APPELLATE PRACTICE MANUAL

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Introduction

This manual cannot answer every question that will arise in every appeal, but it seeks to answer the most common ones. The focus is on criminal appeals, but it also discusses other types of appeals in which public defenders may be appointed, such as children in need of services (CHINS), termination of parental rights (TPR), civil commitments, and contempt cases.

Overview of this Manual

This manual is divided into six sections, roughly tracking the progression of an appeal from its inception to its conclusion.

Section I: Initiating the Appeal. This section covers the filings and procedures necessary to begin an appeal. Before 2012, appeals began by filing a notice of appeal in the trial court. Effective January 1, 2012, a notice of appeal, which requires considerable information and attachments, must be filed with the appellate clerk. Pursuing an appeal is not a passive activity. Counsel is not only responsible for filing things on time but must be sure the trial court clerk and court reporter also fulfill their duties in a timely manner.

Section II: Interlocutory Appeals. This section explains the procedures, beginning in the trial court, by which a ruling may be appealed while a case is pending, i.e., before sentencing has occurred. In criminal cases, interlocutory appeals are most commonly sought when a motion to suppress is denied. With any interlocutory order, a defendant must obtain timely certification from the trial court and then approval from the court of appeals. This section also includes a discussion of the seldom-used appeals involving payment of placements by the Department of Child Services (DCS).

Section III: Motions Practice. This section explains the general requirements for filing appellate motions as well as the requirements and practical considerations for filing several specific motions, including a Motion for Extension of Time, Motion to Dismiss, Motion to Remand, Motion to Stay/Motion for Appeal Bond, Motion to Strike, and Motion for Expedited Appeal. Even if the rules do not specifically address a topic, appellate counsel may file a motion making any ***reasonable*** request of the court.

Section IV: Briefs and Appendices. This section is the longest and arguably the most important one of the manual. It addresses the selection of issues for appeal, legal research, and the preparation of the appendix and briefs. Most cases succeed or fail on the brief, and this section includes important information to consider in crafting each section of a winning brief.

Section V: After the Opinion is Issued. An appeal is not over when the appellate court issues its decision. The losing party may seek rehearing from the court of appeals or discretionary review (through a petition to transfer) by the Indiana Supreme Court. This section discusses when each is appropriate and strategies for writing effective petitions.

Section VI: Oral Argument. Finally, the last section addresses oral arguments. Although many appellate lawyers dread public speaking, oral argument can be an important part of winning a case. This section addresses when it is appropriate to request oral argument, how to make the request, and how to deliver a successful oral argument.

Audience

With rare exceptions, most appeals begin with the Indiana Court of Appeals. See Section I.A. (explaining cases that are directly appealed to the Indiana Supreme Court). There are currently fifteen members of the court and a few senior judges that also take part in deciding cases. Although the court is divided into five districts, the districts are important only to the selection of judges. The districts are illustrated at: https://www.in.gov/courts/appeals/districts/. Each case is randomly assigned to a panel of three judges, and these panels rotate every four months. Therefore, the judges assigned to any given case may or may not be from the same district or the district where the case originated. Counsel will not know which judges are assigned to decide a case unless oral argument is scheduled. See Section VI.

Although cases begin in the Indiana Court of Appeals, the Indiana Supreme Court decides about 50 cases each year on "transfer" from the court of appeals. See Section V. The Indiana Supreme Court currently has five members, each of whom participates in decisions in every case.

Biographies of the justices and judges are available on the courts' websites:

http://www.in.gov/judiciary/supreme/

http://www.in.gov/judiciary/appeals/

Judges come from a variety of backgrounds, and counsel should not assume the judges deciding a case will be experts in the particular area of law involved.

The Indiana Rules of Appellate Procedure

The Indiana Rules of Appellate Procedure were overhauled in 2001. They are available online at: http://www.in.gov/judiciary/rules/appellate/index.html. The rules are significantly different from the pre-2001 appellate rules. If you have not litigated an appeal for several years, you should begin by reviewing the appellate rules. They are comprehensive, logically organized, include an index, sample forms, and answer most of the common questions that arise in an appeal.

Appellate Rule 2 includes several definitions. The definitions most important to criminal appeals are the following:

C. Appendix. An Appendix is a compilation of documents filed by a party pertaining to an

appeal under Rule 49 and Rule 50.

D. Clerk. The Clerk is the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.

E. Clerk's Record. The Clerk's Record is the Record maintained by the clerk of the trial court or the Administrative Agency and shall consist of the Chronological Case Summary (CCS) and all papers, pleadings, documents, orders, judgments, and other materials filed in the trial court or Administrative Agency or listed in the CCS.

F. Court and Court on Appeal. The terms "Court" and "Court on Appeal" shall refer to the Supreme Court and the Court of Appeals.

G. Criminal Appeals. Criminal Appeals are those cases which were designated by the originating court as a Murder – MR, Class A Felony – FA, Class B Felony – FB, Class C Felony – FC, Class D Felony – FD, Level 1 Felony – F1, Level 2 Felony – F2, Level 3 Felony – F3, Level 4 Felony – F4, Level 5 Felony – F5, Level 6 Felony – F6, Criminal Felony--CF; Class D Felony--DF; Criminal Misdemeanor--CM; Post Conviction Relief--PC; Juvenile Status--JS; Juvenile Delinquency--JD; Infraction--IF; Miscellaneous Criminal--MC; Local Ordinance Violation--OV, and Exempted Ordinance Violation--OE. This definition is for ease of reference and does not change the substantive rights of the parties.

I. Notice of Appeal. The Notice of Appeal initiates the appeal under Rule 9 and replaces the praecipe for appeal.

J. Petition. The term "Petition" shall mean a Petition for Rehearing, a Petition to Transfer an appeal to the Supreme Court, and a Petition for Review of a Tax Court decision by the Supreme Court. A request for any other relief shall be denominated a "motion."

K. Transcript. Transcript shall mean the transcript or transcripts of all or part of the proceedings in the trial court or Administrative Agency that any party has designated for inclusion in the Record on Appeal and any exhibits associated therewith.

L. Record on Appeal. The Record on Appeal shall consist of the Clerk's Record and all proceedings before the trial court or Administrative Agency, whether or not transcribed or transmitted to the Court on Appeal.

O. Court Reporter. "Court Reporter" shall mean a person who is designated by a court or Administrative Agency to perform official reporting services, including preparing the Transcript.

P. Case Management System ("CMS"). Case Management System is the system of networked software and hardware used by any Indiana court that may receive, organize,

store, retrieve, transmit, and display all relevant documents in any case before it.

Q. Conventional Filing. Conventional Filing is the physical non-electronic presentation of documents to the Clerk or Court.

R. Electronic Filing ("E-Filing"). E-Filing is a method of filing documents with the clerk of any Indiana court by electronic transmission utilizing the Indiana E-Filing System. E-Filing does not include transmission by facsimile or by email.

S. E-Filing Manager ("EFM"). E-Filing Manager is the centralized entity approved by the Supreme Court that receives and transmits all E-Filing submissions between E-Filing Service Provider(s) and the appropriate CMS.

T. E-Filing Service Provider ("EFSP"). E-Filing Service Provider is the organization and software selected by a User and approved by the Supreme Court to receive and transmit all E-Filing submissions between the User and the Indiana E-Filing System.

U. Electronic Service ("E-Service"). E-Service is a method of serving documents by electronic transmission on any User in a case via the Indiana E-Filing System.

V. Indiana E-Filing System ("IEFS"). Indiana E-Filing System is the system of networked hardware, software, and service providers approved by the Supreme Court for the filing and service of documents via the Internet, into the CMS(s) used by Indiana courts.

W. Notice of Electronic Filing ("NEF"). Notice of Electronic Filing is the notice generated automatically when a document is submitted and transmitted through the IEFS, which sets forth the time of transmission, the name of the Court, User, party, attorney, trial court clerk, or Administrative Agency transmitting the document, the title of the document, the type of document, and the name of the Court, attorney, party, or other person meant to receive the Notice. The time noted in an NEF will be the time at the location of the court where the case is pending. An NEF will appear immediately on the User's screen upon submission of the document for E-Filing.

X. Public Access Terminal. A Public Access Terminal is a publicly accessible computer provided by a clerk or court that allows a member of the public to access the IEFS and public court records.

Y. User Agreement. A User Agreement is an agreement in a form approved by the Division of State Court Administration that establishes obligations and responsibilities of the User within the IEFS.

Z. User. User is a Registered User or Filing User.

(1) **Filing User.** Filing Users include court and clerk staff, unrepresented litigants,

attorneys, or an agent whom an attorney has expressly designated to make a filing on the attorney's behalf and who has an IEFS user ID, password, and limited authority to file documents electronically.

(2) **Registered User.** A Registered User is a person or entity with a user ID and password assigned by the IEFS or its designee who is authorized to use the IEFS for the electronic filing or service of documents.

AA. Service Contacts. A Service Contact is a person for whom an email address and other identifying information has been entered into the IEFS by a Registered User.

(1) **Firm Service Contact.** A Firm Service Contact is a Service Contact associated in the IEFS with an attorney, organization, or law firm.

(2) **Public Service Contact.** A Public Service Contact is a Service Contact who is listed on the Public Service List for purposes of E-Service. A Registered User may add a Service Contact to the Public Service List only if authorized by the Service Contact.

(3) **Public Service List.** The Public Service List is a directory of Public Service Contacts who are available for E-Service.

Importance of Following the Rules/Deadlines: Notice of Defect

The most common and significant problems in an appeal often arise because counsel failed to follow the rules. The rules set clear requirements for every step of a proceeding and deadlines that must be followed. The flowchart at the end of this Introduction provides an overview of these deadlines. The tables that follow include information on the number of copies that must be filed, page and word limits, filing/service requirements, and legal citation.

If a brief or other document tendered to the Clerk fails to comply with the appellate rules, the Clerk will issue a notice of defect. Appellate Rule 23(D) explains the consequences and procedures for curing a defect. Appendix B lists the areas in which the Clerk will issue a notice of defect:

(1) A Notice of Defect may be issued if one or more of the following is missing, insufficient, or incomplete.

(a) A certificate of service, see Ind. Appellate Rules 24, 57(G)(7), 68(F);

(b) A word count certificate, see App. Rs. 34(G)(2), 44(E) & (F), 54(E), 57(G)(6);

(c) A table of contents or table of authorities, see App. Rs. 46(A)(1) & (2), 46(B), 46(E)(1), 50(A)(2), 50(B)(1), 50(C), 57(G)(2);

(d) For any document filed after the Notice of Appeal, a filing fee or material required by Appellate Rule 40; see App. Rs. 9(E), 40, 56(B), 63(P);

(e) For a motion to proceed in forma pauperis, a copy of any affidavit supporting the request to proceed in forma pauperis that was filed with the trial court or an affidavit conforming to Form #App. R. 40-2; or a copy of the order setting forth the trial court's reasons for denying the in forma pauperis status on appeal;

(f) Document was tendered without first filing an appearance, see App. R. 16;

(g) For an Appendix, a verification of accuracy, see App. Rs. 50(A)(2)(i), 50(B)(1)(f);

(h) For an Appellant's Brief, an accompanying copy of the trial court's written opinion, memorandum of decision, or findings of fact and conclusions relating to the issue(s) raised in appeal, see App. R. 46(A)(12);

(i) For an Appellant's Brief in a criminal appeal where the sentence is at issue, an accompanying copy of the sentencing order, see App. R. 46(A)(12);

(j) For a Petition to Transfer, a brief statement, set out by itself on the page immediately following the front page, identifying the issue, question presented, or precedent warranting transfer, see App. R. 57(G)(1);

(k) For a Petition for Review or brief in response, a brief section entitled Reasons for Granting or Denying Review, set out by itself immediately before the Argument section, explaining why review should or should not be granted, see App. R. 63(I).

(l) For a non-public access version of a document, a conspicuous designation of "Not for Public Access" or "Confidential" on the first page, see App. R. 23(F).

(2) A Notice of Defect may be issued if one or more of the following prohibited items is included:

(a) For any Brief, any additional documents, other than the appealed judgment or order, see App. Rs. 46(F), 46(H);

(b) For any document, information excluded from public access when the document is not accompanied by a Notice to Maintain Exclusion from Public Access, see App. R. 23(F)(3).

(3) A Notice of Defect may be issued if the document is otherwise defective because:

(a) Document Production issues exist, except for hyperlinks, which may appear in a color other than black, see App. Rs. 43(C), 51(A), and/or 54(F);

(b) Page numbering issues exist, see App. Rs. 23(F)(3)(b), 34(G), 43(F) and/or 51(C);

(c) The document was conventionally filed but should have been electronically filed through the Indiana E-Filing System, see App. R. 68(C).

Clerk's Online Docket

MyCase includes access to all appellate cases (which can be filtered by checking a box), and the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court has an online docket that is invaluable to appellate practitioners. Case information may be accessed by cause number, litigant name, or counsel name.

Communicating with the Clerk or Court

Questions about filings in a case should be directed to the Clerk's office at 317-232-1930.

Communication with the Indiana Supreme Court or Court of Appeals is generally done through written motion. It is inappropriate to ask to speak to a judge about a pending case or their vote or decision in a decided case. If you have a question about what procedure or motion to file in a unique situation not covered by the rules, contact a staff attorney with the appropriate court at the numbers below.

317-232-2540: Indiana Supreme Court Administrator's Office

317-232-6906: Indiana Court of Appeals Administrator's Office

Citation Guide

You probably hated the Bluebook in law school. Even if you mastered it then, you may have forgotten it since. Even if you understood it then, proper citation has changed in recent years. Law clerks and judges understand citation—and so must you. Failing to cite information or citing it incorrectly can have serious consequences in an appeal. If the court cannot find the case or other source you have cited, it may well reject your argument—and chastise you in the opinion.

