment of Post-conviction Relief (PCR) petition
HOLDING: If PCR Ct. withdraws its findings & vacates judgment of initial ruling on petition for PCR, petitioner is placed in position where he is allowed to amend petition as matter of right, pursuant to PCR Rule 1, 4(C). D filed PCR petition & Ct. denied relief. D then successfully petitioned Ct. to vacate PCR judgment to allow him to present testimony of trial counsel who had been unavailable at time of PCR hearing, & Ct. withdrew its findings of fact & conclusions of law, & vacated order denying relief. Year later, D filed amended petition alleging number of new grounds for relief, & Ct. entered order that previous order vacating judgment was made only to allow for trial counsel testimony, not to raise additional claims, & ordered D's most recent petition stricken. Eventually trial counsel was heard & D's petition denied. Ct. App. found that once PCR Ct. vacated findings & judgment, petition was within ambit of PC Rule 1(4)(C), which gives petitioner leave to amend petition as matter of right, "at any time prior to entry of judgment." Held, reversed & remanded with instructions to reinstate amended petition & any further proceedings.

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.h. Findings of fact/ conclusions of law

TITLE: Bean v. State
INDEX NO.: X.1.h.
CITE: (8/28/84) Ind., 467 N.E.2d 671
SUBJECT: PCR - findings of fact/conclusions of law (FOF/COL)
HOLDING: Judge's order denying D's PCR petition was deficient (general/conclusory) but reversal & remand for more specific findings/conclusions is unwarranted. See Lowe 455 N.E.2d 1126. Here, D attempted to show systematic exclusion of minorities from juries in county. Ct. finds D's evidence cursory & obviously inadequate. Issue was sufficiently presented for this Ct.'s review. Held, denial of PCR affirmed.

RELATED CASES: Mitchell, 946 N.E.2d 640 (Ind. Ct. App. 2011) (issuance of post-conviction ruling before D submitted proposed findings of fact and conclusions was harmless error because D failed to meet his burden of proof by failing to 1) offer original trial transcript as exhibit, 2) ask Tr. Ct. to take judicial notice of transcript, and 3) present any other evidence to support his claims); Howland 503 N.E.2d 1217 (Crim L 998(21); Tr. Ct. did not err by summarily denying conclusory, second PCR petition without making FOF/COL, *citing* Mosley 477 N.E.2d 867; DeBruler DISSENTS without opinion); Jordan 502 N.E.2d 910 (PCR Ct.'s inadvertent technical mistake in *citing* wrong code section in its COL does not interfere with Ind. S. Ct.'s review; held, no error in denial of PCR); Carpenter, 501 N.E.2d 1067 (Crim L 1177; rule requiring Tr. Ct. to issue FOF/COL is for benefit of reviewing Ct. & does not function as ground for automatic reversal when FOF/COL is not made); Pharris 485 N.E.2d 79 (failure to issue FOF/COL is harmless error where D presents no genuine issue of material fact requiring a hearing); Berry 483 N.E.2d 1369 (Crim L 998(13); inadequacies in FOF/COL are harmless where claims presented would not entitle D to relief, *citing* Love 455 N.E.2d 1126 & Davis 330 N.E.2d 738; here, allegations were known to D on direct appeal but were not pursued & do not entitle D to relief on PCR); Lewis 483 N.E.2d 43 (Judges 25(1); where first judge, who granted D relief by reducing sentences, failed to enter FOF/COL, second judge properly denied relief); Taylor 472 N.E.2d 891 (held, cause remanded with instructions to make specific FOF/COL); Williams, App., 477 N.E.2d 906 (in interest of judicial economy, appellate Ct. may make determination of issues where they are clear).

TITLE: Ison v. State
INDEX NO.: X.1.h.
CITE: (3/14/2017), 71 N.E.3d 1174 (Ind. Ct. App 2017)
SUBJECT: Remanded to PC court for findings on IAC and guilty plea claims
HOLDING: The post-conviction court erred by denying Defendant's amended petition for post-conviction relief without addressing the merits of his claims, which are: 1) trial counsel was ineffective and 2) his guilty plea was not knowing, intelligent, and voluntary. On remand, the trial court shall make specific findings of fact and conclusions of law on Defendant's claims. See State v. Cozart, 897 N.E.2d 478, 484 (Ind. 2008). Held, judgment reversed.

RELATED CASES: Kinman, 152 N.E.3d 1060 (Ind. S. Ct. 2020) (remand necessary where Tr. Ct. erroneously failed to include in its summary order any findings or conclusions on the issues D raised in his de facto petition for PCR).

TITLE: Jackson v. State
INDEX NO.: X.1.h.
CITE: (3rd Dist., 1-16-97), Ind. App., 676 N.E.2d 745
SUBJECT: Post-conviction relief (PCR) - findings of fact & conclusions of law
HOLDING: PCR Ct. erred in failing to make specific findings of fact & conclusions of law on all issues incorporated in third amendment to D's petition for PCR. Ind. Post-Conviction Rule 1(4)(c) provides that petitioner shall be given leave to amend petition at any time before entry of judgment. Here, D filed three amendments to his original, pro se petition for PCR. First amendment alleged numerous grounds for relief, second amendment added one additional ground, & third amendment indicated that all grounds raised in previous versions should be addressed collectively. PCR Ct. failed to acknowledge third amendment & addressed only single issue raised in second amendment. Acknowledging general rule that amended pleading wholly replaces its predecessor, State v. LaRue's, Inc., 154 N.E.2d 708, Ct. found that given more liberal amendment procedure for PCR, D was not required to list all previously-plead grounds for relief in final amendment to petition. PCR Ct.'s failure to make specific findings of fact & conclusions of law is not reversible error where issues are sufficiently addressed by parties & presented for review. Herman, 526 N.E.2d 1183. In this case, Ct. found that error in failing to make adequate findings was not reversible, because all grounds were adequately addressed by parties & reviewable by Ct. Thus, D was not entitled to relief on grounds not addressed by PCR Ct. Held, denial of PCR affirmed.

Note: P-C R 1(4)(c) was amended, effective 2/95, to restrict petitioner's ability to amend petition as matter of right to no later than 60 days prior to date petition has been set for trial. Any later amendment of petition shall be by leave of Ct.

RELATED CASES: Ison, 71 N.E.3d 1174 (Ind. Ct. App 2017) (PC court erred in not making findings of fact and conclusions of law on claims in amended PC petition that trial counsel was ineffective and that guilty plea was not knowing, intelligent, and voluntary).

X. POST-CONVICTION REMEDIES

X.1. Procedure

X.1.i. During pendency of direct appeal

TITLE: Rasaki v. State
INDEX NO.: X.1.i.
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: Staples v. State
INDEX NO.: X.1.i.
CITE: (9/6/83) Ind., 452 N.E.2d 985
SUBJECT: PCR - during pendency of direct appeal; Tr. Ct. has no jurisdiction
HOLDING: Second MCE alleging ineffective assistance of counsel filed following denial of properly filed MCE should have been treated as a PC 1 petition rather than as a BMCE or as an amended MCE. Here, trial counsel filed MCE which was denied after appellate counsel entered appearance. After record was filed with Ind. S. Ct., appellate counsel requested & received permission to file an amended MCE, which was denied. On 4/6, counsel filed praecipe requesting transcript of any hearing held on amended MCE. Tr. Ct. erred in granting permission to file amended MCE. There is no authority for a second MCE. Fancher 436 N.E.2d 311. Held, denial of amended MCE vacated, remanded for further proceedings under PC 1.

RELATED CASES: Hatton, 626 N.E.2d 442 (Ct. noted with approval procedure for terminating pending appeal, pursuing PCR, & then initiating new appeal of both original issues & denial of PCR, pursuant to Davis v. State (1977), 368 N.E.2d 1149. This procedure is available for dealing with issues where evidentiary hearing is necessary, but there is no need or desire to wait until original appeal is decided before pursuing PCR); Brewster, App., 697 N.E.2d 95 (Ct. affirmed D's conviction without prejudice to D's right to file petition for PCR pursuant to procedure set forth in Davis/Hatton).

X. POST-CONVICTION REMEDIES

X.2. Counsel

TITLE: Barclay v. State
INDEX NO.: X.2.
CITE: (4th Dist., 4-28-97), Ind. App., 679 N.E.2d 163
SUBJECT: Failure to forward indigent prisoner's post-conviction relief (PCR) petition to State Public Defender
HOLDING: Ind. Post-Conviction Rule 1, § 2 mandates that copy of indigent prisoner's petition for PCR be forwarded to Public Defender's office for review. Explicit request for assistance of counsel is not necessary as long as there is clear proof of indigence. Sanders, 401 N.E.2d 694. Here, D was in prison & attached affidavit of indigence to his petition, but Tr. Ct. did not refer his petition to Public Defender's office. Failure to forward petition denied D assistance of counsel by failing to afford him opportunity to confer with Public Defender. Tr. Ct.'s error was not harmless but required reversal & remand. Held, summary denial of PCR petition reversed & remanded.

RELATED CASES: Cox, 52 N.E.3d 17 (Ind. Ct. App2016); Long, Ind. App., 679 N.E.2d 981 (Tr. Ct. committed reversible error by summarily denying D's second PCR petition & failing to forward petition to State Public Defender.)

TITLE: Blankenship v. Johnson
INDEX NO.: X.2.
CITE: (5th Cir., 7/17/97), 118 F.3d 312
SUBJECT: Right to Counsel -- State's Request for Discretionary Review
HOLDING: When state obtains discretionary review of appellate decision, indigent defendant has 6th amendment right to counsel in discretionary review proceedings. Court expressed concern that, if indigent defendants were denied right to counsel at that point, state could lie in wait at direct appeal stage knowing they would have an advantage later on discretionary review.

TITLE: Carter v. State
INDEX NO.: X.2.
CITE: (1st Dist. 10/10/90), Ind. App., 560 N.E.2d 687
SUBJECT: Waiver of right to counsel - post-conviction (PCR)
HOLDING: Tr. Ct. did not err in finding that D had knowingly & voluntarily waived right to PCR counsel. D filed pro se PCR petition, which was denied. On appeal, D argues that Tr. Ct. failed to establish valid waiver of right to counsel. Specifically, D points to Tr. Ct.'s failure to determine whether D understood his right to be represented by counsel, or to inform him of inherent dangers of self-representation. See Faretta v. California (1975), 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562. However, Ct. App. does not agree that Faretta applies in PCR setting. Faretta set out certain advisements & inquiries which must be made to ensure that D who seeks to proceed pro se knowingly, intelligently, & voluntarily waives 6th Amend. right to counsel. See also Dowell, App., 557 N.E.2d 1063. PCR proceedings are generally not regarded as criminal proceedings, however, & right to counsel is not guaranteed by either 6th Amend. of U.S. Const. or Art. 1, Sec. 13 of Ind. Const. Baum 553 N.E.2d 1200. Right to counsel on PCR is based in PCR Rule 1, sec. 9, which also gives D right to proceed pro se. Thus, at PCR stage, D must assert statutory right to counsel either by retaining counsel or by submitting petition for relief along with affidavit of indigency. D here was aware that he could have state public defender represent him, since this was stated on PCR petition form. He acknowledged on this form that he did not want services of public defender, & he did not attach affidavit of indigency. D was aware of right to counsel & chose not to exercise it, & Tr. Ct. did not err in failing to question D about this decision. Held, PCR denial affirmed.

TITLE: Lott v. State
INDEX NO.: X.2.
CITE: (3rd Dist., 2-29-00), Ind. App., 724 N.E.2d 1118
SUBJECT: Post-conviction relief (PCR) - erroneous denial of counsel's motion to withdraw
HOLDING: Ind. Post-conviction Rule 1(9)(c) provides that if counsel determines proceeding is not meritorious or in interests of justice, before or after evidentiary hearing is held, counsel shall file with Ct. counsel's withdrawal of appearance. Rule further provides that counsel must certify to Ct. that he has consulted with petitioner regarding grounds alleged in petition & other possible grounds & that he has conducted appropriate investigation of matter including review of records. In this case, after D filed his pro se petition for PCR, State Public Defender (PD) filed appearance. However, State PD subsequently filed motion for withdrawal of appearance & certification pursuant to P-C.R 1(9)(c). Tr. Ct. erred in denying counsel's motion to withdraw. Pursuant to rule, Tr. Ct. should have granted motion for withdrawal & afforded D opportunity to proceed pro se. Held, reversed & remanded for further proceedings.

TITLE: Majors v. State
INDEX NO.: X.2.
CITE: (12/6/82) Ind., 441 N.E.2d 1375
SUBJECT: PCR counsel - only State Public Defender (SPD) can represent indigent, incarcerated Ds
HOLDING: PC 1, Section 9(a) forecloses trial judge from appointing counsel other than SPD for petitioner in post-conviction proceeding. Here, deputy moved to be released from appointment & for appointment of other counsel because D wished her to raise ineffectiveness of another deputy from same office who had represented him at PCR hearing. PCR judge denied motion. D argued denial of motion placed Public Defender in untenable position of arguing her own ineffectiveness, prohibited by the Code of Professional Responsibility, or refusing to argue all of D's allegations, in direct contravention of Dixon, App., 284 N.E.2d 102. Ct. finds denial of motion supported by Dixon which holds Public Defender is not entitled to withdraw as counsel for D in appeal from denial of PCR simply because deputy believes appeal is frivolous. Dixon held PC 1, Section 9 mandates SPD to represent pauper D from denial of PCR without exception. Ct. declines to recognize an exception here. Held, no error in denying withdrawal. CONCURRING IN RESULT, Prentice does not agree rule precludes trial judge from appointing counsel other than SPD. Prentice interprets rule to say absent clear showing SPD cannot or probably would not adequately represent D, there is no duty to appoint other counsel. However, Prentice finds D's allegation does not state prima facie case.

RELATED CASES: Murphy 477 N.E.2d 266 (Crim L 1177; Tr. Ct. erred in appointing local pauper counsel rather than notifying SPD office; however, act constitutes error only if D demonstrates denial of effective assistance of counsel).

TITLE: Pennsylvania v. Finley
INDEX NO.: X.2.
CITE: 481 U.S. 551, 107 S. Ct. 1990, 95 L.Ed.2d 539 (1987)
SUBJECT: Post-conviction proceedings: right to counsel/frivolous appeals
HOLDING: State post-conviction relief petitioner is not entitled to effective assistance of counsel under Federal Constitution. Where state has chosen to offer some assistance to those seeking to collaterally attack their convictions, Federal Constitution does not dictate precise form assistance of counsel must take. States have substantial discretion to develop & implement programs to aid prisoners seeking to secure post-conviction review. Here, post-conviction counsel reviewed record & concluded there were no arguable bases for collateral relief. Counsel advised Tr. Ct. & requested permission to withdraw. Tr. Ct. conducted independent review, agreed that there were no issues even arguably meritorious & dismissed petition. On appeal, petitioner argues that she was entitled to benefits of procedure set forth in Anders v. CA (1967), 386 U.S. 738, 87 S. Ct. 1396, 18 L.Ed.2d 493. Anders requires appointed attorney who finds direct appeal wholly frivolous to notify court & request permission to withdraw. Request must be accompanied by brief which sets forth anything in record that might arguably support appeal. Copy of brief supplied to D so he/she may raise other points. Court then decides whether case is wholly frivolous. Held, because there is no constitutional right to appointed counsel on state collateral attack, Anders procedure is not constitutionally required. Blackmun CONCURS IN JUDGMENT, Brennan, joined by Marshall, DISSENTS; Stevens DISSENTS.

NOTE: PC 1, section 9 guarantees Ind. post-conviction petitioner the right to counsel.

RELATED CASES: Hopkinson, 866 F.2d 1185 (10th Cir.) (if rule of Finley applies to death penalty cases, Court would have to hold that federal Constitution does not require entire array of due process protections to be provided in state post-conviction proceedings; thus, claim that procedural errors occurred during state post-conviction proceedings would not rise to level of federal constitutional claim cognizable in habeas corpus).

TITLE: Robinson v. State
INDEX NO.: X.2.
CITE: (5/28/86) Ind., 493 N.E.2d 765
SUBJECT: PCR counsel - second petitions filed by indigents
HOLDING: Tr. Ct. did not err by failing to refer D's second pro se PCR petition to public defender for representation. PC 1, Section 2 requires referral of copy of petition to Public Defender if D is indigent. PC 1, Section 2 does not apply to D's second petition. Under PC 1, Section 4(e), Ct. has discretion to summarily deny second petition if Ct. finds it raises same issues as first petition & pleadings conclusively demonstrate D is entitled to no relief. Held, no error.

TITLE: State v. Monserrate
INDEX NO.: X.2.
CITE: (12/27/82) Ind., 442 N.E.2d 1095
SUBJECT: PCR – counsel, who represents state
HOLDING: PC 1 Section 9(b) requires attorney general to represent interests of state. Here, Lake County prosecutor, initiated appeal of Tr. Ct.'s grant of new trial upon D's PCR petition. Ct. dismisses appeal because of numerous procedural irregularities, including failure to timely serve brief on appellee. Held, state's appeal dismissed.

RELATED CASES: Kindred, 674 N.E.2d 570 (although rule provides that prosecutor of circuit in which court of conviction is situated shall represent State, rule does not prevent another prosecutor from participating in PCR proceedings).

X. POST-CONVICTION REMEDIES

X.3. Grounds

TITLE: A.C. v. State

INDEX NO.: X.3.

CITE: (12-19-2022), Ind. Ct. App., 200 N.E.3d 980

SUBJECT: Human trafficking victim entitled to post-conviction relief under vacatur statute

HOLDING: In enacting the Vacatur Statute, the General Assembly determined that a trafficked person who meets the statutory elements should be entitled to have their conviction vacated. I.C. § 35-38-10-2. The relief is not discretionary if the statutory elements are met. Here, as a juvenile, Petitioner was charged as an adult for a level 3 felony and later convicted of assisting a criminal as a level 6 felony. She sought post-conviction relief under Indiana's vacatur statute. At her post-conviction relief hearing, Petitioner presented undisputed specific evidence that she was a trafficked person at the time of her offense and was therefore entitled to have her conviction vacated per the statute. The post-conviction court denied the petition, instead reducing the conviction to a misdemeanor and finding as a matter of public policy she had not shown she was coerced or under the control of others at the time of the offense. The Court of Appeals reversed the denial of post-conviction relief, stating the Petitioner presented undisputed evidence and met the definition of a trafficked person and there was no public policy exception to the statute. The statutory remedy is vacating of the conviction, not reducing conviction to a misdemeanor.

TITLE: Douglas v. State

INDEX NO.: X.3.

CITE: (2nd Dist., 12-18-03), Ind. App., 800 N.E.2d 599

SUBJECT: Denial of post-conviction relief affirmed - claim of inordinate delay by Ct. & public defender's office

HOLDING: Tr. Ct. did not err in denying D's pro se petition for post-conviction relief. Ct. found that D was not denied due process by Tr. Ct. & public defender's office due to inordinate delay in getting hearing on his PCR petition. Petitioner filed pro se petition in 1992, with the public defender then filing an appearance on his behalf. In 1995, Petitioner filed for an indefinite stay. In 1998, the Tr. Ct. granted the public defender leave to withdraw. In 2002, Petitioner filed an amended PCR petition & the Tr. Ct. held a hearing four months later. His PCR was denied in October of 2002. Lane v. Richards, 957 F.2d 363 (7th Cir. 1992), which D cited in support of his claim, actually supported finding denial of due process did not occur. Although D cited evidence that he attempted to get Tr. Ct. to act on his petition between 1995 & 1998, a Tr. Ct. need not act on pro se motions by a party that is represented by counsel. See Id. "If [Petitioner] were unhappy with his representation, he should have moved to proceed pro se" (although Lane noted such action in an attempt to get a hearing effectively "surrenders all hope of assistance by the public defender.") Several of D's other issues were denied either by waiver or res judicata. Held, judgment affirmed.