The primary goal of citation should be to allow the court to find your source and the appropriate page or part of that source. Beyond that, the appellate rules provide clear guidelines about the proper form of citation.

Cases

"All Indiana cases shall be cited by giving the title of the case followed by the volume and page of the regional and official reporter (where both exist), the court of disposition, and the year of the opinion, e.g., Callender v. State, 193 Ind. 91, 138 N.E. 817 (1922); Moran v. State, 644 N.E.2d 536 (Ind. 1994)." Ind. Appellate Rule 22(A). Rule 22(A) further requires, "Where both a regional and official citation exist, and pinpoint citations are appropriate, pinpoint citations to one of the reporters shall be provided." App. R. 22(A). Finally, Rule 22(A) requires, "Designation of disposition of petitions for transfer shall be included, e.g., State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Indiana Revenue Bd., 144 Ind. App. 63, 242 N.E.2d 642 (1968), trans. denied by an evenly divided court 251 Ind. 607, 244 N.E.2d 111 (1969); Smith v. State, 717 N.E.2d 127 (Ind. Ct. App. 1999), trans. denied.

Although the rule is fairly explicit, appellate counsel sometimes make the following five types of citation errors.

1. Citing cases that are not good law. Counsel should Shepardize or KeyCite every case cited before filing a brief. If a subsequent case has overruled or disapproved the case, the case may no longer be good law on that point—and should not be cited. If transfer has been

granted, the Court of Appeals opinion is vacated—and cannot be cited unless it has been adopted or summarily affirmed by the Indiana Supreme Court. App. R. 58(A).

Appellate Rule 65 was recently amended to allow counsel to cite memorandum (unpublished) decisions for persuasive value. But this applies only to memorandum decisions **issued on or after January 1, 2023**. Citing memorandum decisions issued before that date is prohibited under Rule 65.

2. Failing to include subsequent history. If the subsequent case overruled the case on another legal issue, this should be noted parenthetically, e.g., State v. Hurst, 688 N.E.2d 402, 408 (Ind. 1998), overruled on other grounds by Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004). Discretionary denials, such as rehearing or certiorari, should be included if the opinion cited is less than two years old. The denial of transfer should be included in every case, as required by Rule 22.

3. Failing to include a pinpoint cite. It is not enough to provide a citation to a case, some of which may span twenty pages or longer. You must include a citation to the specific page from which information is taken. For example, if you are relying on information found on page 539 of the Moran case, the citation would be as follows: Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994). Be sure the information relied on is taken from the court's opinion—not the headnotes written by LEXIS or West Publishing, which are ***not*** part of the case.

4. Subsequent citations. Rule 22 does not provide the form for later citations of the same case. Consistent with the Bluebook, counsel should use either the short form or *Id.* when referring to a previously cited case. For example, if referring to something from page 538 of the Moran opinion immediately after the full citation included above, the citation would be "*Id.* at 538." If, however, there are intervening citations to other sources, the correct citation would be "Moran, 644 N.E.2d at 538."

5. Typeface. Case names may either be underlined or *italicized*—not both and not bolded. The rest of the citation should appear in regular Roman type.

Statutes and Court Rules

Rule 22(B) provides specific guidelines for citing statutes and court rules. If referring to a statute or court rule in a textual sentence, counsel should spell it out, e.g., "according to Indiana Code section 35-38-1-7.1(a)" or "Criminal Rule 4 provides . . . ." When citing the statute or rule in a citation sentence, the following form should be used:

INITIAL	SUBSEQUENT
Ind. Code § 34-1-1-1 (20 xx)	I.C. § 34-1-1-1
Ind. Trial Rule 56	T.R. 56

Ind. Crim. Rule 4(B)(1)	Crim. R. 4(B)(1)
Ind. Post-Conviction Rule 2(2)(b)	P-C.R. 2(2)(b)
Ind. Appellate Rule 8	App. R. 8
Ind. Evidence Rule 301	Evid. R. 301
Ind. Jury Rule 12	J.R. 12
Ind. Access to Court Records Rule 7	A.C.R. 7

Although not explained in Rule 22, the Indiana Supreme Court has made clear that Articles of the Indiana Constitution should be in Arabic (and not Roman) numerals. For example, Article 7, Section 4—not Article VII. See Bonner v. Daniels, 907 N.E.2d 516, 518 n.2 (Ind. 2009).

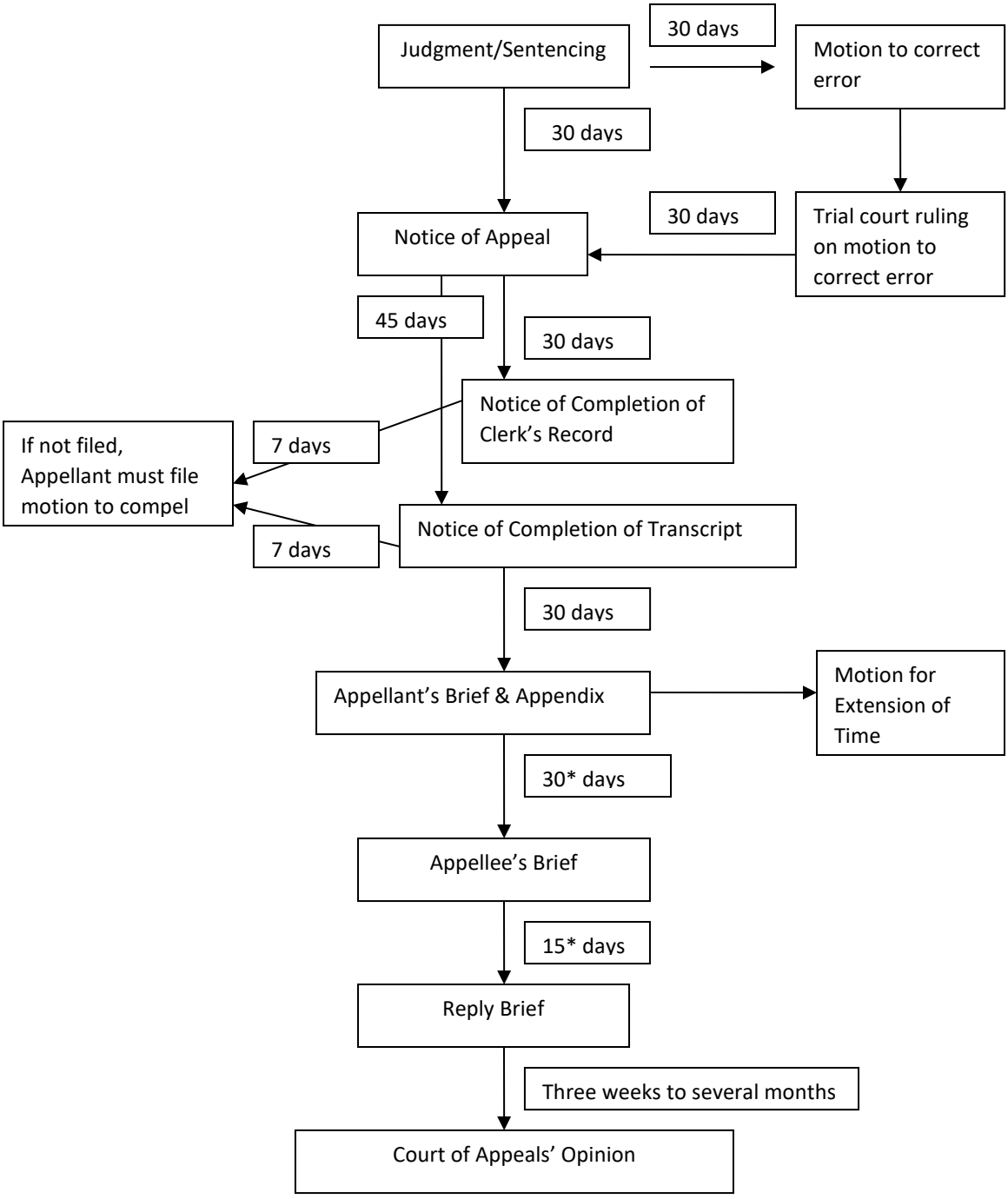
Abbreviations

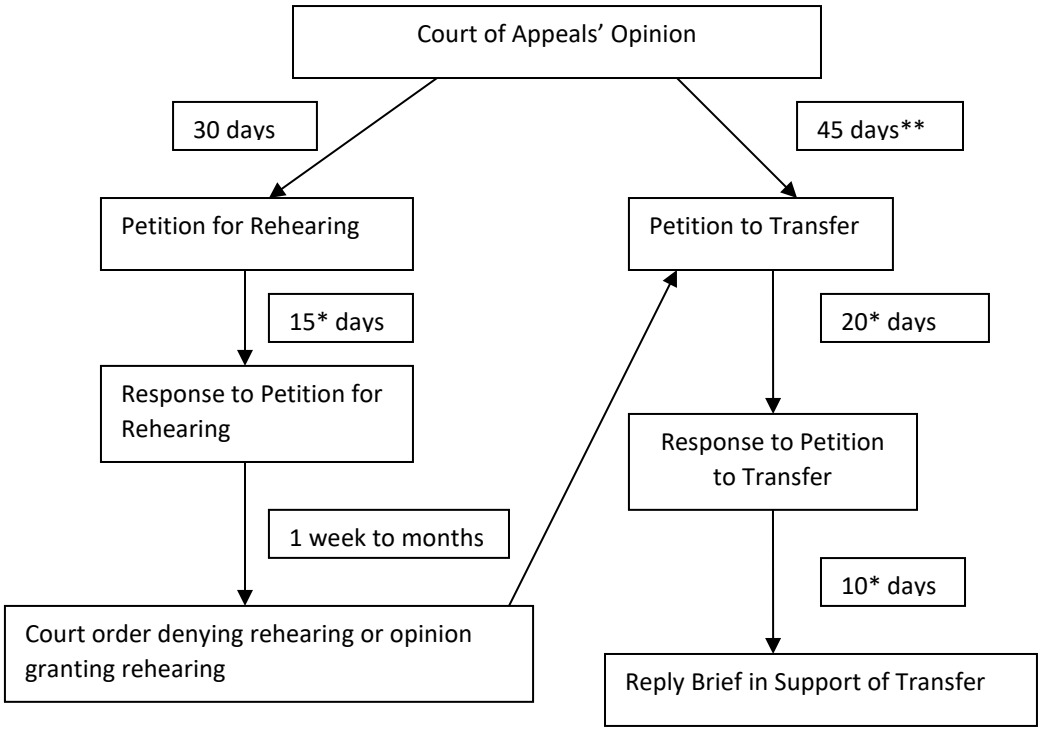
"The following abbreviations may be used without explanation in citations and references: Addend. (addendum to brief), App. (appendix), Br. (brief), CCS (chronological case summary), Ct. (court), Def. (defendant), Hr. (hearing), Mem. (memorandum), Pet. (petition), Pl. (plaintiff), Supp. (supplemental), Tr. (Transcript)." App. R. 22(E).

The Record on Appeal

Finally, Rule 22(C) reminds counsel that citations to the Appendix or Transcript are required for all factual statements in motions and briefs. The rule provides the following two examples: Appellant's App. Vol. II p.5; Tr. Vol. I, pp. 231-32. These can be long and cumbersome. Volume I is always the Table of Contents, which will not be cited. Thus, in cases with a short appendix or transcript (Volume II—and no subsequent volumes), counsel may wish to shorten the citations to "App. 5" and briefly note the shortened form in a footnote.

Direct Appeal Flowchart of Deadlines





*If a document is served by mail, these deadlines are extended by three days.

If either party sought rehearing, a petition to transfer must be filed no later than **30 days after the Court of Appeals disposed of the petition for rehearing. App. R. 57(C).

Section I
Initiating the Appeal
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Section I

Initiating the Appeal

This section discusses what must be done to initiate an appeal, beginning with the Notice of Appeal through the completion of the transcript. Counsel faces several important deadlines, as highlighted on the Direct Appeal Flowchart in the Introduction.

- The Notice of Appeal must be filed within thirty (30) days after sentencing. The Notice is a more detailed pleading and must be filed with the appellate clerk—not the trial court clerk.

- The trial court clerk must file the Notice of Completion of the Clerk's Record within thirty (30) days of the Notice of Appeal.

- The transcript is due to be completed by the court reporter within forty-five (45) days of the Notice of Appeal. When complete, the court reporter files the transcript with the trial court clerk, and within five (5) days the trial court clerk must file the Notice of Completion of Transcript.

- If the clerk or court reporter misses a deadline, appellate counsel must file a motion to compel within seven (7) days of the missed deadline.

Counsel cannot simply sit by and wait. Doing so can lead to the forfeiture of an appeal.

This section is divided into seven parts.

Part A discusses the jurisdiction of the Indiana Supreme Court and Court of Appeals. In short, almost every appeal will begin at the Indiana Court of Appeals, except in death penalty cases, some LWOP cases, and those rare instances in which a trial court declares a statute unconstitutional.

Part B explains indigency and in forma pauperis status on appeal. To avoid the defendant being charged filing fees and transcript costs, the trial court must make a finding of indigency. If the trial court refuses to make such a finding, the issue may be appealed.

Part C discusses the Notice of Appeal, which must be filed within thirty (30) days of sentencing or the denial of a motion to correct error to preserve the right to appeal. The notice must request the specific parts of the Transcript needed for the appeal. If additional portions are later needed, a supplemental notice must be filed. The notice must include fairly detailed information and be filed with the appellate clerk—not the trial court clerk.

Part D explains belated appeals, which may be pursued when a timely Notice of Appeal is not filed. Requests in direct criminal appeals must begin in the trial court and meet specific requirements. If denied, the issue may be appealed. Requests in other cases (probation violations, post-conviction relief, termination of parental rights, etc.) require extraordinary circumstances and a request in the appellate court.