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.a. Right to counsel

TITLE: Joseph v. State
INDEX NO.: X.3.a.
CITE: (10/1/85) Ind., 483 N.E.2d 32
SUBJECT: PCR - grounds; right to counsel
HOLDING: Tr. Ct. did not err in denying D's PCR petition alleging lack of knowing waiver of counsel. Here, D told sheriff he wished to plead guilty & that he did not want his female companion to be charged because she was not guilty. D was present at probable cause hearing & preliminary hearing. Tr. Ct. advised D several times of right to counsel. At latter hearing, D stated he wished to plead guilty & did not want to consult counsel. During hearings, D volunteered that he was wanted in other counties for various offenses. Ct. finds D knew he could still be tried & convicted of these charges. After examination of transcripts, Ct. finds D freely & voluntarily waived right to counsel. Held, no error.

TITLE: State v. Royer
INDEX NO.: X.3.a.
CITE: (4/8/21) Ind. Ct. App., 166 N.E.3d 380
SUBJECT: Newly discovered evidence leads to grant of new trial in successive PCR
HOLDING: The Court of Appeals affirmed the post-conviction court's grant of Defendant's successive petition for post-conviction relief. In 2005, Defendant was convicted of the murder of an elderly woman in her Elkhart apartment. He was convicted along with a co-defendant on the theory she was the "brains" of the plan while Defendant was the "brawn." Elkhart Police asked forensic specialist Dennis Chapman to review latent fingerprints found at the murder scene, and Chapman said one of the prints belonged to the co-defendant. Chapman also testified at the murder trial, but it was later discovered that he had no experience with latent prints.

At the successive post-conviction hearing, law enforcement testified that the interrogating detective, Conway, had been removed from the homicide unit before Defendant went to trial because he gave false information to an attorney in another murder investigation. His removal was not disclosed to the defense before the trial. A key witness also recanted her testimony, claiming she implicated the co-defendant because Conway threatened her with prison time and the removal of her children. She also said Conway fed her information about the homicide during an unrecorded portion of her interview. Also, the witness was paid $2,000 for her testimony, a fact the State did not disclose. Finally, Conway testified that he "suggested" certain details about the murder to Defendant during the interrogation and that he was aware that details Royer provided did not match physical evidence. Another detective had watched part of Conway's interrogation through closed-circuit video and testified that it was "super leading" and "[p]robably one of the most difficult" interrogations he had seen.

The State referred to the misidentified latent fingerprint as the 'most important piece of evidence in this case' and used the fingerprint to place the co-defendant inside the victim's apartment, and it argued Defendant was also in the apartment because the co-defendant exerted substantial influence over him. The State used the key witness's testimony to exemplify the influence the co-defendant exerted over Defendant and to indicate that the co-defendant had told others about her involvement in the crime. The Court of Appeals agreed with the post-conviction court's determination that the misidentified latent fingerprint, the witness's recantation of her testimony, and receipt of a reward that was not disclosed during trial constitute newly discovered evidence that undermines the State's case against Defendant and produces a reasonable probability of a different result on retrial.

Similarly, the Court affirmed the finding that Conway's removal from the homicide unit was newly discovered evidence that should have been disclosed. The prosecutor knew at the time of the 2005 trial that Conway had been removed based on concerns about his credibility in future trials due to misconduct. Conway's credibility was "integral" to the case against Defendant, especially because no physical evidence linked him to the crime. The jury had to rely on Conway's accounts of the interrogations given that no portions were video recorded and large portions weren't audio recorded. As a result, the Court held the State's failure to disclose Detective Conway's removal from the homicide unit calls into question the integrity of Defendants' conviction and requires a new trial. As for Conway's interrogation tactics, the panel noted the other detective "intentionally concealed" his observations about Conway's "super-leading" style, thus undermining the jury's evaluation of Conway's testimony. Further, Conway contradicted himself by claiming at trial that he did not give Defendant details about the murder then claiming the opposite at the successive PCR hearing. Finally, the Court held that Defendant was entitled to a new trial because "Detective Conway's testimony at trial left the jury with the impression that he took Royer's mental disabilities into account and took protective measures before interrogating [Defendant]; whereas, Detective Conway's testimony during the successive post-conviction evidentiary hearing reveals he cavalierly dismissed such concerns."

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.d. Fundamental error

TITLE: Bailey v. State
INDEX NO.: X.3.d.
CITE: (1/25/85) Ind., 472 N.E.2d 1260
SUBJECT: PCR - fundamental error (FE)
HOLDING: In a PCR petition FE must be raised within rules of PCR procedure. Ct.'s pronouncement modifies cases stating FE can be alleged as such at any time. See, e.g., Snider 468 N.E.2d 1037; Haggard 445 N.E.2d 969; Griffin 439 N.E.2d 160; Nelson 409 N.E.2d 637. Claims characterized solely as FE are available only on appeal. Any issue set forth in PCR petition must be raised within purview of PCR rules, e.g., deprivation of 6th Amend right to effective assistance of counsel or be an issue demonstrably unavailable to D at time of trial & direct appeal. Here, Ct. finds issues (interpretation of robbery statute) raised by D were not available to D at time of trial & direct appeal; however, Ct. finds jury was properly instructed & sufficient evidence supported finding of serious bodily injury to non-victim. Held, denial of PCR petition affirmed.

RELATED CASES: Lee 550 N.E.2d 304 (insufficiency of evidence to support proper sequence of prior convictions is FE; can be raised on PCR despite availability on appeal); Garner, App., 550 N.E.2d 1309 (follows Bailey, with DISSENT by Sullivan); Rowley 483 N.E.2d 1078 (D's second PCR petition granted; rule that hypnotically enhanced testimony is inadmissible (Strong 435 N.E.2d 969) was not available to D at trial); Tope 477 N.E.2d 873 (Crim L 998(5); DISSENT by DeBruler contends issue (use of post-advisement silence during cross-exam) was unavailable to D who filed appellate brief one day after U.S. S. Ct.'s decision in Doyle v. Ohio).

TITLE: Jackson v. State
INDEX NO.: X.3.d.
CITE: (5th Dist., 4-16-03), Ind. App., 786 N.E.2d 748
SUBJECT: Waiver of issues in post-conviction relief (PCR) - failure to pursue direct appeal
HOLDING: D's arguments that he did not voluntarily waive right to jury trial & that it was improper to convict him of Class A misdemeanor when he was charged with Class D felony were not cognizable, because he raised them for first time in PCR petition without completing direct appeal. Issues that were or could have been raised upon direct appeal are not available in PCR proceedings. Ford v. State, 755 N.E.2d 1138 (Ind. Ct. App. 2001). Here, D did not file direct appeal, nor did he couch his arguments in terms of ineffective assistance of counsel. Further, D's claim of fundamental error does not affect conclusion because such claims are not cognizable in PCR proceedings. Sanders v. State, 765 N.E.2d 591 (Ind. 2002). Held, denial of PCR petition affirmed.

TITLE: Newcomb v. State

INDEX NO.: X.3.d.

CITE: (8/24/22), Ind. Ct. App, 194 N.E.3d 131

SUBJECT: Denial of petition for post-conviction relief reversed when petitioner was denied his 14th amendment right to due process when convicted of a crime not committed.

HOLDING: Free standing claims of fundamental error are generally disapproved in post-conviction relief. Here, Court of Appeals finds rare exception because petitioner was denied his 14th Amendment right to be convicted of a crime with proof beyond a reasonable doubt. Petitioner was convicted of Class B felony dealing in Methamphetamine as an accomplice, even though the Court of Appeals states the accomplice was a "phantom" and the proof at trial was only that Petitioner was in possession of precursors, a class D felony. Here, Court of Appeals finds rare case of fundamental error at post-conviction relief because Petitioner's conviction of a crime not committed deprived him of thirteen years of liberty. Court of Appeals reverses partial denial of post-conviction relief and vacates class B felony conviction and remands for conviction and sentence on class D felony. Judge Bradford dissents, stating the majority raised the fundamental error claim sua sponte and therefore finding it unavailable.

TITLE: Sanders v. State
INDEX NO.: X.3.d.
CITE: (4-3-02), Ind., 765 N.E.2d 591
SUBJECT: Fundamental error - post-conviction relief
HOLDING: Ct. App. erred in reviewing D's fundamental error claim in a post-conviction proceeding. Fundamental error exception to contemporaneous objection rule applies to direct appeals. Canaan v. State, 683 N.E.2d 227 (Ind. 1997). In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of right to effective counsel or issues demonstrably unavailable at time of trial or direct appeal. Held, transfer granted, denial of post-conviction relief affirmed.

RELATED CASES: Lindsey, App., 888 N.E.2d 319 (D waived issue that Ind. Penal Code is based on "vindictive justice," because issue was available at trial & on direct appeal but was never raised); Woodson, App., 778 N.E.2d 475 (while appellate review of freestanding claims of fundamental error are limited in post-conviction setting, there is no blanket restriction on review of fundamental error claims that arise within rules of post-conviction procedure. Post-conviction relief process is open to raising of issues not known at time of original trial & appeal or for some reason were not available to D at that time; D's claim was demonstrably unavailable at time of trial & direct appeal).

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.e. Newly discovered evidence

TITLE: Bunch v. State
INDEX NO.: X.3.e.
CITE: (03-21-12), 964 N.E.2d 274 (Ind. Ct. App 2012)
SUBJECT: Newly discovered evidence - advances in forensic science
HOLDING: Post-conviction court abused its discretion by denying D's Petition for Post-conviction relief in an arson case where an expert's opinion constituted newly discovered evidence. In order to obtain a new trial based on newly discovered evidence, a D must show: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.

Here, in 1996, D was convicted of felony murder based on a fire in her home that killed her three-year-old son. Since the trial, there have been advances in the field of victim toxicology analysis, i.e., the study of the effects of combustion products on fire victims. Consideration of a victim's condition did not become a recognized component of fire origin analysis until after 2001. At the post-conviction hearing, an expert, McAllister, testified that, based on the victim toxicology and eyewitness reports, the fire originated in a concealed space above the south bedroom in the ceiling and was not caused by an accelerant. Because fire victim toxicology analysis has become recognized as a scientifically reliable method to better interpret existing evidence since the time of the trial, the opinion was discovered since trial and could not have been discovered even with due diligence prior to trial. Although the conclusion of D's experts at trial and on post-conviction relief is the same, i.e., the origin of the fire is undetermined, the State specifically charged and proceeded on the theory that D started the fire in the living room of the mobile home using a liquid accelerate. Because McAllister's opinion disproves this theory, it is reasonably likely to affect the outcome of the case, and thus is material. Moreover, McAllister's opinion is not cumulative of D's trial expert because the trial expert did not arrive at his conclusion based on the child's physical condition. The opinion is not merely impeaching but offers a new, exculpatory explanation for D's child's death. Finally, McAllister's opinion is worthy of credit despite Tr. Ct.'s finding otherwise. Although the appellate courts are to defer to post-conviction court's determination of credibility when a witness's demeanor is at issue, here the post-conviction court's determination was based on McAllister's basis for opinion and not her demeanor. Contrary to the post-conviction court's conclusion, the basis for the opinion was consistent with the evidence. Thus, D has met her burden of proving the fire victim toxicology analysis meets all nine requirements of newly discovered evidence. Held, judgment reversed; Crone, J., dissenting on basis that the victim toxicology evidence is not material, relevant or likely to produce a different result at trial, all of which hinge on the post-conviction court's determination that the evidence is not worthy of credit.

RELATED CASES: Dickens, 997 N.E.2d 56 (Ind. Ct. App 2013) (even though comparative bullet lead analysis used at first trial would be inadmissible at second trial because advances in forensic science, D was not entitled to new trial because it would not likely have different result; D's conviction was largely based on eyewitness testimony, not forensic analysis of bullets); Bradford, 988 N.E.2d 1192 (Ind. Ct.

App. 2013) (distinguishing Bunch, Ct. held that where testimony of post-conviction arson expert was not based on "transformative advancements" or even "considerably different" methods from experts presented at trial, and conclusions were largely cumulative of testimony of defense trial expert, such testimony did not meet the standard for newly discovered evidence; moreover, relevant data could have been discovered through testing techniques that were available at time of trial).

TITLE: Norris v. State
INDEX NO.: X.3.e.
CITE: (11-12-08), Ind., 896 N.E.2d 1149
SUBJECT: Guilty plea precludes PCR on claim of actual innocence
HOLDING: A guilty plea may not be challenged in post-conviction proceedings by a claim of newly discovered evidence regarding the events that constituted the crime. Indiana requires a factual basis for a guilty plea, and judge may not accept a guilty plea while a defendant claims actual innocence. Ross v. State, 456 N.E.2d 420 (Ind. 1983). Moreover, a guilty plea conclusively establishes the fact of guilt, a prerequisite for imposition of criminal punishment.

In holding that a guilty plea forecloses a post-conviction challenge to the facts established by trial court's acceptance of guilty plea and resulting conviction, Court cited P-C R. 1(8), which provides that post-conviction relief generally may not be based upon any "ground...knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction." In establishing extraordinary remedy of post-conviction relief, Court intended the phrase "material facts, not previously presented and heard," in P-C R. 1(a)(4), to refer to evidentiary facts presented to trial court and which had a sufficient causative effect on resulting determination of guilt.

Here, after Defendant pled guilty to child molesting, complaining witness's (CW's) mother submitted affidavit recanting her previous claim that Defendant molested CW. Defendant also submitted psychological report indicating low to borderline range of intellectual functioning. Rather than asking to set aside his guilty plea and proceed to trial, Defendant sought to vacate his conviction. The issue of whether Defendant's plea was knowing, and voluntary was not presented. When trial court accepted Defendant's guilty plea, he waived the right to present evidence regarding his guilt or innocence. Held, transfer granted, Court of Appeals' opinion at 881 N.E.2d 691 vacated, denial of post-conviction relief affirmed.

Boehm and Rucker, JJ. concurring in result, disagree with majority's holding that a guilty plea precludes a court from granting post-conviction relief on a claim of actual innocence. "Any system of justice must allow for correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty." See Sanchez v. State, 749 N.E.2d 509, 515 (Ind. 2001); Herrera v. Collins, 506 U.S. 390, 417 (1993). Further, Post-Conviction Rule 1(a)(4) acknowledges the need for relief on a showing of "evidence of material facts, not previously mentioned and heard, that requires vacation of the conviction or sentence in the interest of justice."

TITLE: Rhymer v. State
INDEX NO.: X.3.e.
CITE: (3rd Dist., 1-20-94), Ind. App., 627 N.E.2d 822
SUBJECT: Newly discovered evidence required post-conviction relief (PCR)
HOLDING: Three witnesses discovered after trial constituted newly discovered evidence, meriting new trial. Evidence showed D was away from home on morning of girlfriend-victim's death for about 2 hours. When he returned, victim was dead from a gunshot wound. Circumstantial evidence of D's guilt was presented, & Yoquelet mutual acquaintance of D & victim, said D had admitted to killing & threatened to kill him if he told. State theorized D killed victim before leaving home. At PCR hearing offers to prove concerning 3 new witnesses were presented. One would testify he was at D's home shortly before D returned, that he saw victim on porch talking to Yoquelet & his friend, & that he didn't come forward before because he was threatened. Second would testify he also saw Yoquelet outside home while D was gone. Third witness would testify that when she drove by house, she saw Yoquelet's friend running from house carrying what looked like gun, & that she didn't come forward because same man beat & raped her in past. Ct. found D's evidence was not merely cumulative because there was no evidence at trial that placed anyone else at home on morning of murder, or that victim was still alive when D left. Ct. also found due diligence was established because witnesses did not come forward due to a fear of harm. As to producing different result on retrial, Ct. found that because most damaging evidence was originally from Yoquelet, evidence he was at victim's home near time of murder would cast serious doubt on his credibility. Evidence victim was still alive when D left would also contradict State's theory of how she was killed, & evidence third person was seen running away with gun would support D's claim he did not shoot victim. Held, PCR court erred in denying new trial, Garrard, J., dissenting.

RELATED CASES: Wethington, App., 655 N.E.2d 91 (P-C court properly concluded that newly discovered evidence would not likely produce different result on retrial).

TITLE: State v. Collier
INDEX NO.: X.3.e.
CITE: (10/25/2016), 61 N.E.3d 265 (Ind. 2016)
SUBJECT: TR 60(B) relief from order summarily denying PCR petition
HOLDING: Tr. Ct. did not abuse its discretion in granting D's Trial Rule 60(B) motion for relief from judgment, specifically from a 2007 order that summarily denied his petition for post-conviction relief. Even though D filed his TR 60(B) motion in 2015, he filed it within a reasonable time. See Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990) (passage of time, standing alone, is not enough to deny a 60(B) motion on grounds of timeliness). D is uneducated and suffers from cognitive disabilities. He has limited resources. Up until recently, he was unrepresented. Extraordinary circumstances also justify granting D's 60(B) motion; the Tr. Ct. failed to forward his petition for post-conviction relief to the State Public Defender, as required by Post-Conviction Rule 1(2). See Smith v. State, 38 N.E.2d 218, 221 (Ind. Ct. App. 2015). D also has a potentially meritorious defense that could ultimately lead to a different result, i.e., the granting of his petition for post-conviction relief. See Butler v. State, 933 N.E.2d 33, 36 (Ind. Ct. App. 2010). That defense includes his claim that trial counsel incorrectly told him that he would be pleading guilty to a misdemeanor when in fact he pled to a felony. It further includes his contention that because he always maintained his innocence, the Tr. Ct. erred in accepting his guilty plea. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment affirmed.

TITLE: State v. Royer
INDEX NO.: X.3.e.
CITE: (04/08/2021), 166 N.E.3d 380 (Ind. Ct. App. 2021)
SUBJECT: Newly discovered evidence leads to grant of new trial in successive PCR
HOLDING: The Court of Appeals affirmed the post-conviction court's grant of Defendant's successive petition for post-conviction relief. In 2005, Defendant was convicted of the murder of an elderly woman in her Elkhart apartment. He was convicted along with a co-defendant on the theory she was the "brains" of the plan while Defendant was the "brawn." Elkhart Police asked forensic specialist Dennis Chapman to review latent fingerprints found at the murder scene, and Chapman said one of the prints belonged to the co-defendant. Chapman also testified at the murder trial, but it was later discovered that he had no experience with latent prints.

At the successive post-conviction hearing, law enforcement testified that the interrogating detective, Conway, had been removed from the homicide unit before Defendant went to trial because he gave false information to an attorney in another murder investigation. His removal was not disclosed to the defense before the trial. A key witness also recanted her testimony, claiming she implicated the co-defendant because Conway threatened her with prison time and the removal of her children. She also said Conway fed her information about the homicide during an unrecorded portion of her interview. Also, the witness was paid $2,000 for her testimony, a fact the State did not disclose. Finally, Conway testified that he "suggested" certain details about the murder to Defendant during the interrogation and that he was aware that details Royer provided did not match physical evidence. Another detective had watched part of Conway's interrogation through closed-circuit video and testified that it was "super leading" and "[p]robably one of the most difficult" interrogations he had seen.