Part E discusses the Clerk's Record and trial clerk's duties. The trial court clerk must file a notice that the Clerk's Record (trial court file) is assembled. If the notice is not filed within thirty (30) days of the Notice of Appeal, appellate counsel must file a motion to compel. The trial court clerk must also file a Notice of Completion of Transcript within five (5) days of the court reporter filing the transcript with the trial court clerk. If the Notice of Completion of Transcript is not filed within 5 days of the court reporter filing the transcript with the trial court clerk, appellate counsel must file a motion to compel.

Part F turns to the transcript and court reporter's duties. The transcript must be completed within forty-five (45) days of the filing of the Notice of Appeal. If it is not, appellate counsel must file a motion to compel. If the Transcript does not include exhibits necessary for the appeal, counsel should promptly contact the court reporter or, if that fails, seek the timely intervention of the Court of Appeals.

Part G explains the procedures for correcting the Clerk's Record or Transcript. Appellate counsel cannot simply note that something is unavailable, missing, or incorrect. Rather, counsel has a duty to fill in the gaps or correct errors by filing appropriate motions in the trial court.

Finally, **Part H** introduces Indiana Rules on Access to Court Records, which has important implications on how cases are captioned and restrictions on certain types of information and documents throughout an appeal.

Effective January 1, 2012, the Appellant's Case Summary has been abolished. Much of the information previously included in the ACS is now included in the Notice of Appeal.

A. JURISDICTION: WHERE DOES THE APPEAL GO?

I. The Rules

Rule 4. Supreme Court Jurisdiction

A. Appellate Jurisdiction.

(1) *Mandatory Review.* The Supreme Court shall have mandatory and exclusive jurisdiction over the following cases:

(a) Criminal Appeals in which a sentence of death or life imprisonment without parole is imposed under Ind. Code § 35-50-2-9 and Criminal Appeals in post conviction relief cases in which the sentence was death.

(b) Appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part.

* * * *

(2) *Discretionary Review.* The Supreme Court shall have discretionary jurisdiction over cases in which it grants Transfer under Rule 56 or 57 or Review under Rule 63.

(3) *Certain Interlocutory Appeals.* The Supreme Court shall have jurisdiction over interlocutory appeals authorized under Appellate Rule 14 in any case in which the State seeks the death penalty or in life without parole cases in which the interlocutory order raises a question of interpretation of IC 35-50-2-9.

Rule 5. Court of Appeals Jurisdiction

A. Appeals from Final Judgments. Except as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana. See Rule 2(H).

B. Appeals from Interlocutory Orders. The Court of Appeals shall have jurisdiction over appeals of interlocutory orders under Rule 14.

*** * * ***

Rule 6. Appeal or Original Action in Wrong Court

If the Supreme Court or Court of Appeals determines that an appeal or original action pending before it is within the jurisdiction of the other Court, the Court before which the case is pending shall enter an order transferring the case to the Court with jurisdiction, where the case shall proceed as if it had been originally filed in the Court with jurisdiction.

II. Practical Considerations

A threshold question in any appeal is where the appeal is going: the Indiana Court of Appeals or the Indiana Supreme Court. Be sure to caption your documents with the correct court and choose the correct court in the drop-down menu when E-filing. The answer 99% of the time is the Indiana Court of Appeals.

A. Indiana Court of Appeals

The Indiana Court of Appeals has general jurisdiction to hear appeals of all final judgments and interlocutory orders, except those in death penalty or life without parole cases. App. R. 5(A) & (B); Ind. Const. Art VII, § 6.

B. Indiana Supreme Court

The Indiana Supreme Court hears very few cases on direct appeal. These include death penalty cases, life without parole cases filed under the death penalty statute (Indiana Code section 35-50-2-9), and cases in which a trial court has declared a statute unconstitutional. Finally, the Indiana Supreme Court will sometimes grant emergency transfer under Rule 56(A), and an appeal will then go directly to it.

B. INDIGENCY/*IN FORMA PAUPERIS* STATUS ON APPEAL

I. The Rule

Rule 40. Motion to Proceed *In Forma Pauperis*

A. Appeal From a Trial Court.

(1) *Prior Authorization by the Trial Court.* A party who has been permitted to proceed in the trial court in *forma pauperis* may proceed on appeal *in forma pauperis* without further authorization from the trial court or Court on Appeal. See Rule 9(E).

(2) *Motion to the Trial Court.* Any other party in a trial court who desires to proceed on appeal in *forma pauperis* shall file in the trial court a motion for leave to so proceed, together with an affidavit conforming to Forms # App.R. 40-1 and #App.R. 40-2, showing in detail the party's inability to pay fees or costs or to give security therefor, the party's belief that the party is entitled to redress, and a statement of the issues the party intends to present on appeal. If the trial court grants the motion, the party may proceed without further motion to the Court on Appeal. If the trial court denies the motion, the trial court shall state in a written order the reasons for the denial.

(3) *Revocation of Authorization by the Trial Court.* Before or after the Notice of Appeal is filed, the trial court may certify or find that a party is no longer entitled to proceed *in forma pauperis*. The trial court shall state in a written order the reasons for such certification or finding.

(4) *Motion to the Court on Appeal.* If the trial court denies a party authorization to proceed in *forma pauperis* the party may file a motion in the Court on Appeal for leave to so proceed within fifteen (15) days of service of the trial court's order. See Form #App.R. 40-1. The motion shall be accompanied by a copy of any affidavit supporting the party's request filed in the trial court. If no affidavit was filed in the trial court or if the affidavit filed in the trial court is no longer accurate, the motion shall be accompanied by an affidavit conforming to Form # App.R. 40-1. The motion shall be accompanied by a copy of the order setting forth the trial court's reasons for denying the party *in forma pauperis* status on appeal.

* * * *

C. Filings Required in the Court on Appeal

With the first document a party proceeding or desiring to proceed in *forma pauperis* files in the Court on Appeal, the party shall file with the Clerk:

(1) the trial court's authorization to proceed in *forma pauperis* on appeal;

(2) an affidavit stating that the party was permitted to proceed in *forma pauperis* in the trial court and that the trial court has made no certification or finding under Rule 40(A)(3); or

(3) a motion to the Court on Appeal to proceed in *forma pauperis*.

If the trial court subsequently enters an order containing a certification or finding under Rule 40 (A)(3), the party shall promptly file the trial court's order with the Clerk.

D. Effect of In *Forma Pauperis* Status.

A party proceeding in *forma pauperis*:

(1) is relieved of the obligation to prepay filing fees or costs in either the trial court or the Court on Appeal or to give security therefor; and

(2) may file legibly handwritten or typewritten briefs and other papers.

II. Practical Considerations

Criminal Rule 11 requires trial courts to advise defendants of their right to appeal and appoint counsel for those unable to afford appellate counsel. Chapter 16 of the IPDC Pre-Trial Manual explains the right to counsel in various types of proceedings. It is important that trial courts make an indigency determination for purposes of appeal. The appellate clerk will expect a filing a fee of $250 for filing a Notice of Appeal or $125 for a Petition to Transfer if there is no indigency determination. The clerk will expect to be paid for photocopies of the Clerk's Record, and the court reporter will expect that arrangements be made to pay for the Transcript.

Problems occasionally arise regarding indigency. If a defendant was indigent for trial, this determination will almost always persist on appeal. Even defendants who hired private counsel for trial often become indigent for purposes of appeal if they are convicted and sent to serve a lengthy prison sentence.

A. Indigency Determination Must be in Writing

Unless a defendant is indigent, the appellate clerk must collect a filing fee of $250 when served with the Notice of Appeal. App. R. 9(E). Rule 9(F)(8) requires counsel attach to the Notice of Appeal "documents required by Rule 40(C), if proceeding in *forma pauperis.*"

B. You Must Ask the Trial Court First

If you find yourself involved in an appeal for an indigent defendant in which the trial court did not enter an order finding your client indigent, Rule 40(A)(2) and Form App.R. 40-1 explains the requirements to establish indigency in the trial court. "If the trial court grants the motion, the party may proceed without further motion to the Court on Appeal. If the trial court denies the motion, the trial court shall state in a written order the reasons for the denial." If the trial court simply denies the motion without a written order including "the reasons for the denial," you should consider filing a Motion to Reconsider, including a reminder about the requirements of Rule 40(A)(2). A Motion to Reconsider will not stay the requirement, explained below, that you file a motion in the court of appeals within fifteen (15) days of the trial court's denial.

C. If the Trial Court Denies Pauper Status, File a Motion in the Court of Appeals

If the trial court denies the motion for pauper status and enters an order including reasons for the denial, the next step is to file a motion for pauper status in the Indiana Court of Appeals. The motion must be filed within fifteen (15) days of the trial court's denial of your motion. Two attachments must be included: (1) "a copy of any affidavit supporting the party's request filed in the trial court" (or a new affidavit if one was not filed or the information has since changed) and (2) "a copy of the order setting forth the trial court's reasons for denying the party in *forma pauperis* status on appeal."

D. Revocation of Indigency Status

Rule 40(A)(3) allows trial courts to revoke an indigency determination either before or after a Notice of Appeal is filed. This must be done by written order with reasons for the denial. When confronted with such a revocation, counsel may consider filing a motion for in *forma pauperis* status anew under Rule 40(A)(2). If it is denied, counsel could then proceed with an appeal as explained in part C, above.

E. Effect of Indigency Status

A determination that your client is indigent for a direct appeal will absolve you of the requirement of paying the filing fees in the Indiana Court of Appeals ($250) or Indiana Supreme Court ($125 for filing a petition to transfer). Litigants in civil cases, however, are not entitled to a free transcript under existing Court of Appeals' authority. See Campbell v. Criterion Group, 605 N.E.2d 150, 161 (Ind. 1992) (requiring counsel to instead re-create the record).

If your client is found indigent, you may also be absolved of trial court expenses such as copying of the Clerk's Record. With E-filing you should be able to secure the Clerk's record without the need for paper (although some trial court clerk offices still print the Clerk's record.) You may also be absolved from paying for the Transcript. But be aware that Transcript costs and who is responsible for payment to the court reporter may vary depending upon whether the county has a public defender office where transcript costs are reimbursed under Indiana Public Defender commission standards.

Counsel must, however, prepare motions and briefs in typewritten form. The provision for legibly handwritten filings in Rule 40(D)(2) applies only to *pro se* litigants.

C. NOTICE OF APPEAL

I. The Rule

Rule 9. Initiation of the Appeal

A. Filing the Notice of Appeal.

(1) *Appeals from Final Judgments.* A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

(2) *Interlocutory Appeals.* The initiation of interlocutory appeals is covered in Rule 14.

* * * *

(4) *Abolition of Praecipe.* The praecipe for preparation of the Record is abolished.

(5) *Forfeiture of Appeal.* Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.

*** * * ***

E. Payment of Filing Fee. The appellant shall pay to the Clerk the filing fee of $250. No filing fee is required in an appeal prosecuted in *forma pauperis* or on behalf of a governmental unit. The filing fee shall be paid to the Clerk when the Notice of Appeal is filed. The Clerk shall not file any motion or other documents in the proceedings until the filing fee has been paid. A party may proceed on appeal in *forma pauperis* pursuant to Rule 40.

F. Content of Notice of Appeal. The Notice of Appeal shall include the following:

(1) *Party Information*.

(a) Name and address of the parties initiating the appeal, and if a party is not represented by counsel, the party's FAX number, telephone number, and electronic mail address, if any;

(b) Name, address, attorney number, FAX number (if any), telephone number and electronic mail address of each attorney representing the parties initiating the appeal;

(c) Certification that the contact information listed on the Indiana Supreme Court Roll of Attorneys for each attorney is accurate as of the date the Notice of Appeal is filed (Attorneys can review and update their Roll of Attorneys contact information on the Indiana Courts Portal);

(d) Acknowledgement that all orders, opinions, and notices in the matter will be sent to the email address(es) specified by the attorney on the Roll of Attorneys regardless of the contact information listed on the Notice of Appeal; and

(e) Acknowledgment that each attorney listed on the Notice of Appeal is solely responsible for keeping his/her Roll of Attorneys contact information accurate per Ind. Admis. Disc. R. 2(A).

(2) *Trial Information*.

(a) Title of case;

(b) Names of all parties;

(c) Trial court or Administrative Agency;

(d) Case number;

(e) Name of trial judge;

(3) *Designation of Appealed Order or Judgment.*

(a) The date and title of the judgment or order appealed;

(b) The date on which any Motion to Correct Error was denied or deemed denied, if applicable;

(c) The basis for appellate jurisdiction, delineating whether the appeal is from a Final Judgment, as defined by Rule 2(H); an interlocutory order appealed as of right pursuant to Rule 14(A), or (D); an interlocutory order accepted for discretionary appeal pursuant to Rule 14(B) or 14(C); or an expedited appeal pursuant to Rule 14.1; and

(d) A designation of the court to which the appeal is taken.

(4) *Direction for Assembly of Clerk's Record.* Directions to the trial court clerk to assemble the Clerk's Record.

(5) *Request for Transcript.* A designation of all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence. In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript.

(6) *Public Access Information*. A statement whether all or any portion of the court records were sealed or excluded from Public Access r.

(7) *Appellate Alternative Dispute Resolution Information*. In all civil cases, an indication whether Appellant is willing to participate in appellate alternative dispute resolution and, if so, provide a brief statement of the facts of the case.

(8) *Attachments*.

(a) A copy of the judgment or order being appealed (including findings and conclusions in civil cases and the sentencing order in criminal cases);

(b) A copy of the order denying the Motion to Correct Error or, if deemed denied, a copy of the Motion to Correct Error, if applicable;

(c) A copy of all orders and entries relating to the trial court or agency's decision to seal or exclude information from public access, if applicable;

(d) A copy of the order from the Court of Appeals accepting jurisdiction over the interlocutory appeal, if proceeding pursuant to Rule 14(B)(3);

(e) The documents required by Rule 40(C), if proceeding *in forma pauperis.*

(9) *Certification*. A certification, signed by the attorney or pro se party, certifying the following:

(a) That the case does or does not involve issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute;

(b) That the attorney or pro se party has reviewed and complied, and will continue to comply, with the requirements of Rule 9(J) and the Rules on Access to Court Records, to the extent they apply to the appeal; and

(c) That the attorney or pro se party will make satisfactory payment arrangements for any transcripts ordered in the Notice of Appeal, as required by Rule 9(H).