The State referred to the misidentified latent fingerprint as the 'most important piece of evidence in this case' and used the fingerprint to place the co-defendant inside the victim's apartment, and it argued Defendant was also in the apartment because the co-defendant exerted substantial influence over him. The State used the key witness's testimony to exemplify the influence the co-defendant exerted over Defendant and to indicate that the co-defendant had told others about her involvement in the crime. The Court of Appeals agreed with the post-conviction court's determination that the misidentified latent fingerprint, the witness's recantation of her testimony, and receipt of a reward that was not disclosed during trial constitute newly discovered evidence that undermines the State's case against Defendant and produces a reasonable probability of a different result on retrial.

Similarly, the Court affirmed the finding that Conway's removal from the homicide unit was newly discovered evidence that should have been disclosed. The prosecutor knew at the time of the 2005 trial that Conway had been removed based on concerns about his credibility in future trials due to misconduct. Conway's credibility was "integral" to the case against Defendant, especially because no physical evidence linked him to the crime. The jury had to rely on Conway's accounts of the interrogations given that no portions were video recorded and large portions weren't audio recorded. As a result, the Court held the State's failure to disclose Detective Conway's removal from the homicide unit calls into question the integrity of Defendants' conviction and requires a new trial. As for Conway's interrogation tactics, the panel noted the other detective "intentionally concealed" his observations about Conway's "super-leading" style, thus undermining the jury's evaluation of Conway's testimony. Further, Conway contradicted himself by claiming at trial that he did not give Defendant details about the murder then claiming the opposite at the successive PCR hearing. Finally, the Court held that Defendant was entitled to a new trial because "Detective Conway's testimony at trial left the jury with the impression that he took Royer's mental disabilities into account and took protective

measures before interrogating [Defendant]; whereas Detective Conway's testimony during the successive post-conviction evidentiary hearing reveals he cavalierly dismissed such concerns."

TITLE: State v. Warren
INDEX NO.: X.3.e.
CITE: (4th Dist. 8/16/89), Ind. App., 542 N.E.2d 562
SUBJECT: PCR - newly discovered evidence
HOLDING: Where D admitted to possession of marijuana at time of guilty plea, he cannot now obtain PCR on basis of testimony that marijuana belonged to his sister-in-law. D pled guilty to 4 counts, including possession of marijuana. Seven years later, he filed PCR petition, alleging that his sister-in-law, on discovering that he was serving time on possession charge, told him marijuana had belonged to her. At guilty plea hearing, D had testified that marijuana was his, but at PCR hearing he testified he had believed police had planted it in his van. PCR Ct. granted relief, & state appeals. Guilty plea is admission of guilt & waiver of specific constitutional rights. [Citations omitted.] PCR Rule 1(1)(a)(4) permits relief where D can demonstrate existence of previously unknown material facts. However, where D was aware of facts at time of guilty plea, relief is not available. Stewart, 517 N.E.2d 1230. Here, D's testimony that he believed police planted marijuana indicates that he knew it did not belong to him at time he pled guilty. Further, there is no evidence that D used due diligence to discover who put marijuana in van prior to plea. See Laird, 385 N.E.2d 452; Ray, 476 N.E.2d 93. Held, grant of PCR reversed.

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.f Guilty Pleas (see C.2)

TITLE: Edmonson v. State
INDEX NO.: X.3.f.
CITE: (11/9/2017), 87 N.E.3d 534 (Ind. Ct. App. 2017)
SUBJECT: Laches finding improper; PCR claim denied on the merits
HOLDING: Post-conviction court erred by finding that laches bar Defendant's petition, but denial of PCR was still proper because Defendant's petition lacks merit. In 1993, Defendant pled guilty to two B misdemeanors, public intoxication and criminal mischief. While on probation, he was convicted of murder. In imposing a 60-year sentence, the trial court cited Defendant's two misdemeanor convictions as aggravating factors. In 1996, the Indiana Supreme Court ruled that this was proper. Defendant did not file a PCR petition to challenge the misdemeanor convictions until 2016. He claimed he was entitled to relief because the trial court that accepted his guilty pleas failed to advise him that his misdemeanor convictions could be used as aggravating factors for a future conviction and sentence.

The trial court erred in ruling that laches barred Defendant's PCR petition. While the trial court properly concluded Defendant's 23-year delay in filing the petition was unreasonable – McCollum v. State, 671 N.E.2d 168, 170 (Ind. Ct. App 1997), *trans. denied* - the State failed to show that the delay would prejudice its efforts to retry Defendant if he prevailed on collateral review. The State offered no evidence to support its claim about prejudice. See Lacy v. State, 491 N.E.2d 520, 521-22 (Ind. 1986).

Nonetheless, Defendant's PCR claim has no merit. Indiana does not require a court to inform a defendant of possible collateral consequences, such as the possibility of habitual offender status or that his convictions could be used to increase future sentences. See Owens v. State, 437 N.E.2d 501, 504 (Ind. Ct. App. 1982); Williams v. State, 641 N.E.2d 44, 46 (Ind. Ct. App. 1994). Held, judgment affirmed.

TITLE: Hopper v. State
INDEX NO.: X.3.f.
CITE: (11-29-11), 957 N.E.2d 613 (Ind. 2011)
SUBJECT: Right to counsel - waiver before guilty plea
HOLDING: The Supreme Court granted rehearing to revise its earlier ruling that, although the Sixth Amendment does not require such an advisement, Tr. Ct.s must advise a D pleading guilty pro se "that an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution's case." Court explained that the lack of such an advisement is just one factor to consider in the totality of the circumstances in determining whether the D waived his right to counsel and entered into his plea agreement knowingly and voluntarily. While the Court does not doubt the value of the Hopper advisement language in particular stages of particular cases with particular Ds, the notion that such language should be mandatory in all stages of all cases with all Ds is misplaced. Hopper never claimed that the failure to receive an advisement about the pitfalls of pleading guilty pro se affected his case. Held, judgment affirmed and State's Petition for Rehearing of Hopper v. State, 957 N.E.2d 613 granted; Rucker and Sullivan, JJ., dissenting on basis that the State presented no new basis for granting rehearing and the advantages of giving such an advisement, especially at the initial hearing stages of the proceedings, far outweigh any disadvantages of doing so.

Note: This opinion is implicitly *overruled* by Lafler v. Cooper, 132 S. Ct. 1376 (2012) and Missouri v. Frye, 132 S. Ct. 1399 (2012), to the extent it holds that plea negotiations are not a "critical stage" under the Sixth Amendment.

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.h. Juvenile

TITLE: Jordan v. State
INDEX NO.: X.3.h.
CITE: (9/1/87), Ind., 512 N.E.2d 407
SUBJECT: Juvenile - PCR
HOLDING: A person adjudged to be delinquent child in juvenile proceeding because of acts which would have constituted crime if committed by adult may not file PCR petition to attack legality of that adjudication. Juvenile adjudications are civil matters & do not constitute criminal convictions. Pallett 381 N.E.2d 452. Statutory provision is made for expungement of delinquency records. This is greater right & remedy than is provided to criminally convicted adults. D has shown no prejudice by Ct.'s refusal to apply PC rules to him, no benefit should the Ct. do so. Adjudication of delinquency is not fact which can be used to enhance criminal sentence, although sentencing Ct. may determine whether there exists pattern of criminal conduct that is likely to continue. Evans 497 N.E.2d 919. Sims, App., 421 N.E.2d 698. Held, Ct. App. opinion vacated, Tr. Ct. affirmed. See Jordan, App., 499 N.E.2d 759. DeBruler & Dickson, DISSENT.

NOTE: Neither majority nor dissent discuss Ind. Code 35-50-2-2-1 [effective 6/1/85] which makes felony sentence non-suspendible if D has particular juvenile record. In denial of rehearing, Jordan 516 N.E.2d 1054, C.J. Shepard suggested T.R. 60 motion. D's subsequent motion was denied as untimely & denial affirmed. Jordan, App., 549 N.E.2d 382.

RELATED CASES: Newsom, App., 851 N.E.2d 1287 (because juvenile D is not a "convicted person" & juvenile ct.'s disposition does not constitute a "sentence," Ct. concluded that motion to correct erroneous sentence is not available to D as a means to challenge his juvenile disposition); Matter of DDJ v. State, App., 640 N.E.2d 768 (Cts. may use TR 60(B) time limitations to determine merits of motions challenging delinquency adjudications).

X. POST-CONVICTION REMEDIES

X.3. Grounds

X.3.i. Other collateral issues

TITLE: Harvey v. State
INDEX NO.: X.3.i.
CITE: (10/29/86) Ind., 498 N.E.2d 1231
SUBJECT: PCR - grounds; D received lesser punishment
HOLDING: Ct. rejects D's contention that commitment order is erroneous because one-year sentences he received could be imposed only for Class A misdemeanor convictions. Here, D requests Ct. to instruct Tr. Ct. to correct commitment order to reflect sentences as attaching to Class A misdemeanors rather than to Class D felonies. Although statute (Ind. Code 35-50-2-7(a)) has been amended to allow for one year sentence in Class D felonies, statute at time D was sentenced did not contemplate one year sentence for Class D felony conviction. Nonetheless, D cannot successfully claim prejudicial error because he received lesser punishment than that proscribed by statute. Mates (1929), 200 Ind. 551; Hunnicutt v. Frauhiger (1927), 199 Ind. 501. Held, denial of PCR affirmed.

X. POST-CONVICTION REMEDIES

X.4. Sentence Modification/ Correction/Jail Time Credit

TITLE: Moredock v. State

INDEX NO.: X.4.

CITE: (2nd. Dist., 4-3-98), Ind. App., 693 N.E.2d 961

SUBJECT: Post-conviction remedies - must show prejudice caused by illegal sentence

HOLDING: Regardless of whether petitioner's sentence was illegal, petitioner was not entitled to relief because he failed to show how he was prejudiced by sentence. Even error of constitutional dimension does not necessarily require reversal but that, in addition to error, party must also make some showing of injury or prejudice resulting from error. White, 497 N.E.2d 893. Here, petitioner entered into plea where he would serve two year sentence for attempted theft concurrent to his time on pending probation revocation proceeding. Petitioner claimed that his sentence violated Ind. statute requiring that sentence for offense committed subsequent to offense for which one is serving current sentence must be served consecutively to sentence for earlier offense. Ind. Code 35-50-1-2. Even if it were improper for petitioner to bargain for above illegal sentence, petitioner was not harmed by sentence. Held, denial of post-conviction relief affirmed.

X. POST-CONVICTION REMEDIES

X.5. Defenses

TITLE: State v. Scales
INDEX NO.: X.5.
CITE: (06/02/92), Ind., 593 N.E.2d 181
SUBJECT: No Statute of Limitations on Post-Conviction Relief (PCR) for misdemeanors
HOLDING: Ind. S. Ct. granted transfer of Ct. App. decision in Scales, App., 571 N.E.2d 1324, to reaffirm fact that Criminal Rules 5 & 10, which together require transcripts of misdemeanor pleas to be kept for at least 10 years, do not impose 10-year statute of limitations on PCR actions for misdemeanor convictions. If record is no longer available, D may not be able to prove necessary allegations to obtain relief, or State may be able to assert laches, but there is no statute of limitations on such relief. Held, Ct. App. decision affirmed.

X. POST-CONVICTION REMEDIES

X.5. Defenses

X.5.b. Waiver

TITLE: Brooks v. State
INDEX NO.: X.5.b.
CITE: (4th Dist. 7/2/90), Ind. App., 555 N.E.2d 1348
SUBJECT: Fundamental error - enhanced sentence based on incorrect information
HOLDING: Where 2 aggravating circumstances cited in support of enhanced & consecutive sentences were based on incorrect information, error was fundamental & could be raised for first time on PCR. PCR Ct. denied D's petition, finding that he had waived issue by failing to raise it on direct appeal & that even without erroneous information there were other aggravating circumstances sufficient to support sentence. Generally, D may not raise issues on PCR which were available on direct appeal unless fundamental error is apparent on record & such error is raised within provisions of PCR Rule 1, Sec.1(a). Bailey, 472 N.E.2d 1260. Where Tr. Ct. makes general statement of aggravating circumstances, which is supported by record, but fails to sufficiently particularize it, error is not fundamental. Beasley, 445 N.E.2d 1372. However, failure to state any aggravating circumstances has been held to be fundamental error. Pearson, App., 543 N.E.2d 1141, & Ct. App. finds this case similar to Pearson. Although statement of aggravating circumstances was sufficient, at least 1 of factors Tr. Ct. relied on was untrue. Although 1 aggravating circumstance may support both enhancement & consecutive sentence, [citations omitted], Ct. App. cannot say that inaccurate information did not contribute to Tr. Ct.'s decision to impose maximum sentence for both convictions & to order consecutive sentences. D has right to have sentencing based on accurate information. D attempted at trial to call attention to this error & was effectively ignored. Further, D presented evidence at PCR hearing that he was ill & hospitalized during sentencing & was too distracted to notice or attempt to correct other inaccuracies. Held, denial of PCR reversed, & remanded for new sentencing hearing.

TITLE: Bunch v. State
INDEX NO.: X.5.b.
CITE: (11-26-02), Ind., 778 N.E.2d 1285
SUBJECT: PCR - waiver as affirmative defense vs. waiver by procedural default
HOLDING: In post-conviction proceedings, in order to establish affirmative defense of waiver, State must raise it in its pleading in post-conviction relief proceeding & carry burden of proof on issue in Tr. Ct. However, appellate Ct. may nevertheless find, *sua sponte* or at suggestion of party, that issue presented in post-conviction petition was waived by procedural default if issue could have been presented on direct appeal but was not. To extent Langley v. State, 267 N.E.2d 538 (Ind. 1971), & its progeny suggest otherwise, they are *overruled*. Here, Ct. agreed with Ct. App. that State was not entitled to affirmance on basis of its affirmative defense of waiver, but Ct. was not barred from finding that D had waived his sentencing issues by failing to raise them on direct appeal. Held, transfer granted, Ct. App.' opinion at 760 N.E.2d 1163 summarily affirmed as to all other issues; denial of post-conviction relief affirmed.

RELATED CASES: Varner, App., 847 N.E.2d 1039 (despite fact that State failed to plead affirmative defense of res judicata in responding to PCR petition, post-conviction Ct. was bound by decision on D's direct appeal under "law of case" doctrine & Ct. would not revisit it); Chism, App., 807 N.E.2d 798 (though State failed to argue waiver, D waived his claims of error regarding motion to correct erroneous sentence by failing to appeal that order); Taylor, App, 780 N.E.2d 430 (D forfeited claim of sentencing error by failing to present it on direct appeal, despite fact that State did not properly plead or prove affirmative defense of waiver in post-conviction proceedings).

TITLE: Capps v. State
INDEX NO.: X.5.b.
CITE: (2d Dist. 08/31/92), Ind. App., 598 N.E.2d 574
SUBJECT: Post-conviction Relief (PCR) - Fundamental error not waived
HOLDING: PCR Ct. erred in not addressing issue of whether D knowingly, voluntarily, & intelligently waived right to jury. D waived jury trial & after bench trial was convicted of murder & sentenced to life imprisonment. Conviction & sentence were affirmed on appeal where issues of waiver of jury trial & ineffective assistance (IAC) of trial counsel were not raised. In PCR petition, D raised above 2 issues & also constitutionality of sentence & IAC of appellate counsel. State asserted waiver as defense to petition, & PCR Ct. found waiver of all issues except IAC of appellate counsel. PCR Ct. found no IAC of appellate counsel, & that it could not consider merits of other issues due to waiver. Ct. App. found claim that waiver of jury trial was not knowing, voluntary, & intelligent, has been held to rise to level of fundamental error, & that fundamental error may still be raised in PCR proceeding, even though claim was available on direct appeal, but not raised. Because claim, if proven by D, could be fundamental, & there was conflict in relevant evidence, Ct. found PCR Ct. erred in finding waiver & not addressing claim on its merits.

NOTE: In footnote, Ct. appeared to find fundamental error not waived only because of precedent so holding. Ct. indicated that even fundamental error should be unavailable in PCR after not being raised on direct appeal, unless it arose in context of IAC of appellate counsel for not raising it on appeal.

TITLE: Collins v. State
INDEX NO.: X.5.b.
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: 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); 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"); 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: Keller v. State
INDEX NO.: X.5.b.
CITE: (1st Dist. 8/12/85) Ind. App., 481 N.E.2d 1109
SUBJECT: PCR - waiver of issue
HOLDING: Prosecutorial misconduct claims are improper for post-conviction review & are solely to be remedied within scope of direct appeal. Bailey 472 N.E.2d 1260 (claims characterized solely as fundamental error are available only on appeal; card at X.3.d). Three reasons why direct appeal is preferred: (1) provides expeditious means by which Tr. judge may correct errors while issues are still fresh in memory/provides speedy vindication on appellate level; (2) code of review is well defined/broader than that permitted by collateral attack through PCR; (3) D is less likely to encounter procedural difficulties/questions of waiver. Langley 267 N.E.2d 538. Here, D waived direct appeal in exchange for lesser sentence & then raised misconduct on PCR. Ct. holds direct appeal was proper remedy. Held, denial of PCR affirmed.

TITLE: Kindred v. State
INDEX NO.: X.5.b.
CITE: (12/12/96), Ind. App., 674 N.E.2d 570
SUBJECT: Post-conviction remedies -- waiver
HOLDING: D was convicted of forgery & theft & adjudicated habitual offender. D filed successive petition for post-conviction relief (PCR) alleging same grounds for relief as his first petition which had been denied. One point D argued was that post-conviction Ct. erred in allowing prosecutor from Morgan County to represent State in post-conviction proceedings in Putnam County. Specifically, D argued that while Morgan County prosecutor may try criminal case in Putnam County, post-conviction rules require Putnam County prosecutor to represent State in post-conviction proceedings. Ct. held that since D did not object to Morgan County prosecutor's representation of State during first post-conviction proceedings, D waived this issue. Further, although rule provides that prosecutor of circuit in which Ct. of conviction is situated shall represent State, rule does not prevent another prosecutor from participating in PCR proceedings. Under these circumstances, there was no error. Held, conviction affirmed.

TITLE: Kling v. State
INDEX NO.: X.5.b.
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 Cts. consider issue of diligence under P-C.R.2. Held, transfer granted, D's request for writ in aid of appellate jurisdiction denied.

TITLE: Rector v. State

INDEX NO.: X.5.b.

CITE: (1st Dist. 12/15/87) Ind. App., 516 N.E.2d 93

SUBJECT: PCR - waiver; ineffective assistance not waived where not discovered before direct appeal

HOLDING: Where D claims he learned of trial counsel's failure to communicate plea offer only after denial of motion to correct errors (MCE), ineffective assistance of counsel (IAC) is not waived for PCR. PCR proceedings are not substitute for direct appeal & may be used only to raise issues unknown or unavailable during trial & appeal. Hollon 494 N.E.2d 280. Issues available but not argued on direct appeal are waived. Riddle 491 N.E.2d 527. Here, D allegedly learned of counsel's failure to inform him of favorable plea offer only after denial of MCE. D may not amend or supplement MCE after Tr. Ct. has ruled on it. Matter of Adoption of H.S., App., 483 N.E.2d 777. Thus, IAC would have been waived on appeal for failure to include it in MCE. IAC could have been heard on direct appeal only if fundamental error. Fundamental error must appear plainly on face of record. Rowley 442 N.E.2d 343. D's particular claim of IAC would not appear on face of record. D's IAC claim was unavailable on direct appeal. PCR Ct. found waiver & made no finding of fact re D's claim. Held, reversed & remanded for determination on merits.