(10) *Certificate of Filing and Service.* The Certificate of Service required by Rule 24. This Certificate shall also certify the date on which the Notice of Appeal was filed with the Clerk. (See Form # App.R. 9-1)

G. Supplemental Request for Transcript. Any party to the appeal may file with the trial court clerk or the Administrative Agency, without leave of court, a request with the court reporter or the Administrative Agency for additional portions of the Transcript.

H. Payment for Transcript. The Court Reporter may require from the appellant a fifty percent (50%) deposit based on the estimated cost of the Transcript, except no deposit may be charged for state or county paid Transcript. Within ten (10) days after the filing of a Notice of Appeal a party must enter into an agreement with the Court Reporter for payment of the balance of the cost of the Transcript. Unless a court order requires otherwise, each party shall be responsible to pay for all transcription costs associated with the Transcript that party requests.

* * * *

J. All Court Records Excluded from Public Access. In cases where all Court Records are excluded from Public Access pursuant to Rule 5(A) of the Access to Court Records Rules, the Clerk shall make the appellate Chronological Case Summary for the case publicly accessible but shall identify

the names of parties and affected persons in a manner reasonably calculated to provide anonymity and privacy.

II. Practical Considerations

A. No More Praecipe

Before the new Appellate Rules were adopted in 2001, counsel filed a Praecipe to request the relevant parts of the appellate record and get the appellate process rolling. Rule 9(A)(4) makes clear that the Praecipe is "abolished." Counsel should now instead file a Notice of Appeal, as explained below.

B. Notice of Appeal is filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court

Prior to 2012, the Notice of Appeal was filed in the trial court. However, under Appellate Rule 9(A)(1), the Notice of Appeal is now filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.

C. The Deadline: 30 Days for Direct Appeals—15 for Interlocutory Appeals

The Notice of Appeal must be filed with the Clerk "within thirty (30) days after the entry of a Final Judgment." The failure to file a timely Notice of Appeal results in the forfeiture of the right to appeal except as provided by Post-Conviction Rule 2. In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014); App. R. 9(A)(5).

If pursuing an Interlocutory appeal, the Notice of Appeal must be filed within fifteen days of the Court of Appeals' order authorizing the Interlocutory Appeal. App. R. 14(B)(3).

1. File with the Appellate Clerk

The rules changed significantly effective January 1, 2012. Previously, the Notice of Appeal had to be filed with the trial court clerk. Now it must be filed with the Appellate Clerk and served on many parties, as explained below. The methods of proper service of documents in the trial court are explained in Trial Rule 5, although the court of appeals has held "for purposes of determining the timeliness of a filing required by the Appellate Rules, the filing provisions of those rules trump those of the Trial Rules." Marlett v. State, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007).

2. Sentencing is Final Judgment

In most criminal cases, final judgment occurs at sentencing, which "disposes of all claims as to all parties." If, however, counsel files a Motion to Correct Error, the deadline for filing a Notice of Appeal is extended as explained below.

3. Motion to Correct Error Extends Time

Counsel may file a Motion to Correct Error pursuant to Trial Rule 59 within thirty (30) days of the entry of final judgment. A Motion to Correct Error is not, however, a prerequisite for an appeal, except

when a party seeks to address newly discovered evidence capable of production within thirty (30) days of final judgment. Ind. Trial Rule 59(A).

If a Motion to Correct Error is filed, the time for filing the Notice of Appeal is tolled until the Motion to Correct is ruled upon or deemed denied pursuant to Trial Rule 53.3. A Motion to Correct Error is generally deemed denied under Trial Rule 53.3 if the trial court fails to set it for a hearing for forty-five (45) days or fails to rule upon it for thirty (30) days after it was heard. Ind. Trial Rule 53.3. A motion for the trial court to reconsider its ruling on a Motion to Correct Error does not toll the thirty-day deadline for filing a Notice of Appeal. See Fancher v. State, 436 N.E.2d 311, 312 (Ind. 1982) ("A motion to reconsider or to rehear a motion to correct errors does not extend the time for taking an appeal. . . . Once a timely Motion to Correct Errors has been denied, the time for perfecting an appeal begins to run.").

4. If the Deadline is Blown, See Rule PC-2 or Adoption of O.R. procedure

If the Notice of Appeal is not timely filed as explained above, counsel must pursue a belated appeal under Post-Conviction Rule 2 (criminal direct appeals) or the procedure outlined in Adoption of O.R. in other appeals, as explained in Section I.D. of this manual.

D. Serve the Parties Listed in Rule 24(A)

A Notice of Appeal must be served on several different parties, as listed in Rule 24(A). These include all parties of record in the trial court and the Attorney General in all Criminal Appeals.

In civil appeals involving termination of parental rights or children in need of services (CHINS), you must serve the parties in the trial court as well as the Attorney General, who represents DCS. If a guardian ad litem was part of the case, they must be served.

Appellate Rule 26(D) requires the Appellate Clerk transmit the Notice of Appeal to the trial court clerk, court reporter and trial court.

Rule 26. Electronic Transmission By Clerk . . . D. Transmission of Notice of Appeal to Trial Court or Administrative Agency. The Clerk shall electronically transmit the Notice of Appeal to: (1) the Court Reporters in the trial court county or Administrative Agency; (2) the clerk of the trial court or Administrative Agency; and (3) the judge of the trial court before whom the case was heard.

E. Content of Notice of Appeal

A Notice of Appeal must include several specific pieces of information. Counsel should consider using Sample Form 9-1 located online under FORMS at the end of the Rules of Appellate Procedure to ensure that everything is included. The primary components: (1) party information (2) trial information, (3) designation of the appealed order or judgment, (4) directions for the assembly of the Clerk's Record, (5) and request for transcript. Some other certifications and attachments are required and explained below.

1. Party Information

As explained in Rule 9(F)(1), the Notice of Appeal must include specific contact information for both the party and counsel. As to the party information, use initials instead of names (both here and in the caption) if the case implicates the restrictions of Indiana Rules on Access to Court Records, Rule 5, e.g., juvenile, civil commitment, and CHINS/TPR cases. Inclusion of the counsel information obviates the need to file a separate appearance.

2. Trial Information

Rule 9(F)(2) requires inclusion of specific information about the proceedings in the trial court, including the name of the case, names of all parties, name of the trial court, trial court cause number, and name of the trial judge.

3. Designation of Appealed Order

Under Rule 9(F)(3), the notice must also include the date and title of the judgment or order appeals, the basis for appellate jurisdiction, and designation of the court to which the appeal is being taken. In most criminal cases, the sentencing date will govern, and the judgment may be the guilty verdicts and/or the sentencing. Unless the case is an interlocutory appeal, the basis for appellate jurisdiction will be a final order (sentencing). Finally, nearly all appeals are taken to the Indiana Court of Appeals, except as explained in section I.A.

4. Clerk's Record

The part of the Notice of Appeal regarding the Clerk's Record must simply include "[d]irections to the trial court clerk to assemble the Clerk's Record." App. R. 9(F)(4). The Clerk's Record consists of all filings in the trial court and the CCS. App. R. 2(E). Simply put, if the trial court's file is properly maintained, filing a Notice of Appeal does not require the Clerk to do anything except file a Notice of Completion. App. R. 10(C).

As explained in part E below, most of these documents will be available electronically. The best practice is to call or email the trial court clerk and ask them what their practice is in providing the clerk's portion. Some of the clerks may give you access to all the trial court filings through MyCase while others might still be using U.S. mail.

5. Transcript

The Notice of Appeal must designate "all portions of the Transcript necessary to present fairly and decide the issues on appeal. . . . In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript." App. R. 9(F)(5). All evidence must be included if a sufficiency challenge is raised.

a. Appeals after Trial

At a minimum, the Transcript for a direct appeal after a trial should include all testimony and evidence at trial and sentencing. At one time, some appellate public defenders were requesting only trial testimony and closing argument—but not opening statements and voir dire. The better practice is to request the entire trial and all pretrial hearings. "Appellate counsel had a duty to thoroughly review the entire record of Wilson's proceedings, including the transcripts from Wilson's pre-trial hearings."

Wilson v. State, 94 N.E.3d 312, 321 (Ind. Ct. App. 2018), trans. denied. In Wilson, appellate counsel was found ineffective for failing to challenge the waiver of counsel on appeal. The Court of Appeals emphasized that the record on appeal includes "all proceedings before the trial court." Ind. Appellate Rule 2(L). Moreover, neither counsel nor the defendant are "required to inform appellate counsel of the possible issue of Wilson's waiver of his right to counsel because it was preserved in the record of the pre-trial hearings."

If appellate counsel plans to limit the request in the Notice of Appeal, it is imperative to review the CCS and talk with trial counsel to be sure to include pre-trial hearings addressing a motion to dismiss or a motion to suppress. Having all the hearings is especially important if you are likely to raise a speedy trial challenge under Criminal Rule 4, for example. The events of each hearing are important in deciding whether the defendant or State should be charged with period of delay.

b. Sentencing Appeals

In sentencing appeals, the Notice of Appeal should request both the sentencing hearing and guilty plea hearing. A claim that a sentence is inappropriate under Rule 7(B) requires consideration of the "nature of the offense," which was likely explained in at least some detail at the guilty plea hearing.

c. Consequences of Inadequate Transcript

The failure to include a complete Transcript may result in the waiver of a claim. For example, in Lightcap v. State, 863 N.E.2d 907 (Ind. Ct. App. 2007), the court found a claim that there was insufficient evidence to support the revocation of probation waived. Although the defendant was acquitted at the trial on new charges, the trial court revoked his probation after finding he "had unsupervised contact with a child in violation of the terms of his probation." Id. at 911. Because the defendant failed to include the evidence from the trial, the Court of Appeals concluded it had "no means to review the evidence upon which the trial court relied." Id.

6. Attachments and Certifications

As detailed in 9(F)(8), appointed counsel in a criminal appeal must attach to the Notice of Appeal, at a minimum: a copy of the appealed order and documentation of *in forma pauperis* status. Counsel must also sign a certification regarding whether the case involves children, which requires expedited status under Rule 21 and compliance with Administrative Rule 9 as explained at the end of this section.

Counsel must also certify the contact information listed on the Indiana Supreme Court Roll of attorneys is current and accurate as of the date the Notice of Appeal is filed and acknowledge that all orders, opinions and notices in the matter will be sent to the email address(es) specified by the attorney on the Roll of Attorneys regardless of the contact information listed on Notice of Appeal and acknowledge that the attorney listed on the Notices of Appeal is solely responsible for keeping his/her Roll of Attorneys contact information accurate per Ind. Admis. Disc. R. 2(A)

F. Supplemental Notice of Appeal

Ideally, the Notice of Appeal will request everything that is needed for the appeal. However, sometimes it turns out the notice was underinclusive and other hearings or parts of the trial must be

transcribed. In such cases, counsel should file a Supplemental Notice of Appeal. (Do **not** file an **Amended** Notice of Appeal, which might be seen to start the 45-day court reporter's clock anew.)

It is important to read the transcript as soon as it is available to be sure it is complete. If appellate counsel learns that additional hearings are needed, it is best to contact the court reporter immediately. If you are early in the process of drafting your brief, an informal request for a hearing might be accommodated without filing any motions or requests. Rather, the court reporter could prepare the additional transcript and file it with the clerk, who would then file a Notice of Completion of Amended Transcript.

If the court reporter cannot prepare an additional transcript in a reasonably short period of time, it may be necessary to file a motion. Counsel should first ask the court reporter for an estimate of how long the supplemental transcript will take to complete. As explained in Section III.B, the Court of Appeals looks on motions for a lengthy extension of time with disfavor. Therefore, counsel should file a Motion for Additional Transcripts under Appellate Rule 9(G). The Motion for Additional Transcript must be filed in the trial court and should be filed as early as possible after counsel learns that additional portions of the Transcript are needed. It should request the hearing(s) or part(s) of trial needed with specificity. It should include a date by which the additional hearings are requested. If the supplemental transcript cannot be completed in time to allow for the preparation of the Appellant's Brief, counsel should file a motion with the Court of Appeals. This should not be titled a Motion for Extension of Time but rather something like, "Motion to Set Deadline for Supplemental Transcript and Briefing" or "Motion for New Briefing Schedule," And counsel should attach a copy of the Motion for Additional Transcript that was filed in the trial court.

D. BELATED APPEALS

I. The Rule

Rule PC 2. Belated Appeals

Eligible defendant defined. An "eligible defendant" for purposes of this Rule is a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Appellate court jurisdiction. Jurisdiction of an appeal under this Rule is determined pursuant to Rules 4 and 5 of the Indiana Rules of Appellate Procedure by reference to the sentence imposed as a result of the challenged conviction or sentence.

Section 1. Belated Notice of Appeal

(a) *Required Showings*. An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

(1) the defendant 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 defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

(b) *Form of petition*. There is no prescribed form of petition for permission to file a belated notice of appeal. The petitioner's proposed notice of appeal may be filed as an Exhibit to the petition.

(c) *Factors in granting or denying permission*. If the trial court finds that the requirements of Section 1(a) are met, it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission.

(d) *Hearing*. If a hearing is held on a petition for permission to file a belated notice of appeal, it shall be conducted according to Ind. Post-Conviction Rule 1(5).

(e) *Appealability*. An order granting or denying permission to file a belated notice of appeal is a Final Judgment for purposes of Ind. Appellate Rule 5.

(f) *Time for initiating appeal*.

(1) If the petition includes a proposed notice of appeal as an Exhibit, an order granting the petition shall also constitute the filing of that notice of appeal in compliance with the time requirements of App. R. 9(A).

Section 2. Belated Motion to Correct Error.

(a) *Required Showings.* An eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction or sentence, if:

(1) no timely and adequate motion to correct error was filed for the defendant;

(2) the failure to file a timely motion to correct error was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated motion error under this rule.

(b) *Merits of motion.* The trial court shall not consider the merits of the motion until it has determined whether the requirements of Section 2(a) are met.

(c) *Hearing.* Any hearing on whether the petition should be granted shall be conducted according to P-C. R. 1(5).

(d) *Factors in granting or denying permission.* If the trial court finds that the requirements of section 2(a) are met, it shall permit the defendant to file the motion, and the motion shall then be treated for all purposes as a motion to correct error filed within the prescribed period.

(e) *Appealability of Denial of Permission.* If the trial court finds that the requirements of Section 2(a) are not met, it shall deny defendant permission to file the motion. Denial of permission shall be a Final Judgment for purposes of App. R. 5.

(f) *Time for initiating appeal.* The time for filing a notice of appeal from denial of permission is governed by App. R. 9(A).

Section 3. Belated Perfection of Appeal.

An eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal for permission to pursue a belated appeal of the conviction or sentence if:

(a) the defendant filed a timely notice of appeal;

(b) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;

(c) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and

(d) the defendant has been diligent in requesting permission to pursue a belated appeal.

II. Practical Considerations

As explained in Part C, the Notice of Appeal must be filed within thirty (30) days of sentencing or the denial of a motion to correct error. If this notice is late—by even one day—it is essential that counsel pursue a belated appeal.

This section is largely focused on the typical scenario—a belated direct appeal of a conviction or sentencing. Part E discusses belated appeals in other types of cases: post-conviction, TPR, CHINS, and civil commitment.

Rule PC-2 is most commonly invoked for motions to file a belated notice of appeal, which is the focus below. Belated motions to correct error are seldom pursued. A belated motion to correct error is appropriate only when counsel has new evidence it wants to get before the trial court—and good reason why that evidence was not submitted within thirty (30) days of sentencing and the appeal was not otherwise timely begun.

Finally, section 3 of the rule explains a different scenario: the failure to perfect an appeal after the timely filing of a notice of appeal. In such circumstances, the defendant should not petition the trial court but rather should petition the appellate court for permission to pursue a belated appeal, explaining why the failure to perfect the appeal was not due to the defendant's fault and that the defendant has been diligent in requesting permission to pursue a belated appeal.

A. What May be Appealed Belatedly?

Criminal defendants pursuing a direct appeal of a conviction or sentence may seek to pursue a belated appeal. Ind. Rule PC-2, § 1(a) ("An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence."). This includes appeals of a sentence after a guilty plea that affords any discretion to the trial court, see generally Childress v. State, 848 N.E.2d 1073 (Ind. 2006), and appeals of convictions after a trial. The procedure may not be invoked when a deadline is missed in appealing a violation of probation, petition for post-conviction relief, or civil matters such as CHINS, TPR, and civil commitment proceedings. See generally Greer v. State, 685 N.E.2d 700, 702 (Ind. 1997); Dawson v. State, 943 N.E.2d 1281 (Ind. 2011). Section E outlines the procedure to follow for non-criminal direct appeals.

B. Which Public Defender is Responsible?

Kling v. State, 837 N.E.2d 502 (Ind. 2005), discusses the role of county appellate public defenders and the State Public Defender in pursuing belated sentencing appeals imposed following a guilty plea. Generally, the State Public Defender represents defendants in only post-conviction proceedings, whereas county defenders are responsible for providing representation in direct appeals. The Indiana Supreme Court held in Kling that deputy state public defenders must consult with clients who have filed a PCR without first appealing their sentence. "[T]his process should involve some assessment of the relative chances for success in each proceeding, including some consideration [of] whether the client would be able to meet the burden of proving [a] lack of fault and diligence under P-C.R. 2." Id. at 507. If a defendant wishes to pursue a P-C.R. 2 belated appeal, the State Public Defender must represent the defendant in the filing of the petition, any hearing on the petition, and any appeal if the petition is denied. Id.

In all other instances in which a PCR has not been filed, the county public defender is responsible for pursuing a belated appeal for an indigent defendant.

C. Start with Motion in Trial Court

A belated appeal or belated motion to correct error must begin with the filing of a petition in the trial court. "There is no prescribed form" for either petition, as the rule explains.

1. Required Showing

Either motion must allege: (1) no timely or adequate motion or notice was filed for the defendant; (2) the failure to file a timely motion or notice was not due to the fault of the defendant; and (3) the defendant has been diligent in requesting permission to file a belated motion under this rule. The defendant must prove these requirements by a preponderance of the evidence. Beatty v. State, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006).

In addition to the requirements of the rule, case law mentions other factors for courts to consider in deciding whether to allow a belated appeal: "the defendant's level of awareness of his procedural remedy, age, education, and familiarity with the legal system, as well as whether he was informed of his appellate rights and whether he committed an act or omission that contributed to the delay . . . ." Jackson v. State, 853 N.E.2d 138, 140 (Ind. Ct. App. 2006).

2. Attachments

Many defendants will include an affidavit in support of these allegations. If transcripts of the guilty plea or sentencing hearing are available, they will often be helpful in supporting an allegation that the defendant was not advised of the right to appeal. See generally Baysinger v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005), trans. denied.

A notice of appeal should **not** be included with the motion to file belated appeal. If the motion is granted by the trial court, a Belated Notice of Appeal must be filed with the Appellate Clerk within thirty days.

3. Hearing

The trial court may hold a hearing, but one is not required. As explained in part D, appellate review is de novo if a hearing is not held. Appellate counsel should consider requesting a hearing in order to obtain the more favorable standard of review. See, e.g., Pryor v. State, 949 N.E.2d 366 (Ind. Ct. App. 2011).

D. Motion in Court of Appeals

If a motion for belated appeal or belated motion to correct error is denied by the trial court, the denial may be appealed to the Indiana Court of Appeals.

1. Deadline for Appeal

If either request is denied, a Notice of Appeal must be filed within thirty (30) days as required for any appeal under Rule 9(A).

2. Required Showing and Standard of Review

The same factors outlined in the rule and case law cited above apply in appellate review of the denial of a request to file a belated notice of appeal.

If a hearing was held in the trial court, the appellate court will review the trial court's ruling for an abuse of discretion. Williams v. State, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007). If no hearing was held, the standard of review is de novo. Id. If the appellate court cannot "make the necessary factual determinations" on the available record, the case may be remanded to the trial court to conduct a hearing. Jackson v. State, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006).

As a final point, if the appellate court upholds the denial because of an insufficient record, a defendant may go back to the trial court and create a new record. Townsend v. State, 855 N.E.2d 1011 (Ind. 2006) (order denying transfer).

E. Belated Appeals in non-Criminal Direct Appeals

The foregoing advice was limited to the typical appeal of a conviction or sentence on direct appeal. If the thirty-day deadline is blown in any other type of case (VOP, post-conviction, juvenile, CHINS, TPR, civil commitment), a different procedure applies. Following the wrong procedure will likely lead to dismissal of an appeal. See, e.g., Core v. State, 122 N.E.3d 974, 975 (Ind. Ct. App. 2019) (dismissing post-conviction appeal pursued under PC-2).

1. Request in the Appellate Court

Unlike the procedure outlined above for direct appeals, a request to pursue a belated appeal in other types of appeals must be initiated in the Court of Appeals. This is typically done by filing a Motion for Leave to File Belated Appeal and attaching the Notice of Appeal.

2. **Required Showing**

Under In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014), an appellant who seeks to pursue a belated appeal must show an "extraordinarily compelling reason." A common reason for belated appeals is that counsel did not receive timely notice of the appointment. In a more recent case challenging a child support modification order "in clear violation of the Child Support Guidelines," the court found an "obvious injustice is an extraordinarily compelling reason" to restore an otherwise forfeited right to appeal. Cannon v. Caldwell, 74 N.E.3d 255, 259 (Ind. Ct. App. 2017). Thus, in some cases counsel may wish to argue that the belated appeal should be allowed because the ruling or judgment at issue is erroneous or unjust.

E. CLERK'S RECORD AND CLERK'S DUTIES

I. The Rules

Rule 10. Duties of Trial Court Clerk or Administrative Agency

A. Notice to Court Reporter of Transcript Request. If a Transcript is requested, the trial court clerk or the Administrative Agency shall give immediate notice of the filing of the Notice of Appeal and the requested Transcript to the court reporter.

B. Assembly of Clerk's Record. Within thirty (30) days of the filing of the Notice of Appeal, the trial court clerk or Administrative Agency shall assemble the Clerk's Record. The trial court clerk or Administrative Agency is not obligated to index or marginally annotate the Clerk's Record.

C. Notice of Completion of Clerk's Record. On or before the deadline for assembly of the Clerk's Record, the trial court clerk or Administrative Agency shall issue and file a Notice of Completion of Clerk's Record with the Clerk and shall serve a copy on the parties to the appeal in accordance with Rule 24 to advise them that the Clerk's Record has been assembled and is complete. The Notice of Completion of Clerk's Record shall include a certified copy of the Chronological Case Summary and shall state whether the Transcript is (a) completed, (b) not completed, or (c) not requested. (See Form # App.R. 10-1). Copies of the Notice of Completion of Clerk's Record served on the parties shall include a copy of the Chronological Case Summary included with the original, but the copies served on the parties need not be individually certified.

D. Notice of Completion of Transcript. If the Transcript has been requested but has not been filed when the trial court clerk or Administrative Agency issues its Notice of Completion of the Clerk's Record, the trial court clerk or Administrative Agency shall issue and file a Notice of Completion of Transcript with the Clerk and shall serve a copy on the parties to the appeal in accordance with Rule 24 within five (5) days after the court reporter files the Transcript. (See Form # App.R. 10-2)

F. Failure to File Notice of Completion of Clerk's Record. If the trial court clerk or Administrative Agency fails to issue, file, and serve a timely Notice of Completion of Clerk's Record, the appellant shall seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to complete the Clerk's Record and issue, file, and serve its Notice of Completion. Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Clerk's Record was due to have been issued, filed, and served shall subject the appeal to dismissal.

G. Failure to File Notice of Completion of Transcript. If the trial court clerk or Administrative Agency fails to issue, file, and serve a timely Notice of Completion of Transcript required by Rule 10(D), the appellant shall seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to issue, file and serve the Notice of Completion of Transcript. Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Transcript was due to have been issued, filed, and served shall subject the appeal to dismissal.

Rule 12. Transmittal of the Record

> **A. Clerk's Record.** Unless the Court on Appeal orders otherwise, the trial court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, or a portion thereof, and the clerk shall provide the copies within seven (7) days, subject to the payment of any usual and customary copying charges.

[See remaining portions of the Rule below under Transcript and Court Reporter's Duties.]

II. Practical Considerations

As explained in Part C, the trial court clerk must simply file a Notice that the Clerk's Record (court file) has been assembled. The Appendix filed with the appellant's brief, however, must include copies of documents from the Clerk's Record. App. R. 50(B). See Section IV.A.

The trial court clerk is unlikely to copy the file, unless counsel specifically makes contact and asks. With most documents available electronically, appellate counsel should secure the relevant parts of the Clerk's Record from MyCase. In situations where documents are not available electronically, Rule 12(A) requires the clerk to provide copies if requested. If the defendant is indigent and appellate counsel does not have access to the trial filings through trial counsel, contact the clerk, explain your appointment and your client's indigency, and specifically ask for a copy of the court's file (or the specific documents you need to prepare the Appendix). In addition, be sure to secure a copy of the CCS, which must be included at the beginning of the Appendix.

A. Deadline for Filing Notices of Completion

The Notice of Completion of the Clerk's Record must be filed by the trial court clerk within thirty (30) days of the filing of the Notice of Appeal. In addition, if the Transcript is not completed at the time of this filing, the trial court clerk must file a Notice of Completion of the Transcript within five (5) days after the court reporter files the Transcript. App. R. 10(D).

B. Duty to Compel

If the trial court clerk fails to file a Notice of Completion of the Clerk's Record within thirty (30) days of the filing of the Notice of Appeal, counsel for the appellant must file a Motion to Compel with the Court of Appeals. Similarly, if the trial court clerk fails to file a Notice of Completion of the Transcript within five (5) days of its filing, counsel for the appellant must file a Motion to Compel with the court of appeals.

Motions to Compel must be filed within seven (7) days of the day on which the trial court clerk should have filed the Notice of Completion. App. R. 10(F)&(G). Failing to file a Motion to Compel within seven days "shall subject the appeal to dismissal." Id.

Although the language of the rule suggests that dismissal is mandatory when a timely Motion to Compel is not filed, the Court of Appeals has denied a motion to dismiss when the delay involved was short and no prejudice was shown. In State v. Moore, 796 N.E.2d 764, 766 (Ind. Ct. App. 2003), the State

failed to file a motion to compel within the deadline for the clerk to file a notice of completion. Nevertheless, the Court of Appeals denied the defendant's motion to dismiss the appeal, emphasizing "the preference that we apply an ameliorative approach to remedy failures by the parties to provide a complete record upon appeal" and the lack of prejudice to the defendant because the notice was filed just one day after the fifteen-day deadline lapsed. Id. However, the court emphasized that dismissal may be appropriate in cases involving longer delays.

If you miss a deadline for filing a Motion to Compel, file a "Belated Motion to Compel" as soon as possible. If the State seeks dismissal, and the delay is short, cite Moore in arguing that dismissal is not appropriate.