RELATED CASES: Dixon, App., 760 N.E.2d 613 (PCR issue waived where it was known & not raised in direct appeal); Woods, 701 N.E.2d 1208 (IAC claim may be raised for first time in post-conviction proceedings if not raised on direct appeal; see full review at Y.4.b).

TITLE: State v. Warren
INDEX NO.: X.5.b.
CITE: (4th Dist. 8/16/89), Ind. App., 542 N.E.2d 562
SUBJECT: Waiver - admission of fact at guilty plea bars later denial of fact
HOLDING: Where D admitted to possession of marijuana at time of guilty plea, he cannot now obtain PCR on basis of testimony that marijuana belonged to his sister-in-law. D pled guilty to 4 counts, including possession of marijuana. Seven years later, he filed PCR petition, alleging that his sister-in-law, on discovering that he was serving time on possession charge, told him marijuana had belonged to her. At guilty plea hearing, D had testified that marijuana was his, but at PCR hearing he testified he had believed police had planted it in his van. PCR Ct. granted relief, & state appeals. Guilty plea is admission of guilt & waiver of specific constitutional rights. [Citations omitted.] PCR Rule 1(1)(a)(4) permits relief where D can demonstrate existence of previously unknown material facts. However, where D was aware of facts at time of guilty plea, relief is not available. Stewart 517 N.E.2d 1230. Here, D's testimony that he believed police planted marijuana indicates that he knew it did not belong to him at time he pled guilty. Further, there is no evidence that D used due diligence to discover who put marijuana in van prior to plea. See Laird 385 N.E.2d 452; Ray 476 N.E.2d 93. Held, grant of PCR reversed.

TITLE: Stewart v. State
INDEX. NO.: X.5.b.
CITE: (2d Dist. 1/16/90), Ind. App., 548 N.E.2d 1171
SUBJECT: Post-conviction relief (PCR) - state's waiver of defense
HOLDING: Tr. Ct. did not err in allowing state to present laches evidence at 2d PCR hearing after sustaining D's Motion to Correct Errors (MCE). On PCR, D challenged his guilty plea on ground that he had not been advised of confrontation right. At PCR hearing, state indicated that it was not prepared to go forward with laches defense, & that, because it wanted appellate Ct. to rule on merits of D's claim as "test case", it would prefer to present laches defense only if D prevailed on appeal. Tr. Ct. denied PCR & ordered 2d hearing on laches if appellate Ct. reversed. Ct. App. points out that if D's appeal had been successful on merits, proper disposition would have been vacation of guilty plea & trial upon original charge, not new PCR hearing. In his MCE, D presented 3 allegations of error, including Tr. Ct.'s ruling that state had not waived laches defense by failing to present it at hearing. At MCE hearing, D stated objection to allowing state to retain laches defense at all but noted that if Tr. Ct. was going to allow it, laches evidence should be presented prior to appeal. Tr. Ct. sustained MCE & ordered 2d PCR hearing on laches. Because D "invited" Tr. Ct. to receive laches evidence at this 2d hearing, Ct. App. is unwilling to find that Tr. Ct. erred in doing so. Held, denial of PCR affirmed.

RELATED CASES: Ware, 567 N.E.2d 803 (it was within prerogative of Tr. Ct. to grant continuance where State, after filing its first affirmative defense of laches, informed court that it was unprepared at that time to go forward with that defense and requested continuance).

TITLE: Williams v. State
INDEX NO.: X.5.b.
CITE: (6/19/84) Ind., 464 N.E.2d 893
SUBJECT: PCR - waiver; ineffective assistance not raised on appeal is waived
HOLDING: Failure to raise issue of ineffective assistance of counsel (IAC) in direct appeal waives issue raised in PCR proceeding. Metcalf 451 N.E.2d 321. Ct. will consider waived issue only if error is fundamental (denied D fair trial). Mitchell 455 N.E.2d 1131. Here, D contends trial counsel was ineffective because he failed to subpoena alibi witness & failed to tender alibi instruction. Ct. finds D's allegations & proof at PCR hearing do not demonstrate fundamental error. Held, denial of PCR affirmed. DeBruler, CONCURRING IN RESULT, would hold that waiver of IAC issue is a defense which state must raise to PCR Ct. State did not raise defense, thus DeBruler cannot concur that waiver occurred.

RELATED CASES: Woods, 701 N.E.2d 1208 (IAC claim may be presented for first time in post- conviction proceedings if not raised on direct appeal; see card at Y.4.b); Askew 500 N.E.2d 1219 (although IAC issue was not raised on direct appeal, Ct. considers it here where same attorney represented D at trial & on appeal, *citing* Majors 441 N.E.2d 1375).

TITLE: Young v. State
INDEX NO.: X.5.b.
CITE: (12/1/86) Ind., 500 N.E.2d 735
SUBJECT: PCR - defenses; waiver
HOLDING: Where Tr. Ct. did not find waiver & state failed to file cross-errors on appeal alleging that Tr. Ct. erred in failing to make special findings & conclusions on issue of waiver, Ct. on appeal cannot base its decision on waiver principle. Johnson 313 N.E.2d 542. Here, Ct. addresses merits of D's allegations of error re (1) determination that witness was competent to testify & (2) sufficiency of evidence & affirms denial of PCR. Held, no error.

NOTE: In Mickens, 596 N.E.2d 1379, court stated that under 1990 amendments to Trial Rule 59(G), State may now argue waiver in its appellee's brief following denial of PCR without first filing cross appeal, so long as State affirmatively presented waiver in post-conviction court.

RELATED CASES: Bunch, 778 N.E.2d 1285 (appellate Ct. may find, *sua sponte* or at suggestion of party, that issue presented in post-conviction petition was waived by procedural default if issue could have been presented on direct appeal but was not; see full review, this section); Clark, App., 648 N.E.2d 1187 (at some point, whether specifically pleaded by the State or not, a post- conviction petitioner is not entitled to further review of questions finally determined); Maxey, App., 596 N.E.2d 908 (It was not error to deny D's fifth PCR petition because issues raised in petition were barred either by waiver or res judicata. Ct. also noted possibility of barring petitioner from filing further petitions except under narrowly tailored circumstances, but elected not to); Gosnell 483 N.E.2d 445 (issues available to D in first PCR proceeding are waived for consideration in second proceeding, *citing* PC1, Section 8; here, D again raised issue of waiver of trial rights, but on different grounds; held, issue waived); Clanton, App., 441 N.E.2d 44 (CONCURRING OPINION by Judge Neal: same holding).

TITLE: Weatherford v. State
INDEX NO.: X.5.b.
CITE: (1st Dist. 08/05/92), Ind. App., 597 N.E.2d 17
SUBJECT: Waiver & res judicata - PCR
HOLDING: Where there was fundamental error in establishing proper sequencing of commission/conviction of prior offenses in habitual offender enhancement, fact that D did not raise issue until second PCR proceeding, did not result in waiver of issue. Additionally, fact that in first PCR proceeding, he attacked one of prior convictions as being ineligible for consideration, did not bar consideration of present issue on grounds of res judicata. Two allegations were sufficiently different so as not to invoke res judicata, Buchanan, J., DISSENTING.

X. POST-CONVICTION REMEDIES

X.5. Defenses

X.5.c. Prior adjudication

TITLE: Harrison v. State

INDEX NO.: X.5.c.

CITE: (1/28/92), Ind. App., 585 N.E.2d 662

SUBJECT: Post-conviction remedies -- waiver; res judicata bars revisiting issue previously determined on first petition for post-conviction relief

HOLDING: Issues previously decided adversely to post-conviction petitioner's decision are barred by doctrine of "res judicata." Here, D was convicted of theft pursuant to guilty plea. D appealed denial of his second petition for post-conviction relief (PCR) in which he sought to withdraw his plea of guilty. D claimed that post-conviction Ct. erroneously dismissed his petition without hearing upon finding that allegations of error contained therein were waived or res judicata. Ct. held that doctrine of res judicata prevented D from relitigating issue of whether he was advised that Tr. Ct. was not bound by plea agreement where post-conviction Ct. which considered first petition found that he had been adequately advised & that finding was affirmed on direct appeal. Held, denial of petition for PCR affirmed.

TITLE: Jewell v. State
INDEX NO.: X.5.c.
CITE: (06-04-08), Ind., 887 N.E.2d 939
SUBJECT: Res judicata -Fundamental error on appeal does not preclude IAC claim on PCR
HOLDING: The Court of Appeals erroneously found that D 's unsuccessful claims of fundamental error precluded any future ineffective assistance of counsel claims in post-conviction proceedings. A criminal D claiming ineffective assistance of trial counsel is at liberty to elect whether to raise this claim on direct appeal or in post-conviction proceedings. But, if raised on direct appeal, the appellate resolution of the issue acts as res judicata and precludes its relitigation in subsequent post-conviction relief proceedings. Unless foreclosed by raising the issue on direct appeal, a D should be permitted to present the issue of ineffective assistance of counsel utilizing the broader evidentiary opportunities afforded in post-conviction proceedings.

Here, D raised trial counsel's failure to object to the filing of an amended charge, failure to cross-examine, failure to investigate and failure to file an alibi notice as fundamental error on appeal. The fact that D unsuccessfully raised these issues as fundamental error does not preclude him from raising these issues as ineffective assistance of counsel in post-conviction relief proceedings. D may thus present a future post-conviction claim alleging ineffectiveness of trial counsel. Held, transfer granted, Court of Appeals opinion at 877 N.E.2d 864 reversing Counts I and II summarily affirmed, and remaining parts opinion, including its discussion of ineffective assistance of counsel, are automatically vacated.

RELATED CASES: Williams, 983 N.E.2d 661 (Ind. Ct. App2013) (different standards for IAC and fundamental error; fundamental error occurs where fair trial is impossible, not merely where trial counsel is ineffective); Benefield, 945 N.E.2d 791 (Ind. Ct. App 2011) (because the standard for IAC prejudice is based on a reasonable probability of a different result and fundamental error occurs only when the error is so prejudicial that a fair trial is rendered impossible, the standard required to establish fundamental error presents a higher bar; thus, the fact D raised erroneous instruction as fundamental error on appeal did not preclude a successful post-conviction claim of IAC for failing to object to the erroneous instruction).

TITLE: Kiger v. State
INDEX NO.: X.5.c.
CITE: (5/5/89), Ind., 537 N.E.2d 501
SUBJECT: PCR defenses - res judicata
HOLDING: Res judicata bars D from reopening question of sufficiency of evidence after co-conspirator's conviction was reversed due to insufficient evidence of agreement. D & co-conspirator were charged with conspiracy to commit battery with a deadly weapon. Same witness testified against both, describing conversation which took place in car on way to scene of fight. Both D & co-conspirator were convicted, & both appealed on sufficiency grounds. While D's appeal was unsuccessful, co-conspirator's appeal was ultimately successful when Ind. S. Ct. found that evidence did not support inference of an agreement among alleged co-conspirators to use deadly weapons. In PCR petition, D argues that in reversing co-conspirator's conviction, Ind. S. Ct. stated new rule of law re basis for inference of agreement to commit offense. However, Ind. S. Ct. responds that it merely made factual determination, which did not create new opportunity for D to challenge sufficiency. Because basic issue of sufficiency was available & was raised on direct appeal, D is barred from raising it on PCR. Givan, J., DISSENTS, *citing* Berry (1930), 173 N.E. 705, for proposition that allowing D's conviction to stand in light of reversal of co-conspirator's conviction creates "repugnancy upon the record."

TITLE: Morris v. State
INDEX NO.: X.5.c.
CITE: (7/24/84) Ind., 466 N.E.2d 13
SUBJECT: PCR - defenses; prior adjudication; ineffective assistance of counsel (IAC)
HOLDING: Denial of PCR was proper where allegation of IAC had been presented on direct appeal to Ind. S. Ct. Res judicata applies. Here, D filed pro se petition & gave several additional examples at PCR hearing of ineffectiveness that were not raised in earlier appeal. Ct. finds these were available to D when direct appeal was filed. Issues not raised but available to D in original appeal cannot be considered in subsequent PCR proceedings. Richardson 439 N.E.2d 610; Kennedy 393 N.E.2d 193; Frasier 366 N.E.2d 1166. Held, denial of PCR affirmed.

RELATED CASES: Seeley, App., 782 N.E.2d 1052 (Allen, 749 N.E.2d 1158 does not preclude claims of ineffective assistance of appellate counsel when claims of ineffective assistance of trial counsel are precluded); Davis, App., 775 N.E.2d 1182 (where ineffective assistance of trial counsel is barred by res judicata, any argument concerning ineffective assistance of appellate counsel based upon those errors is also defeated); Moody, App., 749 N.E.2d 65 (res judicata barred D from relitigating his claim of IAC on post-conviction appeal); Sawyer, 679 N.E.2d 1328 (D, having litigated his IAC claim on direct appeal, is not entitled to litigate it again by alleging different grounds on PCR); Marts 478 N.E.2d 63 (Tr. Ct. did not err in denying D's PCR petition, despite state's stipulation that it should be granted; where Ind. S. Ct. determined on direct appeal that 30-year sentence was not unconstitutional; Tr. Ct. has no jurisdiction to accept sentence reduction to 6 years); Mosley 477 N.E.2d 867 (Crim L 998(19,21); held, no error in summary denial of PCR petition; D was estopped to raise in subsequent petition an issue available when previous petition was filed because latter included D's verification that "every ground known" for relief had been raised); Cambridge 468 N.E.2d 1047; Bell, App., 473 N.E.2d 635 (D may not bring PCR petition based on same grounds presented/could have been presented in coram nobis proceeding by D 20 years earlier).

TITLE: State v. Lopez
INDEX NO.: X.5.c.
CITE: (4th Dist., 1-28-97), Ind. App., 676 N.E.2d 1063
SUBJECT: PCR - res judicata bars revisiting issues previously determined on direct appeal
HOLDING: Post-conviction relief (PCR) Ct. committed clear error in reducing D's sentence after same sentence was affirmed on direct appeal in Lopez v. State, 527 N.E.2d 1110 (Ind. 1988). Clear error existed because PCR Ct. ignored rule of res judicata, which bars further litigation where, as here, final judgment on merits has been rendered on same claim between same parties. Sentencing order in this case had been reviewed & finally decided by Indiana S. Ct. on direct appeal. Held, judgment reversed in part & remanded to PCR Ct. with instructions to reinstate original sentence.

TITLE: Wilson v. State
INDEX NO.: X.5.c.
CITE: (4th Dist. 01/16/91), Ind. App., 565 N.E.2d 761
SUBJECT: IAC issues not raised on direct appeal are not waived if not in record
HOLDING: Ineffectiveness of counsel claims which are not available on direct appeal because error was not part of the record, are not waived or barred by res judicata, but instead constitute "additional argument" which can be raised in a PCR petition. Subsequent to his conviction for murder, D took direct appeal & raised IAC. Ind. S. Ct. affirmed D's conviction & held he received effective assistance, Wilson 468 N.E.2d 1373. In 1985, D filed PCR petition raising IAC again, using as grounds acts & omissions of counsel that did not appear in the record on appeal. At PCR hearing, State argued that issue of ineffective assistance was barred by res judicata. PCR Ct. agreed & denied petition. Ct. App. looked to Morris 466 N.E.2d 13, as further explained by Osborne 481 N.E.2d 376, & Rector, App., 516 N.E.2d 93, in finding that "additional argument" which would overcome res judicata & waiver bar after direct appeal, includes acts or omissions of ineffective assistance not contained in the original record on appeal. Holding, denial of post-conviction relief affirmed on merits of issues raised.

RELATED CASES: Woods, 701 N.E.2d 1208 (IAC claim may be presented for first time in post- conviction proceedings if not raised on direct appeal; see card at Y.4.b).

X. POST-CONVICTION REMEDIES

X.5. Defenses

X.5.d. Second PCR petition (PC 1, 8)

TITLE: Arthur v. State
INDEX NO.: X.5.d.
CITE: (3-22-96), Ind., 663 N.E.2d 529
SUBJECT: Attempted murder instruction - successive PCR petition & res judicata
HOLDING: Tr. Ct. properly denied D's successive petition for post-conviction relief (PCR), because principles of res judicata barred subsequent review of issue presented on prior appeal. Sole issue raised in successive petition for PCR was adequacy of jury instructions for attempted murder. In direct appeal, Ct. previously found that there was sufficient evidence to find intent to kill. At time of Ct. App. decision affirming denial of first PCR petition, some confusion remained on standard for attempted murder instructions, & Ct. relied on decisions in Worley v. State, 501 N.E.2d 406 (Ind. 1986) & Santana v. State, 486 N.E.2d 1010 (Ind. 1986), which were subsequently *overruled*. In appeal of denial of successive PCR petition, D argued that res judicata should not be bar to relief where prior decision is erroneous. Ct. held that in this case, jury instruction issue had been adequately raised & fully litigated in D's first petition for PCR. Thus, P-C.R. 1(8) did not provide D with basis for successive petition for PCR. Held, transfer granted, Ct. App. decision at 657 N.E.2d 435 reversed, & Tr. Ct. affirmed; DeBruler, J., dissenting.

TITLE: Brown v. State
INDEX NO.: X.5.d.
CITE: (2d Dist. 12/22/83) Ind. App., 458 N.E.2d 245
SUBJECT: PCR - effect of failure to verify on waiver issue under PC 1, Section 8
HOLDING: State waived want of verification by failing to object at earliest possible opportunity. (Citations omitted). Verification is not necessary to confer subject-matter jurisdiction. Shelor 386 N.E.2d 690 & Owen, 338 N.E.2d 715 (Tr. Cts. must return unverified petitions for verification, suggesting verification is matter of particular case jurisdiction). Ct. notes Thompson 389 N.E.2d 274 (suggesting verification is necessary before Tr. Ct. gains jurisdiction over PCR petition) but chooses to follow Shelor & Owen. Held, verification issue waived; denial of PCR reversed on other grounds.

RELATED CASES: Barnes, App., 496 N.E.2d 816 (Crim L 998(21); because D's prior 2 PCR petitions were not properly verified, Tr. Ct.'s ruling on their merits did not bar D from pursuing new issue (validity of guilty plea) in third petition; state failed to submit brief & Ct. applies "less stringent standard of review with respect to showing reversible error;" held denial of PCR reversed & cause remanded).

TITLE: Currie v. State
INDEX NO.: X.5.d.
CITE: (8/9/2017), 82 N.E.3d 285 (Ind. Ct. App 2017)
SUBJECT: Erroneous dismissal of PCR petition; petition was not a successive petition
HOLDING: Tr. Ct. erred in dismissing D's PCR petition as it mistakenly concluded the petition was a successive PCR; while D had, in fact, filed two previous PCR petitions, neither petition was adjudicated on the merits, so the PCR petition at issue here was not a successive petition.

In 2006, D pled guilty to two counts of child molesting in Adams Circuit Court. In 2010, he filed a PCR petition but later withdrew it without prejudice. In January of 2016, he filed another petition. In April of 2016, he filed a petition for writ of habeas corpus in Henry County, the county of his incarceration. The Henry Circuit Court transferred the petition to the Adams Circuit Court to be re-flied as a PCR petition. The same day, the Adams Circuit Court dismissed the petition with prejudice, finding that D had already filed other PCR petitions, making this petition a successive petition that the Court of Appeals had not authorized. See Ind. Post-Conviction Rule 1(12). The Tr. Ct. should not have dismissed the April 2016 petition as an unauthorized successive petition because neither of his previous petitions were adjudicated on the merits. See Williams v. State, 808 N.E.2d 652, 659 (Ind. 2004); Cf. Lacey v. State, 829 N.E.2d 518, 519 (Ind. 2005). The 2010 PCR petition was withdrawn without prejudice, and the January 2016 petition was still pending when the Henry County petition was transferred to the Adams Circuit Court. However, the State is correct that D should amend his January 2016 petition to put all claims into one petition. Nonetheless, the Tr. Ct.'s dismissal of the Henry County petition prevented D from doing so. Held, judgment reversed and remanded.