If the State is the appealing party and blows a deadline for filing a Motion to Compel, even by a day, file a motion to dismiss. The rule specifically states that failure to compel "shall subject the appeal to dismissal." If the motion is denied, raise it again in your brief. See generally Davis v. State, 771 N.E.2d 647, 649 n.5 (Ind. 2002) (quoting Douglas E. Cressler, A Year of Transition in Appellate Practice, 35 Ind. L. Rev. 1133, 1144 (2002) ("If a party fails to obtain requested relief from a pre-briefing motion to dismiss (assuming the motion has colorable merit), the best practice is to raise the issue again in the party's brief on the merits.").

C. Content of a Motion to Compel

The Rule does not prescribe a specific form for a Motion to Compel Completion of the Clerk's Record. Such a motion can generally be quite short. It must include the following:

- Nature of the appeal and date of judgment
- Date the Notice of Appeal was filed
- Date the Notice of Completion was due to be filed
- Statement that the Notice of Completion has not been filed

In addition, if counsel has made an effort to contact the trial court clerk or had a discussion with the clerk about the matter, this information could also be included. If the motion includes factual assertions that are not part of the Record on Appeal, it must be verified. See App. R. 34(F).

F. TRANSCRIPT AND COURT REPORTER'S DUTIES

I. The Rule

Rule 11. Duties of Court Reporter

A. Preparation of Transcript. The court reporter shall prepare, certify and file the Transcript designated in the Notice of Appeal with the trial court clerk or Administrative Agency in accordance with Rules 28, 29, and/or 30. Preparation of the separately-bound volumes of exhibits as required by Rule 29 is considered part of the Transcript preparation process. The court reporter shall provide notice to all parties to the appeal that the transcript has been filed with the clerk of the trial court or Administrative Agency in accordance with Rules 28, 29, and/or 30. (See Form # App.R. 11-1) (Standards for Preparation of Electronic Transcripts can be found in Appendix A of the Appellate Rules, after Forms. Court Reporters should be aware of the standards and comply with them in preparation of the transcript.)

B. Deadline for Filing Transcript. For appeals filed on or after July 1, 2016, the Court Reporter or Administrative Agency shall have forty-five (45) days after the appellant files the Notice of Appeal to file the Transcript with the trial court clerk or Administrative Agency.

C. Extension of Time to File Transcript. If the Court Reporter believes the Transcript cannot be filed within the time period prescribed by this rule, then the Court Reporter shall promptly move the Court on Appeal designated in the Notice of Appeal for an extension of time to file the Transcript pursuant to Rule 35(A) and shall state in such motion the factual basis for inability to comply with the prescribed deadline despite exercise of due diligence. (See Form # App.R. 11-2). The Court Reporter shall serve a copy of the motion on the parties to the appeal in accordance with Rule 24. Motions for extension of time in interlocutory appeals, appeals involving worker's compensation, issues of child custody, support, visitation, paternity, adoption, determination that a child is in need of services, and termination of parental rights are disfavored and shall be granted only in extraordinary circumstances.

D. Failure to Complete Transcript. If the Court Reporter fails to file the Transcript with the trial court clerk within the time allowed, the appellant shall seek an order from the Court on Appeal compelling the Court Reporter to do so. The motion to compel shall be verified and affirmatively state that the motion was served on the Court Reporter and that the appellant has complied with the agreement for payment made in accordance with Rule 9(H). Failure of appellant to seek such an order not later than seven (7) days after the Transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal.

Rule 12: Transmittal of the Record

* * * *

B. Transcript.

(1) Except as otherwise provided below, the trial court clerk shall retain the Transcript until the Clerk notifies the trial court clerk that all briefing is completed, and the trial court clerk shall then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(a) In Criminal Appeals in which the appellant is not represented by the State Public Defender, the Clerk shall notify the trial court clerk when the Appellant's Brief has been filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(b) In Criminal Appeals in which the appellant is represented by the State Public Defender, the trial court clerk shall transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29 when the Court Reporter has completed the preparation, certification and filing in accordance with Rule 11(A).

(c) In juvenile termination of parental rights and juvenile child in need of services appeals, the Clerk shall notify the trial court clerk when the Appellant's Brief has been filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(d) Any party may move the Court on Appeal to order the trial court clerk to transmit the Transcript at a different time than provided for in this Rule.

(2) Any party may withdraw the Transcript, or, at the trial court clerk's option, a copy, at no extra cost, from the trial court clerk for a period not to exceed the period in which the party's brief is to be filed.

C. Access to Record on Appeal. Unless limited by the trial court, any party may copy any document from the Clerk's Record and any portion or all of the Transcript. After a Transcript or Appendix has been transmitted to or filed with the Clerk, a party to the appeal may arrange to have access to that Transcript or Appendix during the time period that party is working on a brief, subject to any internal rules the Clerk may adopt to provide an accounting for the location of those materials and for ensuring fair access to the Transcript and Appendices by all parties.

II. Practical Considerations

A. Deadline for Completing the Transcript

The court reporter must file the Transcript with the trial court within forty-five (45) days of the filing of the Notice of Appeal, unless an extension of time is sought. This deadline was previously ninety (90) days.

B. Duty to Compel

As explained in Part E, appellate counsel is responsible for ensuring that the clerk and court reporter fulfill their obligations under the Appellate Rules. If the court reporter fails to complete the Transcript within forty-five (45) days, counsel must file a Motion to Compel within seven (7) days. App. R. 11(D). Failure to file a Motion to Compel "shall subject the appeal to dismissal." Id. As explained in Part E, however, the Court of Appeals may be forgiving of a short delay if no prejudice is shown by the other side. See State v. Moore, 796 N.E.2d 764, 766 (Ind. Ct. App. 2003).

C. Content of a Motion to Compel

The motion to compel shall be verified and affirmatively state that the motion was served on the Court Reporter and that the appellant has complied with the agreement for payment in accordance with Rule 9(H).

Such a motion can generally be quite short. It must include the following:

- Nature of the appeal and date of judgment
- Date the Notice of Appeal was filed
- Date the Transcript was due to be filed
- Statement that the Transcript has not been filed

In addition, if counsel has made an effort to contact the court reporter or had a discussion with the court reporter about the matter, this information could also be included.

D. Proper Form of the Transcript and Inclusion of Exhibits

Appellate Rule 28 spells out the format requirement for the Transcript, including margins, typeface, spacing, and headers/footers. Rule 29 explains the form of the Exhibit volume. If the Transcript or Exhibit Volume does not conform with these requirements, counsel should contact the court reporter and ask that corrections be made—if the transcript has not yet been submitted to the Court of Appeals. After a transcript is filed with the Court of Appeals, counsel will have to file a written motion with the Court of Appeals for any corrections.

Soon after receiving the Transcript, counsel should check the exhibits. If something like cash or drugs has been included, appellate counsel should arrange to have those items returned. If important evidence such as a videotaped confession or oversized picture of the crime scene is missing, counsel should arrange to have it included. This is best done by calling the court reporter and explaining the need for the exhibit. If the court reporter is unwilling to include it, counsel should file a motion to compel with the Court of Appeals, explaining the missing exhibit(s) and their need for a fair resolution of the issues on appeal. This should be done early in the briefing period. If counsel is unable to file a brief because of a missing exhibit, counsel should title the motion something like "Motion to Compel Court Reporter to Provide Necessary Exhibit and Request for Briefing Schedule"—not simply a "Motion for Extension of Time to File Brief." As explained in Section III.B, requests for extension may be viewed with disfavor.

In addition, counsel is required to ensure compliance with Indiana Rules on Access to Court Records, Rule 5. If the Transcript or Exhibits include confidential information, the court reporter must place that information in a separate/confidential volume. If it is not, counsel should contact the court reporter, note the error, and ask for a timely correction if the Transcript has not yet been transmitted to the Court of Appeals. After the transcript has been transmitted, counsel must file a written motion with the Court of Appeals under Appellate Rule 28(F)(4).

Finally, Part G explains the procedures by which counsel may correct an error in a Transcript.

E. Where's the Transcript?

Most trial court clerks now transmit the transcript electronically to the Clerk of the Court upon completion, and appellate practitioners may download a copy from MyCase. Some clerks and/or court reporters also email a copy to counsel of record. If there are large over-sized exhibits, it may be necessary to contact the trial court clerk to determine if the over-sized exhibits were transmitted to the Appellate Clerk. If they were transmitted to the Appellate Clerk, it may be necessary to contact the Appellate Clerk to review over-sized exhibits. Some counties also use The RecordXchange, which provides a portal for counsel to download a copy of the transcript.

G. CORRECTING THE CLERK'S RECORD OR TRANSCRIPT

I. The Rules

Rule 31. Statement of Evidence When No Transcript is Available

A. Party's Statement of Evidence. If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be submitted with the motion.

B. Response. Any party may file a verified response to the proposed statement of evidence within fifteen (15) days after service.

C. Certification by Trial Court or Administrative Agency. Except as provided in Section D below, the trial court or Administrative Agency shall, after a hearing, if necessary, certify a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk's Record.

D. Controversy Regarding Action of Trial Court Judge or Administrative Officer. If the statements or conduct of the trial court judge or administrative officer are in controversy, and the trial court judge or administrative officer refuses to certify the moving party's statement of evidence, the trial court judge or administrative officer shall file an affidavit setting forth his or her recollection of the disputed statements or conduct. All verified statements of the evidence and affidavits shall become part of the Clerk's Record.

Rule 32. Correction or Modification of Clerk's Record or Transcript

A. Submission of Disagreement Regarding Contents to Trial Court or Administrative Agency. If a disagreement arises as to whether the Clerk's Record or Transcript accurately discloses what occurred in the trial court or the Administrative Agency, any party may move the trial court or the Administrative Agency to resolve the disagreement. The trial court retains jurisdiction to correct or modify the Clerk's Record or Transcript at any time before the reply brief is due to be filed. After that time, the movant must request leave of the Court on Appeal to correct or modify the Clerk's Record or Transcript. The trial court or Administrative Agency shall issue an order, which shall become part of the Clerk's Record, that either:

(1) confirms that the Clerk's Record or Transcript reflects what actually occurred; or

(2) corrects the Clerk's Record or Transcript, including the chronological case summary if necessary; to reflect what actually occurred.

B. Transmission of Order. The trial court clerk shall transmit to the Court on Appeal:

(1) the trial court's order or order of an Administrative Agency and any corrections to the Clerk's Record; and

(2) any corrections to the Transcript by means of a supplemental Transcript. See Rule 9(G). The title of any corrected Transcript shall indicate that it is a corrected Transcript.

II. Practical Considerations

In most appeals, counsel will receive everything needed from the clerk and Court Reporter. In rare cases, however, either the Clerk's Record or Transcript may be missing something or contain an error. When this occurs, Rules 31 and 32 provide the procedures through which the matter can be corrected in the trial court. Counsel should not attempt to argue in their briefs or other pleadings to the Court of Appeals that the Record on Appeal is incorrect or to try to fill in the gaps. These claims must first be presented to the trial court.

A. Something is Missing

If the Transcript or Clerk's Record is missing something that was requested in the Notice of Appeal, counsel should first call the court reporter or clerk and inquire about the missing material. The omission may be an oversight that can be easily resolved. If, however, the clerk says the document does not exist or the court reporter says the tape of the hearing has been lost, it is counsel's duty to fill in the gap.

1. Missing Documents in Clerk's Record

Occasionally a document filed in the trial court may not make it into the court file or does not remain there. As explained in Section IV.A., the Appellant's Appendix must include all parts of the Clerk's Record in a criminal case. The Appendix will also include the CCS. If an important document is not referenced as being filed on the CCS and/or not included in the Clerk's Record, it imperative that counsel correct this by filing a Motion to Correct the Clerk's Record with the trial court under Rule 32. See Part IV for a discussion on filing supplemental Appendices until the final reply brief is filed without leave of court pursuant to Rule 49(A).

The motion should explain what is missing and attach a copy.

2. Missing Portions of the Transcript

If a portion of the trial or relevant hearing was not transcribed, counsel for the appellant must similarly make an effort to fill in the gap(s). Ford v. State, 704 N.E.2d 457, 461 (Ind. 1999) (finding the defendant was not denied his right to appeal when the trial court failed to record bench conferences because trial counsel were able to reconstruct the bench conferences by affidavits under predecessor rule). In some cases, the missing information may be crucial, such as objections at a bench conference that were required to preserve an issue for appeal or objections during voir dire that was not transcribed. Cf. Fox v. State, 717 N.E.2d 957, 960-61 (Ind. Ct. App. 1999) (noting in reviewing a claim of error regarding jury selection that counsel did not follow the proper procedure under predecessor appellate rule but that both defense counsel and the trial court recounted what had occurred off the record, which was sufficient to review the claim on its merits); Higgins v. State, 783 N.E.2d 1180, 1184 n.1 (Ind. Ct. App. 2003) (observing that trial counsel's objections to a challenged instruction did not appear in the transcript and could have been included pursuant to Rule 31 and 32 but declining to find

the claim waived in part because the defendant had requested the discussion in his Notice of Appeal and the CCS indicated that objections had been made).

Counsel does not have an obligation to recreate the record on issues that are sufficiently addressed by the portions of the transcript that are "substantially complete." Farris v. State, 818 N.E.2d 63, 70 (Ind. Ct. App. 2004) (rejecting the State's argument that the defendant waived review of claim regarding photo arrays because the Transcript did not include the bench conference at which initial objections were made or a Rule 31 recreation).

B. Something is Incorrect

In addition to the problem of missing information discussed above, sometimes a Transcript or Clerk's Record will include incorrect information. If the incorrect information is important to the issue(s) raised on appeal, counsel for the appellant must attempt to correct it.

The Court of Appeals may, on its own motion, seek to correct or clarify the Clerk's Record or Transcript. Cf. Ringham v. State, 768 N.E.2d 893, 897-98 (Ind. 2002) ("When the Court of Appeals realized that the Record on Appeal was incomplete, it remanded to the trial court for findings. The trial court held an evidentiary hearing, then transmitted its findings of fact and conclusion of law, along with the appointment papers, to the Court of Appeals, which added them to the Record on Appeal. This is exactly what Indiana Appellate Rule 32 requires.").

C. Deadlines for Filing

Counsel should file a Rule 31 or Rule 32 motion with the trial court at the earliest opportunity. It will sometimes take several days or longer for opposing counsel to respond and for the trial court to rule on the motion. Rule 31 provides fifteen (15) days to opposing counsel to respond. Moreover, in the case of alleged inaccuracies in the Transcript, the court reporter will likely need to retrieve the tape or CD.

In cases in which the Transcript is not available, the Rule 31 additions must be finalized before the Appellant's Brief is filed. If they are not, counsel cannot rely on this information in the appeal.

In cases in which the Clerk's Record or Transcript is incorrect, the correction should similarly be finalized before the Appellant's Brief is finalized to allow counsel to cite and rely on the information in their brief. However, Rule 32 permits the trial court "to correct or modify the Clerk's Record or Transcript at any time before the reply brief is due to be filed." App. R. 32(A). Therefore, if the Appellee cites something from the Transcript or Clerk's Record that is incorrect, appellant's counsel may correct it before filing their reply brief. This is what occurred in a civil commitment case in which the Appellee's Brief quoted language from the Transcript that was incorrectly transcribed and painted the Respondent in an especially poor light.

Section II
Interlocutory and DCS Appeals
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Section II

Interlocutory and DCS Appeals

A. INTERLOCUTORY APPEALS

I. The Rule

Appellate Rule 14

* * * *

B. Discretionary Interlocutory Appeals. An appeal may be taken from other interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.

(1) *Certification by the Trial Court.* The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.

(a) *Time for Filing Motion.* A motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date the interlocutory order is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion. If the trial court grants a belated motion and certifies the appeal, the court shall make a finding that the certification is based on a showing of good cause, and shall set forth the basis for that finding.

(b) *Content of the Motion in the Trial Court.* A motion to the trial court shall contain the following:

(i) An identification of the interlocutory order sought to be certified;

(ii) A concise statement of the issues to be addressed in the interlocutory appeal; and

(iii) The reasons why an interlocutory appeal should be permitted.

(c) *Grounds for Granting Interlocutory Appeal.* Grounds for granting an interlocutory appeal include:

(i) The appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment.

(ii) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

(iii) The remedy by appeal is otherwise inadequate.

(d) *Response to Motion.* Any response to a motion for the trial court to certify an interlocutory order shall be filed within fifteen (15) days after service of the motion, and computing time in accordance with Trial Rule 6.

(e) *Ruling on Motion by the Trial Court.* In the event the trial court fails for thirty (30) days to set the motion for hearing or fails to rule on the motion within thirty (30) days

after it was heard or thirty (30) days after it was filed, if no hearing is set, the motion requesting certification of an interlocutory order shall be deemed denied.

(2) *Acceptance of the Interlocutory Appeal by the Court of Appeals.* If the trial court certifies an order for interlocutory appeal, the Court of Appeals, in its discretion, upon motion by a party, may accept jurisdiction of the appeal. The motion shall be accompanied by an appearance as required by Rule 16(H).

(a) *Time for Filing Motion in the Court of Appeals.* The motion requesting that the Court of Appeals accept jurisdiction over an interlocutory appeal shall be filed within thirty (30) days after the date the trial court's certification is noted in the Chronological Case Summary.

(b) *Content of the Motion in the Court of Appeals.* The motion requesting that the Court of Appeals accept jurisdiction shall state:

(i) The date of the interlocutory order.

(ii) The date the motion for certification was filed in the trial court.

(iii) The date the trial court's certification of its interlocutory order was noted in the Chronological Case Summary.

(iv) The reasons the Court of Appeals should accept this interlocutory appeal.

(c) *Submission with Motion.* The party seeking an interlocutory appeal shall submit with its motion a copy of the trial court's certification of the interlocutory order and a copy of the interlocutory order.

(d) *Response to Motion.* Any response to a motion requesting the Court of Appeals to accept jurisdiction shall be filed within fifteen (15) days after service of the motion.

(3) *Filing of Notice of Appeal.* The appellant shall file a Notice of Appeal with the Clerk within fifteen (15) days of the Court of Appeals' order accepting jurisdiction over the interlocutory appeal. The Notice of Appeal shall be in the form prescribed by Rule 9, and served in accordance with Rule 9(F)(10). The appellant shall also comply with Rule 9(E).

* * * *

D. Statutory Interlocutory Appeals. Other interlocutory appeals may be taken only as provided by statute.

E. Clerk's Record and Transcript. The Clerk's Record shall be assembled in accordance with Rule 10. The court reporter shall file the Transcript in accordance with Rule 11.

F. Briefing. Briefing in interlocutory appeals shall be governed by Rules 43 and 44.

G. Shortening or Extending Time.

(1) *Extensions.* Extensions of time to prepare the Transcript or to file any brief in an interlocutory appeal are disfavored and will be granted only upon a showing of good cause. Any motion for extension must comply with Rule 35.

(2) *Shortening Deadlines.* The Court of Appeals, upon motion by a party and for good cause, may shorten any time period. A motion to shorten time shall be filed within ten (10) days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal.

H. Stay of Trial Court Proceedings. An interlocutory appeal shall not stay proceedings in the trial court unless the trial court or a judge of the Court of Appeals so orders. The order staying proceedings may be conditioned upon the furnishing of a bond or security protecting the appellee against loss incurred by the interlocutory appeal.

I. Death Penalty Cases. In any case in which the State seeks the death penalty or in which the interlocutory order raises a question of interpretation of IC 35-50-2-9, references in this Rule to the Court of Appeals shall refer to the Supreme Court.

As explained in the Introduction to this manual, litigants are entitled to an appeal as a matter of right of all final judgments. Ind. Appellate Rules 2(H) & 5(A). Criminal cases generally become final after sentencing, when all claims are resolved. App. R. 2(H). Sometimes, however, there are compelling reasons to appeal a ruling earlier in the process. In those cases, the proper course of action is an interlocutory appeal. An interlocutory appeal is one of an order of trial court; the rule "does not require or even permit certification of particular issues." Harbour v. Arelco, Inc., 678 N.E.2d 381, 386 (Ind. 1997) (explaining predecessor rule); see also Curtis v. State, 947 N.E.2d 1143, 1148 (Ind. 2011).

Appellate Rule 14(A) delineates some instances in which a party may pursue an interlocutory appeal as a matter of right; none of these arise in criminal cases. Therefore, this section—and criminal practice—is limited to discretionary interlocutory appeals, i.e., those that require the approval of both the trial court and court of appeals to be pursued.

II. Important Considerations in Pursuing an Interlocutory Appeal

In 2018, 204 motions for permissive interlocutory appeal were filed with the Indiana Court of Appeals and about 39% (79) were granted. This is similar to other recent years. Securing approval for an interlocutory appeal may be an uphill battle, but this does not mean counsel should never ask. Rather, counsel should ask only in appropriate cases and in an appropriate manner that is likely to lead the trial court to certify the issue and the court of appeals to accept your request.

Rule 14(B) lists three grounds for granting an interlocutory appeal. These are quite broad and non-exhaustive; parties may assert a ground not listed in the rule. In a 2016 presentation, the Court of Appeals' Chief Staff Attorney listed the following as items the judges will consider in ruling on a motion for discretionary interlocutory appeal:

- Does the case present a question of law?

- Is the case too fact-sensitive?
- Will the issue presented be dispositive of the case as a whole?
- Does the case present an issue of first impression?

In any event, the reason(s) stated should be compelling. Recent practice suggests that the most common issues approved for interlocutory appeal in criminal cases involve search and seizure claims, although a variety of other issues may grab the court's attention.

- Search and Seizure: Fourth Amendment and/or Article 1, Section 11
- Interrogations
- Double Jeopardy: Constitutional and/or Statutory Claims
- Delay in Bringing Charges: Due Process or Statute of Limitations
- Dismissal of Charges: Constitutionality and/or Statutory Interpretation
- Speedy Trial: Criminal Rule 4
- Discovery
- Waiver of Juvenile to Adult Court

Important Note: Bail is Not an Interlocutory Order. Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995) ("The denial of bail is deemed a final judgment appealable immediately, without waiting for the final judgment following trial."). See also Kerr, 16A Ind. Prac., Criminal Procedure—Trial § 11.8 (April 2022 Update) ("A trial court's determination of an issue concerning bail is a final judgment which is subject to an immediate appeal.").

III. Motion in the Trial Court

The first step in pursuing an interlocutory appeal is seeking certification of the order being appealed from the trial court.

A. Deadline

A motion requesting certification of an order for interlocutory appeal must be filed in the trial court within thirty (30) days of the trial court's order that a party seeks to appeal. Ind. Appellate Rule 14(B)(1)(a).

Trial courts may allow a belated motion for interlocutory appeal when good cause is shown. If trial counsel blows the thirty-day deadline, the trial court must make a finding that good cause justified the belated certification. Without such a finding, the Court of Appeals will dismiss the appeal for lack of jurisdiction. Pipkin v. State, 982 N.E.2d 1085 (Ind. Ct. App. 2013). When filing a motion for belated certification of an order for interlocutory appeal, counsel should specifically explain the good cause and include it in the proposed order tendered to the trial court with your motion. The court of appeals will

afford considerable deference to the trial court's determination of good cause. State v. Foy, 862 N.E.2d 1219, 1224 (Ind. Ct. App. 2007) (upholding trial court's grant of a belated motion, filed four days late, when the trial court found "the State's failure to timely file the appropriate Motion was not based upon a disregarding of the time limit involved, but rather a mistake in calculation" of the time available to file the certification motion).

B. Content of Motion

The motion must: (1) identify the order sought to be certified, (2) include a concise statement of the issues to be addressed in the interlocutory appeal, and (3) explain the reasons why an interlocutory appeal should be granted. Ind. Appellate Rule 14(B)(1)(b). As to the third, the motion should specifically advance one or more of the three grounds cited in Rule 14(B)(1)(c): (1) the defendant will suffer substantial injury if the trial court's erroneous ruling is not addressed until after a trial; (2) the order involves a "substantial question of law" that could be resolved on appeal and lead to "a more orderly disposition of the case"; and (3) the normal remedy of a direct appeal is not adequate.

In some cases, you might seek the State's agreement (or lack of objection) to an interlocutory appeal. If the issues are significant ones that would prove dispositive of the case, it is often in the State's interest to have them resolved in an interlocutory appeal rather than after a long and expensive trial.

Finally, you should include language in your motion requesting that the trial court stay the proceedings pending resolution of the request for an interlocutory appeal.

C. Tender a Proposed Order with the Motion

Most counties have local rules requiring counsel to tender a proposed order with any motion. This is especially important with a motion for interlocutory appeal. If granted, a copy of the order must be attached to the motion in the court of appeals. Your proposed order should include appropriate language and findings to advance your claim in the court of appeals, i.e., one or more of the grounds in Rule 14(B)(1)(c). In the absence of a proposed order from you, the trial court may draft an order that fails to recite any of these grounds. This will allow the State an easy opportunity to urge the court of appeals to deny your request. Without a proposed order to sign, the trial court may also attempt to designate certain issues for the interlocutory appeal. This would be inappropriate, as an interlocutory appeal is of "an interlocutory order"—and not specific issues.

In addition, the proposed order should include language granting a stay of the proceedings pending resolution of the interlocutory appeal. Without such language, the trial court might continue to schedule hearings or even hold a trial in the case.

D. The Importance of a Timely Ruling

A trial court does not have unlimited time to certify an order for interlocutory appeal. If a few weeks have passed without a ruling, you should inquire about the status of your motion. A motion is deemed denied if the trial court fails to take any action for thirty (30) days or fails to grant the motion within thirty (30) days of holding a hearing. Ind. Appellate Rule 14(B)(1)(e).

E. Effect of Denial

The trial court's denial of a request to certify an order for interlocutory is the end of the matter. You cannot appeal that denial to the Indiana Court of Appeals. Rather, counsel should proceed to trial, renew all objection(s) to the evidence or procedure at trial, and raise the issue on direct appeal. A defendant may not pursue a guilty plea and later seek to raise the pre-trial issue on direct appeal. Alvey v. State, 911 N.E.2d 1248 (Ind. 2011); Cornelius v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2007) ("When a defendant pleads guilty he or she cannot question pre-trial orders after a guilty plea is entered."); but cf. Douglas v. State, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007) (allowing defendant who pleaded guilty without a plea agreement to raise an *ex post facto* claim that was thoroughly litigated in the trial court).

IV. Motion in the Court of Appeals

If your request for certification of the interlocutory order is granted by the trial court, you must next secure acceptance of the order for interlocutory appeal to the Indiana Court of Appeals. Therefore, it is essential to make a cogent and compelling case while following all the rules and meeting the deadlines.

A. Deadline

A motion requesting the court of appeals to accept jurisdiction over an interlocutory appeal must be filed within thirty (30) days of the date the trial court certified the order for interlocutory appeal. Ind. Appellate Rule 14(B)(2)(a). The rule does not allow for a belated motion to the court of appeals. See generally Haston v. State, 695 N.E.2d 1042, 1044 (Ind. Ct. App. 1998) (interpreting predecessor rule) ("Failure to timely perfect an interlocutory appeal results in forfeiture of the opportunity to pursue the appeal."); cf. Young v. Estate of Sweeney, 808 N.E.2d 1217, 1219 (Ind. Ct. App. 2004) (finding no jurisdiction to hear interlocutory appeal and dismissing it sua sponte).

If the thirty days since certification has lapsed, the best course of action is to ask the trial court to re-certify the order under Rule 14(B)(1)(a); or, as a recent case suggests, you can file a repetitive motion or a motion to reconsider. See National Collegiate Athletic Ass'n v. Finnerty, 191 N.E.3d 211, 216 (Ind. 2022) (holding that App. R. 14(B) "broadly permits review of 'other interlocutory orders,' including an order on a repetitive motion to reconsider").