TITLE: Everroad v. State
INDEX NO.: X.5.d.
CITE: (5th Dist., 4-21-97), Ind. App., 678 N.E.2d 1136
SUBJECT: Summary denial of successive petition for post-conviction relief (PCR) improper
HOLDING: Post-Conviction Rule 1, Sec. 12(c) provides that once authority to file successive petition for PCR is granted, petition is to be forwarded to post-conviction Ct. for hearing. When rule provides for mandatory procedural hearing on motion or petition, hearing is prerequisite to denial of motion or petition. Rumfelt v. Himes, 438 N.E.2d 980 (Ind. 1982). Here, Ct. App. authorized filing of D's successive PCR petition & directed it to post-conviction Ct. for hearing. Post- conviction Ct.'s summary denial of petition was improper, because hearing on petition was prerequisite to ruling on merits. Held, reversed & remanded for mandatory hearing.

TITLE: Johnson v. State

INDEX NO.: X.5.d.

CITE: (8/26/96), Ind. App., 670 N.E.2d 59

SUBJECT: Post-conviction remedies -- second PCR petition; improper retroactive application of PCR 1(12)

HOLDING: Post-conviction Ct. erred in denying D's successive petition for post-conviction relief. D filed his successive petition in 1989, which was dismissed in 1995, because D failed to file successive petition with clerk of Indiana S. Ct. Ind. Post-Conviction Rule 1(12), which became effective in 1990, requires leave of either Indiana S. Ct. or Ct. App. before filing successive petition in Tr. Ct. Ct. noted that retroactive application of P-C.R. 1(12) to D was improper. Tolson v. State, 439 N.E.2d 454 (Ind. 1986). Held, judgment reversed & remanded.

TITLE: Love v. State
INDEX NO.: X.5.d.
CITE: (4/20/2016), 52 N.E.3d 937 (Ind. Ct. App 2016)
SUBJECT: Failure to request permission to file successive post-conviction petition
HOLDING: D improperly filed a successive petition for post-conviction relief without permission from the Court of Appeals in according with Indiana Post-Conviction Rule 1(12). When Tr. Ct. encounters an improper successive petition for post-conviction relief, it should dismiss the petition. Young v. State, 888 N.E.2d 1255 (Ind. 2008). Held, remanded with instructions to dismiss D's claims.

TITLE: Mosley v. State
INDEX NO.: X.5.d.
CITE: (5/12/85) Ind., 477 N.E.2d 867
SUBJECT: PCR - defenses; second petitions
HOLDING: Tr. Ct. did not err in summarily denying D's second PCR petition without a hearing. Ct. finds pleadings conclusively demonstrate second petition raises issues available when first petition was filed, thus summary denial without a hearing was proper. PC 1, Section 4(e). D is estopped from raising in subsequent petition issues available when previously filed petition included verification that D had raised every ground known for relief. See, e.g., Jewell 397 N.E.2d 946; Lamb 325 N.E.2d 180; Stone, App., 444 N.E.2d 1214. Ct. finds no allegation of newly discovered grounds for relief in second petition. Ct. notes D would have been entitled to hearing had he pled fact(s), which if proved would dispel otherwise inescapable conclusion of waiver. Hearing would determine correctness of facts alleged. Held, no error.

RELATED CASES: Kirk, App., 632 N.E.2d 776 (No error in summarily dismissing D's successive PCR petition, despite claim that State's answer to petition was untimely. In dismissing petition, PCR Ct. found abuse of PCR process, as issues presented were available to D when he filed his first petition & Ct. App. agreed. Although successive PCR petition is to be handled pursuant to PCR rule 1(1)-(9) when State's answer is untimely, successive petition is not treated as initial petition subject to requirements of PCR rule 1(2). PCR Ct. could therefore summarily dismiss D's petition without referral to public defender under PCR rule 1(4)(e)); Howland, 503 N.E.2d 1217 (Crim L 998 N.E.2d 21); Tr. Ct. did not err by summarily denying conclusory, second PCR petition without making FOF/COL *citing* Mosley; DeBruler DISSENTS without opinion).

TITLE: Patton v. State
INDEX NO.: X.5.d.
CITE: (2d Dist. 5/14/87) Ind. App., 507 N.E.2d 624
SUBJECT: Second PCR petitions after White
HOLDING: Appellate Ct. rejects D's contention that cause should be remanded for limited hearing to enable him to present additional evidence necessary to meet White 497 N.E.2d 893 standard. D argues that allowing him to file new petition, as done in White & subsequent cases, is inadequate because he will face possibility of waiver under PC 1, 8. D also contends if he files new petition, he may be subject to increased sentence under PC 1, 10 if relief is eventually granted. See Tolson 493 N.E.2d 454. Ct. does not believe second PCR petition could be dismissed upon grounds of waiver, because PC 1, 8 provides that "sufficient reason" prevents waiver from barring claim for relief. Change in standard of proof effected by White constitutes sufficient reason. Held, denial of PCR affirmed. Ratliff CONCURS IN RESULT without opinion.

RELATED CASES: Harrison, App., 585 N.E.2d 662.

TITLE: Saylor v. State
INDEX NO.: X.5.d.
CITE: (7/12/2017), 81 N.E.3d 228 (Ind. Ct. App 2017)
SUBJECT: Proper remedy is Successive PCR, not declaratory judgment
HOLDING: Tr. Ct. did not err in granting the State's motion for judgment on the pleadings. It is clear from the face of D's motion for declaratory judgment that he was not entitled to relief under any circumstances because he has another full and adequate remedy, namely, a successive petition for post-conviction relief. See Ind. Post-Conviction Rule 1(12); see also Volkswagon, A.G. v. Watson, 390 N.E.2d 1082, 1085 (Ind. Ct. App 1979). D was convicted of child molesting, vicarious sexual gratification, and intimidation. He pled guilty to being a habitual offender. On post-conviction review, Court reversed the habitual offender conviction and remanded for a new trial on that charge. D then filed a motion for declaratory judgment, claiming that because there was no probable cause to support his arrest, he was entitled to immediate release. The State filed a motion for judgment on the pleadings, which the Tr. Ct. granted. A motion for judgment on the pleadings should be granted "where it is clear from the face of the complaint that under no circumstances could relief be granted." Veolia Water Indianapolis, LLC v. National Trust Ins. Co., 3 N.E.3d 1, 5 (Ind. 2014). The propriety of a motion for declaratory judgment depends, in part, on whether another remedy is more effective or more efficient. Tramill v. Anonymous Healthcare Provider, 37 N.E.3d 553, 577 (Ind. Ct. App 2015), *trans. denied*. Because D has a remedy through a successive petition for post-conviction relief – indeed the only remedy left to challenge his convictions – it is clear that under no circumstances could he obtain relief though his motion for declaratory judgment. Also, even if, as D claims, he was merely seeking clarification about the law, clarification would not affect his convictions and would constitute an advisory opinion, which would make such a request non-justiciable. Held, judgment affirmed.

TITLE: Shaw v. State

INDEX NO.: X.5.d.

CITE: (08/21/2019), 130 N.E.3d 91 (Ind. S. Ct. 2019)

SUBJECT: May file petition for post-conviction relief after remand for new trial, new sentencing, or new appeal obtained from federal habeas proceeding

HOLDING: Per Curiam. After Defendant's murder conviction was affirmed on direct appeal, he filed a petition for post-conviction relief (PCR) alleging ineffective assistance of appellate counsel, which was denied. Defendant then filed a writ of habeas corpus, which was denied by the District court but vacated by the Seventh Circuit Court of Appeals, which remanded to issue a writ of habeas corpus unless the State of Indiana granted Defendant a new appeal. After unsuccessfully filing a second direct appeal, Defendant filed another (new) PCR petition alleging that his appellate attorney in the new direct appeal was ineffective. The trial court dismissed the new PCR petition as an unauthorized successive PCR petition under Indiana Post-Conviction Rule 1(12). The Court of Appeals affirmed the dismissal in a memoradum opinion.

On transfer, the Indiana Supreme Court held that a PCR petition that addresses only the proceeding on remand is not a successive petition under Indiana Post-Conviction Rule 1(12) and as long as the new petition raises only the issues emerging from the second direct appeal, Defendant is authorized to file the new petition for post-conviction relief.

X. POST-CONVICTION REMEDIES

X.5. Defenses

X.5.e. Laches

TITLE: Armstrong v. State
INDEX NO.: X.5.e.
CITE: (5-21-01), Ind., 747 N.E.2d 1119
SUBJECT: Post-conviction relief (PCR) not barred by laches - prejudice not shown
HOLDING: Post-conviction Ct. erred in finding that D's petition for PCR, filed three years after direct appeal, was barred by laches. For laches to apply, State must prove by preponderance of evidence that petitioner unreasonably delayed in seeking relief & that State is prejudiced by delay. Williams v. State, 716 N.E.2d 897 (Ind. 1999). Prejudice exists when unreasonable delay operates to materially diminish reasonable likelihood of successful re-prosecution. Stewart v. State, 548 N.E.2d 1171 (Ind. 1990). Here, post-conviction Ct. erred in finding that State would be prejudiced in any retrial due to fact that one of State's original eyewitnesses now lives in Georgia. Although it would be expensive, time-consuming, & logistically difficult for State to bring witness back to testify in Indiana, there was no indication that State attempted to determine whether witness would voluntarily return & testify. Both Georgia & Indiana have adopted Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Proceedings. Ind. Code 35-37-5-1 to -9. As to other witnesses, State did not present evidence establishing that they are likely to testify differently than they did at original trial. Even if Ct. were to consider extent that there may exist diminished likelihood of successful re-prosecution by reason of witness's location & change in motivations of witnesses to testify consistent with their prior testimony, there was no evidence that these factors did not also exist when direct appeal concluded. Thus, alleged prejudice claimed by State to support its defense of laches is neither attributable to nor materially enhanced by D's three-year delay in filing petition for PCR. Held, transfer granted, judgment reversed & remanded for further proceedings.

TITLE: Edwards v. State
INDEX NO.: X.5.e.
CITE: (3rd Dist., 3-4-97), Ind. App., 676 N.E.2d 1087
SUBJECT: Post-Conviction relief (PCR) not barred by laches
HOLDING: Where D is diligent in maintaining contact with Public Defender, continually expressing his desire for assistance, laches defense to PCR will not apply, especially where he is continuously promised assistance. Gallagher, 410 N.E.2d 1290. Here, over course of 14-year period, D repeatedly sought, & was promised assistance from State Public Defender. Ct. concluded that D was diligent in attempting to obtain assistance in filing for PCR. Although 14 years is lengthy period to seek relief, mere passage of time alone is not enough to constitute laches. Slone, App., 590 N.E.2d 635. Lengthy delay will not negate petitioner's diligence under these circumstances absent showing of abusive delay by petitioner. Gallagher. In this case, there was no abusive delay by D. Ct. rejected State's argument that laches should nevertheless apply since D had knowledge of post-conviction remedies & could have filed his petition pro se at any time. Filing pro se petition is not only way to demonstrate due diligence in seeking relief. Held, judgment reversed; Hoffman, J., concurring in result.

TITLE: McCollum v. State
INDEX NO.: X.5.e.
CITE: (5th Dist., 10-8-96), Ind. App., 671 N.E.2d 168
SUBJECT: PCR - defenses; laches; unreasonable delay & prejudice to State shown
HOLDING: Tr. Ct.'s finding that post-conviction relief (PCR) was barred by laches was proper & did not violate due process of law. To prove laches, State must show by preponderance that D unreasonably delayed in seeking relief & that State has been prejudiced by delay. Holland, App., 609 N.E.2d 429. Here, D's continuous consultations with attorneys regarding challenged conviction, & his access to law library while incarcerated, was sufficient evidence to support finding that D had knowledge of defect in his conviction & that his 12-year delay in seeking PCR was unreasonable. D had opportunity for full & fair review of merits of his claims, which he waived by his unreasonable delay. Further, State presented sufficient evidence of faded memories & missing witnesses to show that State was prejudiced by D's delay. Held, denial of PCR affirmed.

Note: On rehearing at 676 N.E.2d 356, Ct. noted that D's contacts with attorneys & criminal justice system can support inference of knowledge of defect or means to challenge conviction, even if contacts relate to different types of proceedings.

RELATED CASES: Edmonson, 87 N.E.3d 534 (Ind. Ct. App. 2017) (while D's 23-year delay in filing PCR petition was unreasonable, State's naked assertion that the delay would prejudice its ability to retry D was insufficient to meet its burden to prevail on laches defense.); Jent, 120 N.E.3d 290 (Ind. Ct. App. 2019) (PCR petition barred by laches even though State does not plead prejudice from delay); Balderas, 116 N.E.3d 1141 (Ind. Ct. App. 2018) (where D waited 12 years to file PCR alleging ineffective assistance of counsel for not advising her that she could be deported if she pleaded guilty, the unreasonable delay prejudiced the State so that the Tr. Ct.'s application of laches was not erroneous); Thompson, 31 N.E.3d 1002 (Ind. Ct. App. 2015) (delay between filing PCR petition and date of hearing is valid basis for laches finding; D's 22-year delay was unreasonable and prejudiced the State); Kirby, App., 822 N.E.2d 1097 (PC-court did not err in determining that D's claims were barred by laches, where D filed PCR petition 28 years after convictions & had repeated contacts with criminal justice system); Lile, App., 671 N.E.2d 1190 (D's filing delay supported conclusion that D was guilty of laches for failing to timely raise issues in his PCR petition; state showed prejudiced from unreasonable delay).

TITLE: Sanders v. State
INDEX NO.: X.5.e.
CITE: (8-21-00), Ind., 733 N.E.2d 928
SUBJECT: Laches - two years is not unreasonable
HOLDING: Post-conviction Ct. erred in finding that petition for post-conviction relief was barred by laches. To prevail on claim of laches, State must prove by preponderance of evidence that: (1) petitioner unreasonably delayed in filing for post-conviction relief, & (2) State was prejudiced by delay. Twyman, 459 N.E.2d 705, 712 (Ind. 1984). Here, Ct. App. denied petitioner's appeal on October 9, 1991. However, petitioner did not learn of denial until almost one year later. One month after learning of appeal, petitioner requested record from Ct. App. & received it in January 1993. One year later which was approximately two years after Ct. App.' opinion, petitioner filed his pro se petition for post-conviction relief, to which State did not assert laches. Ct. did not act on petition until State Public Defender got involved in October 1997, & five months later, State amended its original petition to include defense of laches. Because petitioner had below average reading & comprehension ability & State did not assert defense of laches until four years after D's original petition, it was not unreasonable for him to take one year in filing petition for post-conviction relief. Also, fact that State' s witness moved to Tennessee did not automatically prejudice State. Witness signed affidavit that he was willing to testify & had clear memory of events. Thus, laches does not bar litigation of post-conviction relief. Held, judgment reversed.

RELATED CASES: Mahone, App., 742 N.E.2d 982 (although pending federal habeas corpus did not excuse 5 1/2 year delay in filing PCR petition, State failed to show prejudice because State contacted 22 of 26 witnesses & failed to inquire about their memory of events or willingness to testify).

TITLE: Stone v. State
INDEX NO.: X.5.e.
CITE: (1st Dist. 2/3/83) Ind. App., 444 N.E.2d 1214
SUBJECT: PCR - defenses; laches; state waiver
HOLDING: It is state's responsibility to raise laches defense to PCR petition at Tr. Ct. level. Rader, App., 393 N.E.2d 199. State waives defense by responding to an allegation on the merits at the hearing below. See Richardson 439 N.E.2d 610. Here, there was a lapse of almost 13 years between D's guilty plea & his PCR petition in which he challenged his guilty plea. State responded to the merits of D's PCR petition, thus is barred from arguing laches on appeal. Held, denial of PCR petition affirmed.

TITLE: Twyman v. State
INDEX NO.: X.5.e.
CITE: (2/10/84) Ind., 459 N.E.2d 705
SUBJECT: PCR - defenses; laches; prejudice
HOLDING: PCR Ct. erred in denying D relief under doctrine of laches (delay of 8 years), but denial of PCR was proper because D waived issue raised in PCR petition (criminal Ct. jurisdiction over juvenile who misrepresented his age). Ct. accepts petition to transfer & vacates 1st Dist. opinion (452 N.E.2d 434) holding that "once [laches] is raised by the state, the petitioner must explain his delay in filing." Ind. S. Ct. holds that before D can be denied relief because of laches, state must affirmatively plead & prove laches. Ct. overrules Stutzman, App., 427 N.E.2d 724 to extent that it places burden of proof on D to disprove laches. Held, denial of PCR affirmed.

RELATED CASES: Mansfield, App., 850 N.E.2d 921 (Ct. may not raise laches *sua sponte*); Blunt-Keene, App., 708 N.E.2d 17 (Tr. Ct.'s conclusion that State had established affirmative defense of latches was clearly erroneous); Baxter, 636 N.E.2d 151 (Mere allegation of constitutional error does not defeat laches defense & State's showing of prejudice doesn't require that they be unable to present any case at all); Corder, App., 516 N.E.2d 71 (state's mere assertion that it is unable to re-prosecute because of lack of evidence, without more, is insufficient; here, records & transcripts of guilty plea hearing had been destroyed & Tr. judge was deceased); Washington 507 N.E.2d 239 (Ct. finds delay unreasonable; however, state's half-hearted search for witnesses begun 2 days before PCR hearing was insufficient to support claim of prejudice; held, remanded); Parrish, App., 498 N.E.2d 73 (Ct. finds prejudice where victim is dead, Tr. Ct. records were destroyed in flood & no bank teller could independently recall D' s presentation of forged check); Gibbens 494 N.E.2d 963 (DISSENT FROM DENIAL OF CRIMINAL TRANSFER contends where constitutional infirmity is clear, prejudice to state's retrial capabilities is insufficient); Taylor, App., 492 N.E.2d 109 (10-year delay in filing PCR petition alone is insufficient to prove laches; Ct. rejects state's contention that D's failure to challenge defective guilty plea until that conviction was used to request habitual offender prejudices state); Perry, App., 492 N.E.2d 57 (Ct. discusses inferences of knowledge & inquiry & rejects D's attacks on laches doctrine); Lacy 491 N.E.2d 520 (on transfer; prejudice not shown; evidence "falls far short" of that in Harrington, Dillon, & Pinkston (all infra); held, Ct. App. decision at 484 N.E.2d 81 vacated; Pivarnik DISSENTS); Badelle 487 N.E.2d 844 (victim unavailable; held, prejudice shown); Gregory 487 N.E.2d 156 (prejudice shown); Gipson 486 N.E.2d 992 (state did not prove laches; held, remanded with instructions to grant PCR); Nine, App., 484 N.E.2d 614 (Crim L 998(17); prejudice established); Day 483 N.E.2d 745 (held, laches proven; DeBruler DISSENTS; only 16 months passed from sentence to D's first request for assistance & D made continual effort to acquire means to evaluate/assert claims); Dillon 479 N.E.2d 610, on rehearing, 482 N.E.2d 747 (prejudice proven where state purged file & complaining witness was mentally deficient); Pinkston, App., 479 N.E.2d 79 (investigating officer's inability to find file or complaining witness (who did not return officer's call) constitutes prejudice; Shields DISSENTS); Blatz, App., 472 N.E.2d 615 (neither passage of time nor ordinary expense of retrial alone demonstrate prejudice); Harrington, App., 466 N.E.2d 1379 (although state did not plead laches as affirmative defense, issue was tried without objection & state proved prejudice - unavailability of witnesses, records, etc.; held, denial of PCR affirmed); Morrison, App., 466 N.E.2d 783 (denial of PCR reversed on laches issue; 2 judges provide "possible guidance" re D's assertions of no unreasonable delay & no prejudice); Hernandez, App., 450 N.E.2d 93 (Ct. may raise laches issue *sua sponte*; held, denial of PCR affirmed).

TITLE: Horton v. State
INDEX NO.: X.5.e.
CITE: (7/28/87) Ind., 510 N.E.2d 648
SUBJECT: Laches - risks of pro se D
HOLDING: Tr. Ct. did not err in determining that D's PCR petition was barred by laches. Here, 3 weeks after sentencing, D elicited aid of fellow prisoner in reformatory to help him prepare PCR petition. However, 1 year later, jailhouse lawyer was paroled & D then attempted to elicit aid of Public Defender's Office. Although D is not chargeable with any delay which occurred after he contacted State Public Defender, Ct. holds D is chargeable with delay which occurred after his receipt of transcript & before he contacted Public Defender. When a prisoner undertakes to represent himself/herself with aid of other inmates, D does so at own peril if undue delay is result. Ct. finds D knowingly acquiesced in delay & holds delay inexcusable. Held, denial of PCR affirmed.

TITLE: Perry v. State
INDEX NO.: X.5.e.
CITE: (9/4/87) Ind., 512 N.E.2d 841
SUBJECT: PCR - defenses; laches; knowing acquiescence
HOLDING: Actual knowledge of possible post-conviction remedies is necessary to support a finding of unreasonable delay for purposes of laches defense in PCR action. State has burden to prove each element of laches by preponderance of evidence. Elements include knowing acquiescence which leads to unreasonable delay. Twyman, 459 N.E.2d 705. State argues change of circumstances, such as conviction or incarceration, should cause a person to inquire into possible post-conviction remedies. Ct. App. has held, under such circumstances, that neglect or failure to inquire into possible remedies shall charge a person with laches the same as if the remedies were known. See, e.g., Morrison, App., 466 N.E.2d 783. However, such objective presumptions of knowledge are not probative of knowing acquiescence required to show unreasonable delay. Laches must be based on showing of conscious indifference. Miladin, App., 119 N.E.2d 12. Nonetheless, state of mind may be inferred from circumstantial evidence. Facts from which reasonable finder of fact could infer petitioner's knowledge of post-conviction remedies may support finding of laches. See, e.g., Gregory 487 N.E.2d 156; Parrish, App., 498 N.E.2d 73.

RELATED CASES: Shelburne, App., 540 N.E.2d 146 (fact that D had counsel when he entered guilty pleas in 1977 & 1980, & that he had further contacts with criminal justice system in 1984 & 1987, was sufficient to support inference of knowing acquiescence, laches bars 1988 PCR); Irvin, App., 515 N.E.2d 566 (D who had twice pled guilty without counsel to DWI charges & was never incarcerated is not charged with laches).

TITLE: Slone v. State
INDEX NO.: X.5.e.
CITE: (3d Dist. 04/21/92), Ind. App., 590 N.E.2d 635
SUBJECT: Post-Conviction Relief (PCR) not barred by laches
HOLDING: Where D had only 2 contacts with justice system, was not incarcerated for his offenses, consulted with his attorneys in only limited fashion before entering pleas, & only 3 years passed from most recent conviction before he became aware right may have been violated, PCR petition was not barred by laches. Pursuant to plea agreement, D pled guilty to Driving While Intoxicated in 1/87. In 2/91, he filed his petition for PCR, stating he did not enter plea knowingly & voluntarily, & that there was no factual basis for plea. Petition was denied on ground it was barred by laches. To establish laches, State must prove by preponderance that D unreasonably delayed in seeking relief, & that State has been prejudiced by delay. PCR Ct. found because D received disposition he bargained for, & delayed inquiring into PCR remedies because he was satisfied, laches was satisfied. Ct. App. held PCR Ct.'s finding wholly irrelevant to determination of whether D "knowingly acquiesced" in violation of his rights, & that if PCR Ct.'s finding were sufficient, laches would bar every PCR petition where conviction was by plea, regardless of whether D's rights were violated. PCR Ct.'s own finding that D was unaware of his PCR options, showed that D could not have acquiesced to purported violation of rights, & that State failed to carry burden showing laches. Ct. went on to determine that PCR should have been granted because D did not make valid waiver of his rights. At guilty-plea hearing, Ct. asked D if he understood that he was waiving his constitutional rights, & at conclusion of hearing, signed Waiver of Rights form, with Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274, advisements was submitted. D apparently signed waiver form after pleading guilty; it was not received until after hearing was concluded; Ct. did not question D as to his understanding; & there was no other evidence that D understood rights he was waiving. If Tr. Ct. does not inform D of his Boykin rights, conviction will be vacated without showing of prejudice, White 497 N.E.2d 893. Therefore, it was error to deny D's PCR petition. Held, reversed, Hoffman, J., dissenting on laches issue.

RELATED CASES: Higgason, App., 631 N.E.2d 539 (Where petitioner had frequent contact with criminal justice system, consulted with counsel regarding other PCR proceedings as early as nine years before filing this PCR, had access to legal library while incarcerated, & where officer who arrested him could not remember much about incident & other officer was deceased, PCR Ct. did not error in denying petition based on laches.)

TITLE: Smith v. State
INDEX NO.: X.5.e.
CITE: (3d Dist. 01/29/91), Ind. App., 565 N.E.2d 1114
SUBJECT: Laches - delay prior to conviction not relevant
HOLDING: D's evasion of arrest for 5 years prior to guilty plea was not conduct constituting prejudicial delay necessary to show laches because such delay must have occurred after D was convicted. State argued that it was prejudiced by D's 3-year delay between sentencing & PCR petition because its witnesses were either deceased or unavailable. Ct. App. noted that problem was also present prior to guilty plea & that D's conduct in evading arrest could not be considered prejudicial delay required for laches. Held, PCR petition not barred by laches.

TITLE: Woodford v. State
INDEX NO.: X.5.e.
CITE: (10/28/85) Ind., 484 N.E.2d 563
SUBJECT: PCR - defenses; laches; remand for evidentiary hearing
HOLDING: Tr. Ct. erred in denying PCR petition, based upon laches, relying upon Stutzman, App., 427 N.E.2d 724 (D must disprove laches). Stutzman was *overruled* by Twyman 459 N.E.2d 705. Here, D requested vacation of guilty plea for lack of advisements. Tr. Ct. denied petition, filed 6 years after conviction, finding laches. Ct. determines state was hampered by error not chargeable to it, because applicable case law did not place burden of proving laches on state. State is entitled to fair notice of burdens it must meet. Thus, state is allowed second chance on laches issue. Ct. is cognizant of concerns expressed in Boykins, App., 470 N.E.2d 765 (proper remedy is vacation of plea, not remand for hearing on laches; Twyman was based on PC 1, Section 5, TR 8(c) & Frazier 355 N.E.2d 623, authority available to state at PCR hearing) & dissenting opinion in Ray, App., 466 N.E.2d 1389 (majority holds remand is proper remedy), but refuses to hold state accountable for burdens placed elsewhere by case law. Held, denial of PCR reversed; remanded for further proceedings consistent with opinion. Shepard, joined by Prentice (who wrote majority opinion) CONCURS, finding evidence of laches insufficient. Givan DISSENTS without opinion.

RELATED CASES: Cf. Gipson 486 N.E.2d 992 (where state failed to prove laches, Ct. remands with instructions to grant PCR).

TITLE: Woods v. State
INDEX NO.: X.5.e.
CITE: (3d Dist. 4/13/87) Ind. App., 506 N.E.2d 487
SUBJECT: Laches - challenge based on equity
HOLDING: Ct. rejects D's contention that laches cannot be used to bar him from challenging 1968 conviction while allowing state to use it against him in habitual offender proceedings. State was not able to use old conviction until conditions precedent to habitual offender charge came into existence, while D was able to challenge it from time it was entered. Ct. finds laches & also notes that even if challenge was not barred by laches, D would not prevail. Held, denial of PCR affirmed.

X. POST-CONVICTION REMEDIES

X.6. Reprosecution (vindictive prosection, see B.10.l; vindictive sentencing, see E.11.f)

X.6.a. PC 1, 10

TITLE: Tolson v. State
INDEX NO.: X.6.a.
CITE: (5/30/86) Ind., 493 N.E.2d 454
SUBJECT: PC 1, Section 10 - more time
HOLDING: On rehearing. Amendments to PC 1, Section 10 affect only those petitions filed after 1/1/86. Here, State Public Defender filed Amicus Curiae, noting anomalous result of applying new rule to petitions filed before 1/1/86, but which had not been fully litigated. Ct. notes potential due process & equal protection problems. Ct. implicitly overrules Tolson 489 N.E.2d 42.

RELATED CASES: Johnson, App., 670 N.E.2d 59 (retroactive application of PC 1(12), re: successive PCR petitions, was improper); Little, 501 N.E.2d 447 (Ct. finds D's case is governed by former rule precluding more time following successful PCR; held, remanded for re-sentencing to concurrent rather than consecutive 30-year sentences).

X. POST-CONVICTION REMEDIES

X.6. Reprosecution (vindictive prosection, see B.10.l; vindictive sentencing, see E.11.f)

X.6.b. Ind. Code 35-50-1-5

TITLE: Dean v. State
INDEX NO.: X.6.b.
CITE: (10/27/86) Ind., 499 N.E.2d 185
SUBJECT: PCR - reprosecution; greater penalty disallowed
HOLDING: Where D successfully challenged guilty plea, it was improper for him to be sentenced to more time following reprosecution. Here, D filed a motion to correct error, which Ct. finds in nature of motion to vacate judgment & withdraw plea pursuant to Ind. Code 35-35-1-4 (c). Such motion is treated as a PCR petition. Ct. finds Ind. Code 35-50-1-5, which allows for imposition of more severe penalty, inapplicable to D because effective date (9/1/84) occurred after D's request to vacate original guilty plea. Similar issue of retroactivity was addressed in Tolson 493 N.E.2d 454, which held amendment to PC 1, Section 10, allowing for more severe sentences, applies only to petitions filed after amendment date because of potential due process/equal protection issues. See Tolson card at X.6.a. Ct. finds Tolson reasoning applicable to case at bar. See Ballard 318 N.E.2d 798 (where guilty plea was set aside as result of PCR, D could not be sentenced to more time upon retrial on reinstated original charges). Ballard was interpreted in Bates 426 N.E.2d 404. Limitation upon greater sentence applies not only to offense for which D was initially sentenced, but also to all other crimes flowing from occurrences that gave rise to initial charges for which state had pertinent information & opportunity to charge. Ct. finds precedents compel it to agree with D's contention that Tr. Ct. erred in failing to comply with restrictions of PC 1, Section 10(b) that sentencing Ct. shall not impose more severe penalty than that originally imposed & shall give credit for time served. Held, remanded for resentencing.

X. POST-CONVICTION REMEDIES

X.7. Appeal

TITLE: City of Seattle v. Klein
INDEX NO.: X.7.
CITE: 166 P.3d 1149 (Wash. 2007)
SUBJECT: State constitutional right to appeal trumps fugitive disentitlement doctrine
HOLDING: Washington Supreme Court held the fugitive disentitlement doctrine, which bars a criminal defendant who flees while his case is on appeal from further pursuing that appeal, cannot be squared with the state constitution's guarantee of the "right to appeal in all cases." Such an express, individual constitutional right may not be deemed relinquished absent a voluntary, knowing, and intelligent waiver. Court noted that the government bears the burden of proving that a defendant intentionally relinquished or abandoned a constitutional right. Forfeiture by way of the fugitive disentitlement doctrine "presumes rather than proves constitutional waiver. The fugitive disentitlement doctrine applies to defendants "who affirmatively avoid the court's jurisdiction" by removing themselves from its power to enforce its judgment. Here, city claimed that Defendants fell within doctrine because they forfeited their appellate rights when they missed review hearings after they filed notices of appeal. However, Washington law is clear that a waiver of a constitutional right must be made voluntarily, knowingly, and intelligently. "It follows that we do not embrace an inadvertant waiver without notice," Court noted. Thus, in "a criminal appeal of right, knowing waiver by the defendant is required to dismiss an appeal . . . there can be *no presumption in favor of the waiver of the right to appeal* in a criminal case." Court noted that knowledge is crucial to waiver of appellate rights and because Defendants were never told they could lose their right to appeal by failing to appear in court, they did not validly waive that right.

Court had previously held that the fugitive disentitlement doctrine does not apply to a defendant who absconds after conviction but before sentencing. Court *clarified* here that even when a defendant absconds after sentencing, the State still bears the burden of showing that a waiver was knowing, intelligent, and voluntary. Court emphasized that the FDD is a judicially created doctrine and, as such, it cannot be held to repeal a constitutional mandate. The right to appeal, by contrast, must "be accorded the *highest respect* by this court." Court also recognized that applying the FDD to presume waiver of the right to appeal would be inconsistent with due process.

TITLE: Howard v. State
INDEX NO.: X.7.
CITE: (8-15-95), Ind., 653 N.E.2d 1389
SUBJECT: PCR - appeal of denial of petition to file belated praecipe
HOLDING: Tr. Ct. properly denied D's petition for permission to file belated praecipe, which was filed approximately 8 months after denial of his petition for post-conviction relief. D attempted to initiate untimely appeal from denial of post-conviction petition by using Ind. Post- Conviction Rule 2(a), alleging that: "(a) the failure to file a timely praecipe was not due to the fault of the D; & (b) the D has been diligent in requesting permission to file a belated praecipe under this rule." Under current version of P-C.R. 2, D may file petition to file belated praecipe only for appeal of conviction. Ind.'s Rules on Post-Conviction remedies do not provide avenue for appeals of other post-judgment petitions thus Tr. Ct. was not authorized under Rule 2(1) to grant D permission for belated praecipe. Held, transfer granted, Tr. Ct. affirmed.

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); Taylor, 939 N.E. 2d 1132 (Ind. Ct. App 2011) (although D filed P-C Rule 2 petition to file belated appeal, which was an inappropriate procedural vehicle for seeking relief from denial of PCR petition, Court held D demonstrated extraordinary circumstances justifying exercise of its inherent power to grant equitable relief; see full review at G.2.b); Neville, 694 N.E.2d 296, App., (Tr. Ct. did not have authority under P-C.R. 2(1) to grant permission to file belated praecipe for appeal from revocation of probation); Greer, 685 N.E.2d 700 (Tr. Ct. lacked authority to grant D permission to file belated praecipe because P-C.R. 2(1) allows belated praecipe only for direct appeal of conviction); Bailey, App., 653 N.E.2d 518 (specific wording of P-C.R. 2 excludes petition for permission to file belated praecipe for decisions which address post-conviction relief).

TITLE: Huguley v. State
INDEX NO.: X.7.
CITE: (05-23-12), 967 N.E.2d 572 (Ind. Ct. App 2012)
SUBJECT: Belated appeal after D failed to appeal denial of PCR pursuant to Davis/Hatton procedure
HOLDING: Although D cannot file belated appeal from denial of his petition for post-conviction relief (PCR), Tr. Ct. should determine whether he has been without fault and diligent in pursuit of his original appeal of his 1999 child molesting convictions. D filed a timely appeal, but later petitioned the Court of Appeals to terminate the appeal and remand the cause to pursue PCR pursuant to procedure set forth in Davis v. State, 368 N.E.2d 1149 (1977) and Hatton v. State, 626 N.E.2d 442 (Ind. 1993). Post-conviction court denied D's petition for relief, but no notice of appeal of that decision was ever initiated. Eight years later, D filed a petition for belated appeal, claiming he was unaware that his request for PCR was denied or that no notice of appeal was filed. He argued he was diligent in determining why his appeal was not pursued. Court held that D is unable to belatedly appeal the denial of his petition for PCR, but that his original appeal may be "revived" pursuant to Indiana Post Conviction Rule 2(3)(b). Held, remanded in part to allow D the opportunity to make a factual case to support his allegations. If Tr. Ct. finds in favor of D, then he may continue his appeal as originally initiated.

TITLE: Stone v. State
INDEX NO.: X.7.
CITE: (1st Dist. 2/3/83) Ind. App., 444 N.E.2d 1214
SUBJECT: PCR - appeal
HOLDING: Where petitioner has raised a question upon which the Tr. Ct. has ruled in a PC 1 proceeding & petitioner chose not to appeal within the time under the civil rules, that question has been waived for purposes of appeal & may not be raised in a subsequent PC 1 proceeding. Jewell 397 N.E.2d 946. Time for taking an appeal is not extended by filing a repetitive motion such as one to reconsider or rehear. Fancher 436 N.E.2d 311; TR 53.3. Here, D raises 2 issues in amended PCR petition that had been in original PCR petition (which had been denied). D did not appeal from denial of first PCR petition. Held, issues waived.

TITLE: Vasquez v. State
INDEX NO.: X.7.
CITE: (2nd Dist., 3-5-03), Ind. App., 783 N.E.2d 1262
SUBJECT: Relief from judgment pursuant to T.R. 60 (B)(7) after grant of post-conviction relief - equitable jurisdiction
HOLDING: After Tr. Ct. granted D's petition for post-conviction relief, State presented proper grounds for relief from judgment pursuant to T.R. 60(B)(7), & Tr. Ct. properly invoked its equitable jurisdiction to reinstate D's conviction & sentence. D argued that State's motion to reconsider Tr. Ct.'s earlier ruling was merely an attempt to revive an expired appeal & that Tr. Ct. was without jurisdiction to reinstate her conviction & sentence. In accordance with T.R. 60(B)(7), Tr. Ct. may relieve party from judgment when prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that judgment should have prospective application.

Here, post-conviction relief was granted under Williams v. State, 641 N.E.2d 44 (Ind. Ct. App. 1994), which held that failure to advise of consequence of deportation can, under some circumstances, constitute deficient performance. However, just before D obtained relief, in Segura v. State, 749 N.E.2d 496 (Ind. 2001), S. Ct. revised standard of review for claims of post- conviction relief relating to penal consequences. Even though Segura agreed with pronouncement in Williams, failure to advise of consequences of deportation will not afford petitioner relief as matter of law. Specifically, Segura court observed that factors to be considered are whether lawyer knew of client's status as alien (trial counsel here did not), client's familiarity with consequences of conviction, severity of criminal penal consequences, & likely subsequent effects of deportation. Further, it is apparent that neither party nor Tr. Ct. was aware of holding in Segura when hearing on post-conviction relief was held. Moreover, neither party disputed that Tr. Ct.'s initial decision to vacate D's conviction was premised upon Ct. App. holding that had been modified by S. Ct. Therefore, State presented proper grounds for relief pursuant to T.R. 60(B)(7) & Tr. Ct. did not err in reinstating D's conviction & sentence. Held, judgment affirmed.

RELATED CASES: Smith, 38 N.E.3d 218 (Ind. Ct. App 2015) (no evidence to support petitioner's T.R. 60(B) motion, which alleged someone impersonating him committed two traffic infractions).

X. POST-CONVICTION REMEDIES

X.8. BMCE (Belated motion to correct errors) (PC 2, 1)

TITLE: Amphonephong v. State
INDEX NO.: X.8.
CITE: (5/27/2015), 32 N.E.3d 825 (Ind. Ct. App 2015)
SUBJECT: No abuse of discretion in allowing belated notice of appeal
HOLDING: Where D had a very limited understanding of English and Tr. Ct. told him it would appoint a public defender for him but did not, there was no error in granting permission to file a belated notice of appeal. D allowed 18 months to pass between his sentencing hearing and the time he first tried to file his petition for permission to file a belated notice of appeal. Post-Conviction Rule 2(1) does not require Tr. Ct. to hold a hearing on a D's petition to file a belated notice of appeal.

Court rejected State's argument D was not diligent in pursuing his appeal, as he told Tr. Ct. at his sentencing that he wanted to appeal and that when he learned he filed his pro se motion with the wrong court, he filed it with the Tr. Ct. without delay. Held, judgment affirmed.

TITLE: Bailey v. State
INDEX NO.: X.8.
CITE: (10/27/82) Ind., 440 N.E.2d 1130
SUBJECT: PCR - BMCE; waiver of appeal
HOLDING: Determination of whether BMCE should be permitted lies within sound discretion of Tr. Ct. Here, D insisted he did not receive notice of his right to appeal the denial of his PC 1 petition. Deputy State Public Defender testified at PC 2 hearing regarding letter to D containing Ct.'s findings of fact & conclusions of law (PC 1) & advising of right to appeal. D's pro se filings (PC 1 petition, motions, letters to Ct.) were viewed as proof of D's ordinary skill & mental ability; thus, D's failure to notify Public Defender that he did wish to exercise right to appeal defeats his claim. Zellers 389 N.E.2d 299; Money, App., 387 N.E.2d 474. Held, no error in denial of petition for permission to file BMCE.

RELATED CASES: Clark 506 N.E.2d 819 (Crim L 1026; 1069(1); fact that D's trial attorney advised him he had no grounds for appeal does not serve to excuse D is not basis for BMCE; absolute right to appeal (Ind. Const., Art. 7, Section 6), does not preclude waiver of that right; held, no error in denial of petition for permission to file BMCE).

TITLE: Brown v. State
INDEX NO.: X.8.
CITE: (12/29/82) Ind., 442 N.E.2d 1109
SUBJECT: BMCE
HOLDING: Mere omission of issues in an otherwise timely & proper MCE does not render such motion inadequate so as to serve as grounds for a BMCE under PC 2, Section 1. Dobeski 419 N.E.2d 753; Adams 386 N.E.2d 657. Here, trial attorney filed timely MCE which was denied. Another attorney was appointed to perfect the appeal. Second attorney petitioned for leave to file BMCE. Petition denied. D now alleges denial constituted abuse of discretion. Ct. finds original MCE was timely filed & alleged errors with specificity. Held, no abuse of discretion.

TITLE: Blackmon v. State
INDEX NO.: X.8.
CITE: (2d Dist. 6/21/83) Ind. App., 450 N.E.2d 104
SUBJECT: PCR - BMCE; hearing
HOLDING: Tr. judge abused his discretion in denying D's petition for permission to file BMCE under PC 2, Section 1 without a hearing where D's petition was facially sufficient & record fails to negate any of 3 prerequisites to relief under PC 2, Section 1. Zellers 361 N.E.2d 143. Here, following sentencing, judge informed D that he could "appeal the sentence." D responded that he would not appeal sentence because he thought it was just. D filed no MCE. Two years later, D filed PC 2, Section 1 petition seeking permission to file BMCE. Tr. judge summarily denied petition. Three requirements must be met under PC 2, Section 1: (1) no timely & adequate MCE; (2) failure to file MCE was not D's fault; (3) D diligent in requesting permission to file BMCE. Ct. finds D did not waive hearing by failing to request one, distinguishing Adams 386 N.E.2d 657 (petition held facially insufficient because timely MCE filed). Held, remanded for further proceedings.

RELATED CASES: Green, App., 593 N.E.2d 1237 (Ct. does not have to hold hearing on motion to file belated praecipe pursuant to PCR 2, where D does not raise genuine factual dispute concerning existence of grounds for relief); Woody, 563 N.E.2d 85 (hearing is not required on petition if neither it nor record shows that petitioner is entitled to relief); James 541 N.E.2d 264 (where D was arrested shortly before time for appeal has run, & his mailed request for appeal was received from prison within few days after time for filing, failure to appear for trial & sentencing did not foreclose possibility that failure to file was not D's fault; hearing was required).

TITLE: Prater v. State
INDEX NO.: X.8.
CITE: (2/10/84) Ind., 459 N.E.2d 39
SUBJECT: PCR - BMCE; fugitive 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 Ct.'s jurisdiction & had no standing to appeal. Where D escapes & remains fugitive, D is not subject to jurisdiction of IN Cts. 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 non-compliance 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: Crank, App., 502 N.E.2d 1355 (Crim L 946, 998(3); where D voluntarily absented himself from jurisdiction during his trial & sentencing & time for direct appeal, Ct. 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: Sceifers v. State
INDEX NO.: X.8.
CITE: (4th Dist., 4-16-96), Ind. App., 663 N.E.2d 1191
SUBJECT: PCR - appeal of denial of petition to file belated MCE - no error
HOLDING: Tr. Ct. properly denied D's petition for permission to file belated motion to correct error, which was filed almost 4 years after denial of his petition for post-conviction relief. D based his petition on Ind. Post-Conviction Rule 2(2)(c), alleging that he was diligent in pursuing appeal from denial of PCR petition. Ct. held that P-C.R. 2 clearly applies to belated motions to correct errors relating to matters on direct appeal, not to matters at post-conviction stage. Howard v. State, 653 N.E.2d 1389 (Ind. 1995).

TITLE: Staples v. State
INDEX NO.: X.8.
CITE: (9/6/83) Ind., 452 N.E.2d 985
SUBJECT: PCR - BMCE; no Tr. Ct. jurisdiction after record filed
HOLDING: Second MCE alleging ineffective assistance of counsel filed following denial of properly filed MCE should have been treated as a PC 1 petition rather than as a BMCE or as an amended MCE. Here, trial counsel filed MCE which was denied after appellate counsel entered appearance. After record was filed with Ind. S. Ct., appellate counsel requested & received permission to file an amended MCE, which was denied. On 4/6, counsel filed praecipe requesting transcript of any hearing held on amended MCE. Tr. Ct. erred in granting permission to file amended MCE. There is no authority for a second MCE. Fancher 436 N.E.2d 311. Held, denial of amended MCE vacated, remanded for further proceedings under PC 1.

X. POST-CONVICTION REMEDIES

X.9. Belated appeal (PC 2, 2)

TITLE: Baysinger v. State
INDEX NO.: X.9.
CITE: (2nd Dist., 10-06-05), Ind. App., 835 N.E.2d 223
SUBJECT: Erroneous denial of petition to file belated notice of appeal - sentence from "open plea"
HOLDING: 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 65-year sentence imposed after he pled guilty to murder in an "open plea." 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. Collins, 817 N.E.2d 230. 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. Here, at guilty plea hearing, Tr. Ct. failed to inform D of his right to appeal his sentence & instead informed him that by pleading guilty he was giving up "most" of his grounds for appeal. This insufficient advisement, taken with assertion that trial counsel did not inform D of his right to appeal his sentence, led Ct. to conclude that failure to file a timely notice of appeal was not due to fault of D. Upon learning of proper method for challenging his sentence, D diligently sought permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2. Held, judgment affirmed.

RELATED CASES: Perry, App., 845 N.E.2d 1093 (although delay in filing was slightly longer than in Baysinger, sufficient evidence was shown by D in pursuing his appeal in light of Collins' clarification of law).

TITLE: Beasley v. State

INDEX NO.: X.9.

CITE: (8/11/2022), Ind. Ct. App., 192 N.E.3d 1026

SUBJECT: Appeal from denial of post-conviction relief dismissed as untimely; Indiana Post-Conviction Rule 2 inapplicable to belated appeal from Order denying post-conviction relief

HOLDING: Twenty days after the trial court issued an Order denying post-conviction relief, Petitioner filed a pro se motion to proceed in forma pauperis, which was granted. Over a year later, Petitioner filed a verified petition for permission to file a belated notice of appeal under Indiana Post-Conviction Rule 2, which was granted and in which he stated that a timely notice of appeal had not been filed due to no fault of his own because pauper counsel was never appointed. The Court of Appeals dismissed the appeal, finding P-C Rule 2 inapplicable to a missed appellate deadline in a post-conviction proceeding and that the filing of a motion to proceed in forma pauperis was not the equivalent of filing a notice of appeal. The Court of Appeals distinguished In re O.R., where an appeal was permitted belatedly in a termination of parental rights case, finding that post-conviction does not have the same liberty issues at interest as a termination of parental rights. Held, appeal dismissed.

TITLE: Beatty v. State
INDEX NO.: X.9.
CITE: (2nd Dist., 09-26-06), Ind. App., 854 N.E.2d 406
SUBJECT: State may appeal order granting petition to file belated appeal
HOLDING: Indiana Post-Conviction Rule 2(1) explicitly allows a D to appeal from the denial of his petition to file a belated notice of appeal but is silent with respect to State's authority to cross-appeal an order granting such a petition. Rule does provide, however, that if Tr. Ct. grants the petition, the notice of appeal shall be treated for all purposes as if filed within the prescribed period. Pursuant to Indiana Appellate Rule 9(D), an appellee--here, the State--may cross-appeal by raising cross-appeal issues in the appellee's brief. Nothing in the Appellate Rules otherwise limits State's ability to cross-appeal under these circumstances. Consequently, Court concluded that State is authorized to appeal from an order granting a D's petition to file a belated notice of appeal. As to merits of State's argument, Court held that D failed to establish that he was without fault for failing to file a timely notice of appeal or that he was diligent in requesting permission to file belated notice of appeal, where six years elapsed from time D learned that no direct appeal of voluntary manslaughter conviction had been filed, & when he first filed petition for post-conviction relief. Held, order granting D's petition reversed & appeal dismissed.

RELATED CASES George, App., 862 N.E.2d 260 (State did not waive argument where Tr. Ct. did not hold hearing in D's petition for permission to file belated notice of appeal & granted D's petition six days after D filed it).

TITLE: Bolden v. State
INDEX NO.: X.9.
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.

HOLDING: Eminger, 204 N.E.3d 926 (Ind. Ct. App. 2023)

TITLE: Bosley, Jr. v. State
INDEX NO.: X.9.
CITE: (1st Dist., 08-15-07), Ind. App., 871 N.E.2d 999
SUBJECT: Denial of petition to file belated direct appeal affirmed
HOLDING: D timely filed his notice of appeal to challenge the summary denial of his first petition for permission to file a belated notice of appeal but failed to promptly perfect the appeal by filing transcript & appellate brief. Instead, he affixed a post-conviction proceedings cause number to a second petition & attempted to re-litigate an issue previously decided adversely to him & not reversed on appeal. Due to principles of res judicata, he may not do so. Ford v. State, 755 N.E.2d 1138 (Ind. Ct. App 2001). Moreover, although post-conviction rules do not directly address successive motions for permission to file a belated appeal, it is clear that the rules are not designed to allow unlimited challenges to a conviction or sentence. See Indiana Post-Conviction Rule 1(12) (providing that a successive petition for post-conviction relief may be filed only with leave of appellate Ct.). Thus, post-conviction Ct. erred by considering D's second petition for permission to file a belated appeal.

Ct. affirmed initial denial of D's petition to file a belated appeal, finding that D failed to show that his failure to file a timely notice of appeal was not due to his fault & that he had not been diligent in requesting permission to file belated appeal under Post-Conviction Rule 2. Held, denial of permission to filed belated appeal affirmed.

TITLE: Cole v. State
INDEX NO.: X.9.
CITE: (6/25/2013), 989 N.E.2d 828 (Ind. Ct. App 2013)
SUBJECT: Denial of petition to file belated appeal 5 decades after conviction affirmed
HOLDING: Tr. Ct. did not abuse its discretion by concluding that D was not diligent in pursuing permission to file a belated notice of appeal. Post-Conviction Rule 2(1)(a) permits belated appeals for Ds found to be without fault and diligent in seeking relief. In this case, D was convicted of second degree murder in 1963, sentenced to life imprisonment, and filed petition for post-conviction relief (PCR) in 1969. In 1971, D escaped from prison and was apprehended thirty years later. D filed several pro se motions, but it was not until April, 2012 that D filed motion asking Tr. Ct. to appoint counsel to pursue a belated appeal. D argued he was diligent because he pursued a belated appeal as soon as he learned from a fellow inmate that he could do so. However, Tr. Ct. explicitly found that D was not credible in claiming he had just learned of the possibility of filing a belated notice of appeal. Fact that D had assistance of counsel in his proceedings for PCR and in filing request to file successive petition for PCR may have led Tr. Ct. to believe that at least one of those attorneys would have discussed possibility of a belated appeal. Held, denial of petition for permission to file belated appeal denied.

TITLE: Crouse v. State

INDEX NO.: X.9.

CITE: (10-08-20), Ind. Ct. App., 158 N.E.3d 388

SUBJECT: Belated appeal of alleged illegal sentence permitted despite waiver-of-appeal plea term

HOLDING: After Defendant appealed his aggregate forty-year sentence for four convictions of Class B felony armed robbery, the State cross-appealed, arguing the trial court abused its discretion in permitting Defendant to file a belated appeal. Defendant's plea agreement capped his sentence at forty years but gave the trial court discretion to determine the length of his aggregate sentence and how that sentence was to be structured and served. The plea agreement also waived the right to appeal his sentence "so long as the court sentences the defendant within the terms of his plea agreement." Following Crider v. State, 984 N.E.2d 618 (Ind. 2013), the Court of Appeals noted that Defendant's waiver of appeal may not be a barrier to appealing his sentence if he believes the trial court sentenced him illegally. As in Haddock v. State, 112 N.E.3d 763 (Ind. Ct. App. 2018), Defendant alleged he was not sentenced in accordance with the applicable law. Thus, Court found no abuse of discretion in allowing Defendant to file a belated appeal. And although trial court misstated the number of victims, the Court noted, "the fact that one of the clerks was so unfortunate to be victimized twice does not suggest the trial court abused its discretion." Judge Vaidik issued a concurring opinion to reject the majority's reliance on Haddock, which she believes was wrongly decided since it allowed an implausible claim of illegality. In her view, a defendant who enters a plea agreement with a waiver-of-appeal provision should be required to identify a plausible, specific theory of illegality in order to become an "eligible defendant" for a belated appeal, which Defendant here did.

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).

TITLE: Cummins v. State

INDEX NO.: X.9.

CITE: (11-21-19), Ind. Ct. App., 137 N.E.3d 255

SUBJECT: Post-Conviction Rule 2 does not permit belated consideration of an appeal of a probation revocation

HOLDING: The trial court revoked Defendant's probation under three separate cause numbers and ordered him to serve the suspended sentences in the Department of Correction. Four months later, Defendant filed a petition for permission to file a belated appeal pursuant to Post-Conviction Rule 2 and trial court granted it over the State's objection. Defendant appealed, arguing the trial court abused its discretion in revoking his probation and the State cross-appealed, arguing that belated appeals from orders revoking probation are not available pursuant to Post-Conviction Rule 2. The Court of Appeals dismissed the appeal, holding that Defendant is not an "eligible defendant" because belated appeals from orders revoking probation are not available pursuant to Post-Conviction Rule 2. The Court noted that the Indiana Supreme Court explained in In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014), that an appellate court may restore a right of appeal from an untimely notice if there are "extraordinarily compelling reasons to do so," but no such reasons were present here.

TITLE: Dobrowolski v. State

INDEX NO.: X.9.

CITE: (Ind. Ct. App. 2022), 04/14/2022, 186 N.E.3d 1168

SUBJECT: After admitting probation violation, probationer could not challenge waiver of counsel in belated appeal

HOLDING: The trial court allowed Defendant to admit to a probation violation without being represented by counsel. After revoking Defendant's probation, the trial court appointed a public defender to represent her to request a belated notice of appeal. The trial court then granted Defendant's motion under Post-Conviction Rule 2 to file a belated appeal. The Court of Appeals determined that Defendant was not an "eligible defendant" for a belated appeal under Post-Conviction Rule 2 because a probationer may not challenge on direct appeal a finding, she violated the conditions of probation after admitting a violation. Instead, to challenge the validity of her waiver of counsel, Defendant must file a petition for postconviction relief under Post-Conviction Rule 1. Held, appeal dismissed without prejudice.

TITLE: Fields v. State
INDEX NO.: X.9.
CITE: (Ind. Ct. App. 2021), 02/01/2021, 162 N.E.3d 571
SUBJECT: Notwithstanding waiver of appeal provision in plea agreement, belated appeal permitted under PC Rule 2
HOLDING: Defendant entered into a plea agreement with the State wherein he pleaded guilty to six felony counts as well as a habitual offender sentencing enhancement with sentencing "open to argument" but with "a cap of 25 years on any executed sentence." The plea agreement included a provision that waived "the right to appeal any sentence imposed by the Court…so long as the Court sentences the defendant within the terms of this plea agreement." The trial court sentenced Defendant to an aggregate term of 37 years, with 25 years executed and 12 years suspended. Four years later, Defendant filed a petition for permission to file a belated notice of appeal, asserting that his sentence was contrary to law because the trial court had used an improper aggravator when it sentenced him. The trial court denied the petition without a hearing.

The Court of Appeals noted that even when a waiver of appellate review appears to be unqualified, a defendant retains the right to appeal his sentence when it is imposed contrary to law and the defendant did not agree to the specific sentence. See Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013). Here, while Defendant agreed to the cap on the executed portion of his sentence, he did not agree to be sentenced either to the full executed term or to an additional 12 years suspended based on an improper aggravator. Defendant would have had the right to raise that issue in a timely appeal. Held, Defendant is an eligible defendant pursuant to Post-Conviction Rule 2. a.

TITLE: Gutermuth v. State
INDEX NO.: X.9.
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: Haddock v. State

INDEX NO.: X.9.

CITE: (10/29/2018), 112 N.E.3d 763 (Ind. Ct. App 2018)

SUBJECT: Illegal sentence can be reason for granting belated appeal despite waiver of right to appeal in guilty plea

HOLDING: D signed a plea agreement that indicated he waived his right to appeal his sentence. At his guilty plea hearing, D indicated that he had carefully gone over the agreement with his attorney. D believed he had waived his right to appeal his sentence. Two years later, after filing a petition for post-conviction relief, D became aware that he could appeal his sentence on the ground that the sentence was illegal. D met the requirements under Post-Conviction Rule 2 by showing that the failure to file a timely notice of appeal was not his fault and he was diligent in requesting permission to file a belated notice of appeal.

TITLE: Haluska v. State
INDEX NO.: X.9.
CITE: (2nd Dist., 4-17-96), Ind. App., 663 N.E.2d 1193
SUBJECT: Petition to file belated appeal of delinquency adjudication & T.R. 60
HOLDING: After finding of delinquency was returned against D, trial counsel failed to file timely praecipe. Pursuant to Post-Conviction Rule 2, Section 3, Appellate counsel filed petition for permission to file belated appeal with Ct. App. Following Chief Justice Shepard's concurring opinion in Jordan v. State, 516 N.E.2d 1054 (Ind. 1987), Ct. held that D's verified petition for permission to file belated appeal under P-C. Rule 2-3 should be treated as petition for relief from judgment under T.R. 60 in Tr. Ct. In Davis v. State, 368 N.E.2d 1149 (Ind. 1977), S. Ct. held that petition for post- conviction relief is functional equivalent of Rule 60(B) motion. Held, remanded for purpose of D filing T.R. 60 motion for Tr. Ct.'s consideration.

NOTE: Decision does not discuss Van Meter v. State, 650 N.E.2d 1138 (Ind. 1995), which held that T.R. 60(B) motion is inappropriate in criminal proceeding where petition for post-conviction relief is available. However, juvenile adjudications are not convictions. Thus, post-conviction relief is not procedure used in juvenile Ct. process. Jordan v. State, 512 N.E.2d 407 (Ind. 1987).

TITLE: Hill v. State
INDEX NO.: X.9.
CITE: (01-24-12), 960 N.E.2d 141 (Ind. Ct. App 2012)
SUBJECT: IAC - Baum standard applies to P-C R. 2 attorney's performance
HOLDING: Tr. Ct. properly denied D's Petition for Post-conviction Relief. P-C.R. 2 permits an eligible D convicted after a trial or plea of guilty to petition the Tr. Ct. for permission to file a belated notice of appeal of the conviction or sentence if: (1) the D failed to file a timely notice of appeal; (2) the failure to file a timely notice of appeal was not due to the fault of the D; and (3) the D has been diligent in requesting permission to file a belated notice of appeal. The denial of a petition for permission to file a belated notice of appeal is an appealable order.

Here, D pled guilty and was given a fifty-two- year sentence. D did not timely appeal, but filed a petition for post-conviction relief under P-C.R. 1. D's post-conviction attorney dismissed the P-C.R. 1 petition without prejudice and filed a petition to file a belated notice of appeal the sentence under P-C.R. 2. Tr. Ct. denied the P-C.R. 2 petition, and post-conviction counsel failed to timely appeal the denial. Eventually, subsequent post-conviction counsel filed another petition for post-conviction relief under P-C.R.1, which was considered an amendment to the original, dismissed petition. In the P-C.R. 1 petition, D alleged first post-conviction counsel ineffective for failing to appeal the denial of the petition to file a belated appeal. The Indiana Supreme Court held that post-conviction counsel's performance must be analyzed under the lower standard enunciated in Baum v. State, 533 N.E.2d 1200 (Ind. 1989), and not the Strickland v. Washington standard. Under Baum, courts inquire whether counsel in fact appeared and represented the petitioner in a procedurally fair setting which resulted in a judgment of the court. Baum applies because P-C.R. 2 proceedings do not deal with the merits of the appeal, but rather with the D's lack of fault and his diligence. However, if a D is granted permission to file a belated appeal, his attorney on appeal will be held to the standard set forth in Strickland v. Washington. Because post-conviction counsel did not deprive her client of a procedurally fair setting in the P-C.R. 2 hearing, her performance did not violate the Baum standard. Further, even if post-conviction counsel had pursued an appeal, the appeal would have been unsuccessful because it was within Tr. Ct.'s discretion to find D did not act diligently. Held, Court of Appeal's memorandum opinion vacated and judgment of the Tr. Ct. affirmed; Sullivan, J., concurring on basis that although counsel's performance in P-C.R. 2 proceedings should be evaluated under the Strickland v. Washington standard, counsel's performance here did not violate such standard; Rucker, J., dissenting on basis that counsel's performance here violated the lower Baum standard; D is simply asking for an appeal from his sentence which he has never received.

TITLE: Hovis v. State
INDEX NO.: X.9.
CITE: (07-07-11), 952 N.E.2d 231 (Ind. Ct. App. 2011)
SUBJECT: Belated appeal dismissed as second direct appeal from guilty plea
HOLDING: Defendant's appeal was dismissed because it was his second appeal of the same conviction. In 2003, Defendant entered an open plea to felony murder and other offenses. Trial court later denied Defendant's verified motion to withdraw guilty plea and subsequently imposed an aggregate sentence of 70 years. Defendant appealed, arguing that the denial of his motion to withdraw guilty plea was an abuse of discretion. See Hovis v. State, 02A03-0401-CR-45 (Ind. Ct. App. July 20, 2004). Defendant could have challenged his sentence but did not. On October 20, 2010, Tr. Ct. granted D's petition for belated motion to correct error pursuant to Ind. Post-Conviction Rule 2(2), to allow Defendant to challenge his sentence on appeal.

For purposes of a belated motion to correct error, Ind. Post-Conviction Rule 2(2) defines an "eligible D" as "a D who, but for the D's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a . . . plea of guilty . . . by filing a notice of appeal, . . . motion to correct error, or pursuing an appeal." Under this definition, Defendant is no longer an eligible D because he already took and received a timely direct appeal following his guilty plea, in which he could have presented the perceived sentencing error. Further, Ind. Code 35-35-1-4(b), which sets forth the procedure for motions to withdraw guilty pleas, does not impermissibly limit the issues that can be raised on appeal, as Defendant contends, but merely sets forth the applicable standard of review for an appeal challenging the denial of a motion to withdraw guilty plea. Held, appeal dismissed.

TITLE: Howard v. State
INDEX NO.: X.9.
CITE: (8-15-95), Ind., 653 N.E.2d 1389
SUBJECT: PCR - appeal of denial of petition to file belated praecipe
HOLDING: Tr. Ct. properly denied D's petition for permission to file belated praecipe, which was filed approximately 8 months after denial of his petition for post-conviction relief. D attempted to initiate untimely appeal from denial of post-conviction petition by using Ind. Post-Conviction Rule 2(a), alleging that: "(a) the failure to file a timely praecipe was not due to the fault of the D; & (b) the D has been diligent in requesting permission to file a belated praecipe under this rule." Under current version of P-C.R. 2, D may file petition to file belated praecipe only for appeal of conviction. Ind.'s Rules on Post-Conviction remedies do not provide avenue for appeals of other post-judgment petitions thus Tr. Ct. was not authorized under Rule 2(1) to grant D permission for belated praecipe. Held, transfer granted, Tr. Ct. affirmed.

RELATED CASES: Bailey, App., 653 N.E.2d 518 (specific wording of P-C.R. 2 excludes petition for permission to file belated praecipe for decisions which address post-conviction relief).

TITLE: Jimenez v. Quarterman

INDEX NO.: X.9.

CITE: (U.S.), (01-13-09 2009), 129 S. Ct. 681

SUBJECT: Reinstatement of appeal restarts one-year deadline to file habeas petition

HOLDING: If a state prisoner is allowed by a state court to file a belated appeal that will delay the start of the one-year filing period for pursuing a habeas corpus challenge until after the state appeal is resolved. 28 U.S.C. 2244(d)(1)(A) provides that the one-year limitations period for seeking review under the Antiterrorism and Effective Death Penalty Act of 1996 begins on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." A State conviction is not "final" for federal habeas corpus purposes where, as here, State has allowed an out-of-time, direct appeal of a conviction. Thus, district court erred in dismissing Defendant's petition for habeas corpus as time barred. Held, judgment reversed and remanded.

TITLE: Johnson v. State
INDEX NO.: X.9.
CITE: 898 N.E.2d 290 (Ind. 2008)
SUBJECT: Erroneous denial of permission to file belated appeal
HOLDING: Distinguishing Moshenek v. State, 868 N.E.2d 419 (Ind. 2007), Court held that Defendant established that he had been without fault in failing to file a timely appeal of his sentence following an "open plea," and was diligent in requesting permission to do so under Post-Conviction Rule 2(1). Defendant challenged his sentence by filing a petition for post-conviction relief under P-C.R. 1 less than three years after sentencing. Once procedures for challenging a sentence following an open plea were made clear in Kling v. State, 837 N.E.2d 502 (Ind. 2005), Defendant acted almost immediately to follow its dictates. Held, transfer granted, Court of Appeals' memorandum opinion vacated, remanded with instructions to grant Defendant's petition for permission to file a belated appeal.

RELATED CASES: Sanford, 51 N.E.3d 1182 (Ind. 2016) (under the unique circumstances of this case, D should be permitted to filed a belated Notice of Appeal from his 1989 guilty plea and 170-year sentence for two counts of murder, robbery and burglary).

TITLE: Jordan v. State
INDEX NO: X.9.
CITE: (5/22/2013), 988 N.E.2d 394 (Ind. Ct. App 2013)
SUBJECT: Erroneous denial of petition to file belated notice of appeal
HOLDING: Tr. Ct. erred in denying D's petition to file a belated notice of appeal, inasmuch as he was without fault in failing to file a timely notice of appeal in light of his attorney's terminal illness. Before D's attorney could file a notice of appeal, he was fighting for his life against a recurrence of cancer to which he succumbed only a few months later. D was imprisoned and not adequately informed regarding the status of his appeal. Although Tr. Ct. informed D of his appellate rights and there is no evidence he failed to understand them, Court declined to say that a post-conviction petitioner is at fault for failing to file a timely notice of appeal when his attorney becomes terminally ill shortly after the sentencing hearing, and the petitioner is incarcerated. Held, judgment reversed and remanded.

TITLE: Kelly v. State
INDEX NO.: X.9.
CITE: (3rd Dist., 12-16-93), Ind. App., 625 N.E.2d 1278
SUBJECT: Diligence required for filing belated praecipe
HOLDING: After examining delay & D's familiarity with legal system, Ct. determined that 18-year delay between D's last actions & filing for permission to file belated praecipe showed failure to exercise necessary diligence under PCR Rule 2 & 1. Therefore Tr. Ct. did not err in denying D's request. D contended delay was due to appointed counsel, & decision reflects some unusual & confusing procedural postures that are probably not likely to recur.

RELATED CASES: Ricks, App., 898 N.E.2d 1277 (D's letter to Tr. Ct. requesting appellate counsel over two months after sentencing did not prove by preponderance of evidence that he was without fault for failure to timely file his notice of appeal); Reid, 883 N.E.2d 872 (where D's petition did not present evidence as to why he was not at fault and acted diligently, trial court erroneously granted petition without hearing evidence); 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); Beaudry, App., 763 N.E.2d 487 (no abuse of discretion in denying D's petition to file belated 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); Townsend, App., 843 N.E.2d 972 (D's petition for belated appeal did not allege he was without fault or that he was diligent in pursuing a belated appeal nor did he submit any evidence to support his diligence. Because of this, D did not meet his burden of proof).

TITLE: Land v. State
INDEX NO.: X.9.
CITE: (09-26-94), Ind. App., 640 N.E.2d 106
SUBJECT: No error in denying permission to file belated praecipe
HOLDING: Where D had multiple involvements with judicial system & appeals of convictions subsequent to conviction at issue, & delayed filing first attempt at praecipe until 16 years after conviction, with verified petition not filed until 26 years after conviction, Tr. Ct. did not err in denying permission to file belated praecipe, because D did not establish that he was without fault in failing to file earlier & that he exercised diligence in pursuing his rights. Held, judgment affirmed.

RELATED CASES: Tolson, App., 665 N.E.2d 939 (Tr. Ct. abused discretion in denying D's motion to file belated praecipe or motion to correct errors).

TITLE: Leshore v. State

INDEX NO.: X.9.

CITE: (02-28-23), Ind. Ct. App., 203 N.E.3d 474

SUBJECT: Belated appeal may proceed when petitioner learned of his right to appeal his sentence 20 years after his plea

HOLDING: Defendant entered into a guilty plea in 1999 and neither the trial court nor his attorney advised him he could appeal his sentence. In 2001, he petitioned for post-conviction relief under Rule 1 and argued his sentence was inappropriate. However, on review, the State Public Defender withdrew its representation, concluding the trial court had correctly advised Defendant of all necessary rights. On December 1, 2021, a fellow inmate told Defendant he could appeal his sentence and he petitioned for post-conviction relief to file a belated notice of appeal under Rule 2 just 19 days later.

On transfer from a 2-1 memorandum Court of Appeals' decision, a divided Supreme Court held that Defendant was not at fault for failing to file a timely notice of appeal. The source of the delay was the mistaken advice he was given, "[i]n short, he had no reason to appeal his sentence when he was never aware of his right to do so." The Court also concluded that Defendant was diligent in pursuing his belated notice of appeal and that his petition, filed just 19 days after he learned of his right to appeal his sentence, was prompt. Held, remanded with instructions to grant the petition for a belated appeal. Justice Goff dissented, joined by Justice Slaughter, and found Defendant has not demonstrated diligence in pursuing an appeal. The dissent found that Defendant should have pursued his Post-Conviction Rule 1 petition pro-se after the State Public Defender withdrew and that "the very fact that the State PD had analyzed his sentencing in depth must have indicated to [Defendant] that there was an opportunity to challenge his sentence in post-conviction proceedings."

TITLE: Moshenek v. State
INDEX NO.: X.9.
CITE: (06-20-07), Ind., 868 N.E.2d 419
SUBJECT: Denial of petition to file belated appeal - lack of diligence
HOLDING: Post-Conviction Rule 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. Tr. Ct.'s ruling on a petition to seek belated appeal under Post-Conviction Rule 2(1) should be affirmed unless it was based on an error of law or a clearly erroneous factual determination. Townsend v. State, 843 N.E.2d 972 (Ind. Ct. App 2006). Moreover, if Tr. Ct. did not advise a D of the right to appeal the sentence in an "open plea," that may well suffice to meet the lack of fault requirement under Post-Conviction Rule 2 depending on other evidence, but D must make some additional showing to establish diligence. Several factors are relevant to this inquiry, such as: overall passage of time; extent to which D was aware of relevant facts; & degree to which delays are attributable to other parties.

Here, Tr. Ct. did not abuse its discretion in determining that an eleven-year span without any effort to raise a sentencing claim showed lack of diligence in pursuing a belated appeal. D waited three years from receipt of his transcripts before filing his initial petition for post-conviction relief, which did not attack his sentence. D testified that he had constantly informed his lawyers of his desire to challenge his sentence & had relied on his counsel to make that claim. But he raised no challenge to his sentence in the three years before he requested a public defender. Held, transfer granted, Ct. App.' opinion at 851 N.E.2d 339 vacated, denial of permission to seek relief under P-C Rule 2 affirmed.

See also: Witt, 867 N.E.2d 1279 (D did not meet requirement that he demonstrate by a preponderance of evidence that he had been diligent in requesting permission to file a belated notice of appeal, where he did not challenge sentence until nine & one-half years after it was entered).

RELATED CASES: Johnson, 898 N.E.2d 290 (distinguishing Moshenek, Ct. held that D established that he had been without fault in failing to file a timely appeal of his sentence following open plea & was diligent in requesting permission to do so under P-C. R. 2(1)).

TITLE: Neville v. State
INDEX NO.: X.9.
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: Dawson, 943 N.E.2d 1281 (Ind. 2011) (imposition of full sentence after revocation of probation does not constitute a "sentence" that may be belatedly appealed under PCR 2); Cooper, 917 N.E.2d 667 (Indiana Supreme Court recognizes that issue of whether PCR 2 can be used to belatedly appeal probation revocations is unresolved); 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: Norton v. State

INDEX NO.: X.9.

CITE: (05/23/2023), Ind. Ct. App, 210 N.E.3d 886

SUBJECT: Appeal dismissed; trial court lacked authority to sua sponte extend deadline to file a belated notice of appeal

HOLDING: In a split opinion, the Court of Appeals dismissed Defendant's appeal without prejudice after the trial court extended the time limit prescribed by Appellate Rule 9 to file a notice of appeal. The majority held there is no authority that permits trial courts to expand the time limits and noted that Defendant did not file a belated appeal under Post-Conviction Rule 2 and provide evidence he was without fault for failing to file a timely notice and had been diligent in pursuing a belated appeal. Judge Weissmann dissented and noted that while the majority was correct that trial courts lack authority to unilaterally extend the clock for an appeal, the available remedies in this situation have dramatically shifted over the years. She would not fault the incarcerated defendant for relying on the trial court's order and noted the Court's interest in judicial economy and preference for resolving cases on the merits "whenever possible."

TITLE: Salazar v. State
INDEX NO.: X.9.
CITE: (2nd Dist., 10-10-06), Ind. App, 854 N.E.2d 1180
SUBJECT: Erroneous denial of petition to file belated notice of appeal - sentence from "open plea"
HOLDING: Tr. Ct. erred in denying D's petition for permission to file belated appeal of sentence imposed after he pled guilty in an open plea. Indiana Post-Conviction Rule 2(1) 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. Here, Tr. Ct. told D at his guilty plea hearing that if he proceeded to trial, he would have the right to appeal his conviction, but that if he pleaded guilty, he would give up such right. Although not incorrect, Tr. Ct.'s advisement was incomplete. Those who plead guilty have the right to challenge sentence imposed to extent that Tr. Ct. exercised its discretion in imposing sentence. Tumulty v. State, 666 N.E.2d 394 (Ind. 1996). Fact that Tr. Ct. failed to inform D of his right to appeal his sentence following guilty plea is not irrelevant in context of considering whether a D is at fault for failing to file a timely appeal. Collins v. State, 817 N.E.2d 230, 233 (Ind. 2004). Thus, D was not at fault for failing to file a timely notice of appeal. Furthermore, D was also diligent in requesting permission to file a belated notice of appeal, as he filed a request for counsel sixty-four days after Collins was decided. Held, judgment reversed.

RELATED CASES: Mead, App., 875 N.E.2d 304 (D's failure to file a direct appeal was not his fault, & he was diligent in pursuing an appeal of his sentence); Roberts, App., 854 N.E.2d 1177 (although failure to file timely notice of appeal was not due to D's fault, Tr. Ct. did not abuse its discretion by concluding that D was not diligent in petitioning for a belated appeal. D was aware of Collins decision when his petition to transfer his PCR claims was denied, but he waited over eight months to file petition for permission to file belated appeal).

TITLE: Satterfield v. State
INDEX NO.: X.9.
CITE: (5/12/2015), 30 N.E.3d 1271 (Ind. Ct. App 2015)
SUBJECT: Appeal not forfeited despite late notice of appeal
HOLDING: Even though D did not timely file his notice of appeal to challenge the denial of bail, extraordinarily compelling reasons justify review on the merits. See In Matter of Adoption of O.R., 16 N.E.3d 965, 971 (Ind. 2014). The right to bail is "a traditional and cherished right." Bozovichar v. State, 103 N.E.2d 680, 681 (Ind. 1952), abrogated on different grounds by Fry v. State, 990 N.E.2d 429 (Ind. 2013). Where, as here, a D is charged with murder, denial of the right to bail where the proof of guilt is not evident or the presumption of guilt is not strong would be a deprivation of liberty without due process of law, and would call for prompt corrective action. See Ex Parte McDaniel, 97 So. 317, 318 (Fla. 1923). Accordingly, D's "otherwise forfeited appeal deserves a determination on the merits." Held, appeal allowed to proceed.

TITLE: Stanley v. State

INDEX NO.: X.9.

CITE: (3rd Dist.; 06-13-06), Ind. App., 849 N.E.2d 626

SUBJECT: Belated Appeal -- improper avenue to challenge factual basis to HO enhancement admission

HOLDING: Because the D's belated appeal follows a guilty plea & admission of being a habitual offender, the belated appeal must be dismissed without prejudice to D's right to raise issue in subsequent post-conviction proceeding. One of the things a person gives up by pleading guilty is the right to direct appeal except for the issue of an open sentence. An admission to being a habitual offender is the equivalent to a guilty plea. Here, D admitted, pursuant to a plea agreement, that he was a habitual offender. However, one of the predicate offenses alleged was possession of a controlled substance, which did not qualify as predicate offense under Ind. Code 35-50-2-8(d). Because this appeal is challenging the sufficiency of factual basis for D's habitual offender determination on his guilty plea, the belated appeal must be dismissed without prejudice so D can properly raise issue in post-conviction relief petition. Held, appeal dismissed without prejudice.

TITLE: Strong v. State
INDEX NO.: X.9.
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.