B. Content of Motion

The motion to the court of appeals must include three important dates: (1) the date of the order you are seeking to appeal, (2) the date the motion for certification was filed in the trial court, and (3) the date the trial court's certification of its interlocutory order was noted in the Chronological Case Summary. Ind. Appellate Rule 14(B)(2)(b). Most importantly, the motion must explain the reasons why the interlocutory appeal should be accepted. Id. This should focus on one or more of the grounds listed in Rule 14(B)(1)(c): (1) the defendant will suffer substantial injury if the trial court's erroneous ruling is not addressed until after a trial; (2) the order involves a "substantial question of law" that could be resolved on appeal and lead to "a more orderly disposition of the case"; and (3) the normal remedy of a direct appeal is not adequate. The first two grounds are the most useful, and the cases discussed in Part II above provide some idea of the types of issues generally appropriate for interlocutory appeal.

Because the judges on the motions panel at the Court of Appeals will be reviewing several motions at the weekly conference to decide whether to accept your interlocutory appeal, be specific about the reasons that your case stands out from the crowd. A bare bones motion stating the issue involves suppression will not suffice. At CLEs, Court of Appeals judges have said the most common reason a motion for interlocutory appeal is denied is that they do not have enough information about the issue. One way to get the necessary information before the motions panel is to file a very comprehensive petition for interlocutory appeal in the trial court setting out in detail the pertinent facts, law and argument regarding why you should prevail. You can then attach that motion to your motion for interlocutory appeal in the Court of Appeals. It may seem like a lot of work, but if the Court of Appeals grants your motion for interlocutory appeal, you will already have a great foundation for your brief and will not have to start from scratch. As noted above, the Court of Appeals will be most interested in issues that will be dispositive of the case—like a suppression motion that renders the State unable to proceed. Fact-specific claims are generally better resolved at trial, while legal questions are more suitable for interlocutory resolution. Be sure to emphasize if your case is one of first impression in Indiana.

Finally, the motion should follow all the requirements for motions explained in Rule 34 and Section III of this manual.

C. Submissions with the Motion

At a minimum, a party seeking an interlocutory appeal must submit with its motion two documents to the motion for interlocutory appeal in the court appeals: (1) the trial court's order certifying the order for interlocutory appeal and (2) the order being appealed. App. R. 14(B)(2)(c). As stated above, including a very comprehensive petition filed in the trial court that clearly sets out the facts, law and arguments can be very helpful. You will usually not have a transcript to include. If, for example, the case involves a challenge to the charging information, you should include a copy of it. Because the motions panel will be considering numerous motions at its weekly conference, carefully select only the attachments necessary and helpful to your case.

D. An Appearance Must be Filed with Motion

A party seeking to pursue an interlocutory appeal must file an Appearance with the motion. App. R. 14(B)(2).

E. If Motion is Denied

You may not seek rehearing or transfer from an order denying your motion for interlocutory appeal. App. R. 54(A) & 57(B). Therefore, in most cases the denial by the court of appeals is the end of the matter.

In an extraordinary case you may consider filing a motion to reconsider. As explained in Section III(H), Rule 34(B) allows parties to seek reconsideration of the ruling on a motion within ten (10) days. Counsel should not routinely ask the court to reconsider the denial of every motion. If, however, there has been a significant development since the initial motion, a motion to reconsider may be appropriate.

For example, in Zitlaw v. State, 880 N.E.2d 724 (Ind. Ct. App. 2008), trans. denied, the court initially denied the motion for interlocutory appeal by a 2-1 vote. The case involved a sting operation

that affected more than twenty pending cases in Hamilton County, and a different judge had recently granted a motion to dismiss on the same facts. The State failed to perfect an appeal of that ruling while Zitlaw's petition was pending. Both the Attorney General and Hamilton County Prosecutor did not object to Zitlaw's motion to reconsider his interlocutory appeal to have "these legal questions decided by this Court prior to the twenty-something pending matters proceeding to trials." The motion was effectively captioned, "Motion to Reconsider Denial of Petition to Accept Jurisdiction of an Interlocutory Appeal Without Objection from the Attorney General," and it was granted by a 3-0 vote just ten days after it was filed.

F. If Motion Granted: Proceed to Briefing

If your motion for interlocutory appeal is granted by the court of appeals, most of the appellate rules apply just as they do in direct appeals. There are a few important exceptions, however.

1. Notice of Appeal: Fifteen (15) days

Although appellants normally have thirty (30) days to file a notice of appeal, those pursuing an interlocutory appeal must file a Notice of Appeal within fifteen (15) days of the court of appeals' order accepting the interlocutory appeal. App. R. 14(B)(3). Section I explains the important procedures for initiating an appeal and securing the transcript and clerk's record.

2. Extensions Disfavored

Appellate Rule 21(A) provides for expedited consideration by the court of interlocutory appeals. Consistent with that rule, extensions for additional time to file any briefs "are disfavored and will be granted only upon a showing of good cause." Ind. Appellate Rule 14(G)(1).

3. Deadlines May Be Shortened

Rule 14(G)(2) allows for a party to file a motion to shorten the deadlines within ten (10) days of the filing of the Notice of Appeal. These motions are uncommon and likely to be filed and granted only in cases of a time-sensitive nature and wide impact. For example, deadlines were shortened to allow for all briefs to be filed and oral argument to be held in just a month in a Marion County case involving the dismissal of criminal charges based on the failure of police officers to take their oath when the Indianapolis Police Department merged with the county sheriff to become the Indianapolis Metropolitan Police Department. State v. Oddi-Smith, 49S00-0710-CR-396. The case cast doubt on the ability of the State to prosecute thousands of cases.

G. Interlocutory Appeals in the Indiana Supreme Court

Almost all discretionary interlocutory appeals under Appellate Rule 14(B) must be filed in the Indiana Court of Appeals. Under Rule 14(I), cases in which "the State seeks the death penalty or in which the interlocutory order raises a question of interpretation of IC 35-50-2-9" are appealed directly to the Indiana Supreme Court.

H. Statutory Interlocutory Appeals: Appeals by the State

The State's right to appeal is statutory and requires an express grant of authority by the legislature. State v. Aynes, 715 N.E.2d 945, 948 (Ind. Ct. App. 1999). Rule 14(D) makes clear that the

State may pursue interlocutory appeals. Indiana Code § 35-38-4-2(6) echoes the grounds of Appellate Rule 14(B)(1)(c) and allows the State to seek certification of an interlocutory order in the trial court and approval from the court of appeals to pursue an interlocutory appeal.

The State's right to appeal in criminal cases is broader. For example, other sections of the statute authorize an appeal by the State "[f]rom an order granting a motion to dismiss one (1) or more counts of an indictment or information" or "[f]rom an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution of one (1) or more counts of an information or indictment." Ind. Code § 35-38-4-2(1) & (5). In the latter instances, the State may pursue an appeal without jumping through the 14(B) hoops. But cf. State v. Campos, 845 N.E.2d 1074 (Ind. Ct. App. 2006) (holding that the State cannot appeal the dismissal of one count of a multi-count information under the statute).

B. DCS APPEALS

I. The Rule

Rule 14.1. Expedited Appeal for Payment of Placement and/or Services

A. Applicability. This Rule governs appellate review per Indiana Code sections 31-34-4-7(f), 31-34-19-6.1(f), 31-37-5-8(g), and 31-37-18-9(d). All other appeals concerning children alleged to be in need of service or children alleged to be delinquent are not covered by this rule.

B. Notice of Expedited Appeal.

(1) The Department of Child Services ("DCS") shall file a Notice of Expedited Appeal with the Clerk within five (5) business days after the trial court's order of placement and/or services is noted in the Chronological Case Summary. (See Form #App.R. 9-1).

(2) On the same day DCS files the Notice of Expedited Appeal, it shall serve the Notice on the trial court judge, the clerk of the trial court, the Court Reporter (if a Transcript, or any portion of a Transcript is requested), the county commissioners, the guardian ad litem, CASA, any juvenile who is the subject of the order if 14 years of age or older, counsel for the juvenile, the parents of the juvenile, the Attorney General, in the case of a juvenile delinquency matter the Chief Probation Officer and Prosecutor, and any other party of record.

(3) The Notice of Expedited Appeal shall include all content required by Rule 9(F).

(4) The certificate of service attached to the Notice of Expedited Appeal shall include (a) the name and address, and (b) the FAX number and e-mail address if known, of every person to whom it was sent.

(5) Any party who has received the Notice of Expedited Appeal shall have five (5) business days from service of the Notice of Expedited Appeal to file an Appearance and request any additional other items to be included in the record. Failure to file an Appearance shall remove that party from the Appeal.

(6) The trial court shall be considered a party to the Appeal if it files a timely appearance.

C. Transcript and Record.

(1) The completion of the Transcript and the Record on Appeal shall take priority over all other appeal Transcripts and records. Within ten (10) business days after the filing of the Notice of Appeal is noted in the Chronological Case Summary, the assembly of the Clerk's Record shall be completed and any requested Transcript shall be prepared and filed, after which the clerk shall immediately issue and file a Notice of Completion of Clerk's Record (and a separate Notice of Completion of Transcript if assembly of the Clerk's Record is completed before the Transcript is filed) and shall immediately serve all parties to the Appeal by both: (i) U.S. mail or third-party commercial carrier; and (ii) personal service, electronic mail, or facsimile.

(2) The Clerk's Record in appeals governed by this rule shall contain the pre-dispositional report and any attachments thereto, in addition to the other records listed in Appellate Rule 2(E). The trial court clerk is not obligated to index or marginally annotate the Clerk's Record, which shall be the responsibility of DCS.

(3) On the eleventh (11th) business day following the filing of the Transcript, the trial court clerk shall transmit the Transcript to the Clerk without any further notice from the Clerk. Failure to meet this deadline shall require the trial court clerk to show cause to the Court on Appeal why he or she should not be held in contempt. DCS may, but is not required to, file a show cause motion with the Court on Appeal concerning the trial court clerk's failure to meet this deadline.

D. Memoranda.

(1) Any party on Appeal may file a memorandum, which may be in narrative form and need not contain the sections under separate headings listed in Appellate Rule 46(a).

(2) Memoranda shall not exceed ten (10) pages unless limited to 4,200 words and shall adhere to the requirements of Appellate Rules 43(A)-(H), and (J). Memoranda exceeding ten (10) pages in length shall contain the word count certification required by Appellate Rule 44(F). Any factual statement shall be supported by a citation to a page where it appears in the record.

(3) DCS shall have five (5) business days from the notation in the Chronological Case Summary of the filing of the Notice of Completion of Transcript (or the Notice of Completion of Clerk's Record if a Transcript was not requested) to file a memorandum stating why the trial court's decision should be reversed. DCS's memorandum shall be accompanied by an Appendix that shall contain copies of all relevant pleadings, motions, orders, entries, and other papers filed, tendered for filing, or entered by the trial court, including but not limited to the pre-dispositional report and all attachments thereto.

(4) Any responding party shall have five (5) business days after DCS has filed its memorandum to file a responsive memorandum stating why the decision should be sustained or reversed, and to file any accompanying supplemental Appendix.

(5) No reply memorandum shall be allowed.

E. Extensions of Time. Extensions of time are not allowed.

F. Rehearing on Appeal. A party may not seek rehearing of an appellate decision issued under this rule.

G. Outcome of Appeal. If DCS prevails on appeal, payment shall be made in accordance with Indiana Code sections 31-34-4-7(g), 31-34-19-6.1(g), 31-37-5-8(h), or 31-37-18-9(e), as the case may be.

H. Petition to Transfer. A Petition to Transfer must be filed no later than five (5) business days after the adverse decision of the Court of Appeals. A party who files a Petition to Transfer by mail or third-party commercial carrier shall also contemporaneously tender a copy to the Clerk's Office via facsimile. The Petition to Transfer shall adhere to the requirements of Appellate Rules 43(A)-(G), (J), and (K). Appellate Rules 43(H) and (I), 44, and 57 shall not apply. The Petition to Transfer shall not exceed one (1) page in length, excluding the front page, signature block and certificate of service, and shall notify the Supreme Court simply of the party's desire for the Supreme Court to assume jurisdiction over the appeal following the adverse decision of the Court of Appeals. A file-stamped copy of the Court of Appeals' opinion or memorandum decision shall be submitted with the Petition to Transfer. No brief in response shall be allowed. The Supreme Court will consider the merits of the Petition to Transfer based on the

party's filings submitted to the Court of Appeals and on the Court of Appeals' opinion or memorandum decision.

I. Certification of Opinion. The Clerk shall certify the Court of Appeals' opinion or memorandum decision six (6) business days after it is handed down unless a timely Petition to Transfer has been filed and served in accordance with the preceding section. The Clerk shall certify any opinion of the Supreme Court immediately upon issuance.

J. Service. If a party provides service by mail or third-party commercial carrier pursuant to Rule 68(F)(2), then the party shall also provide service by contemporaneous fax or email on all parties whose FAX number or e-mail address is known by the serving party. Parties who are served by contemporaneous FAX or e-mail shall not be entitled to the extension of time set forth in Appellate Rule 25(C). Any party filing an appearance after documents have been served shall promptly be served with all documents not previously provided to the later-appearing party.

II. Practical Considerations

This rule took effect January 1, 2009, and few cases have been litigated under it but limited practice has highlighted a few things,.

A. Scope of the Rule

The rule applies only to the DCS appeal of issues regarding the *payment for services*. The underlying appeal of the merits of the case (e.g., whether the child delinquent or was the child a CHINS) will proceed under the regular appellate rules and deadlines. Because of the significant liberty interests involved, counsel may consider seeking an expedited appeal of the merits of the case. See Section III(F).

B. Importance of Filing a (Timely) Appearance

If you plan to be involved in a DCS appeal, you must file an appearance in the court of appeals within five days of the filing of the Notice of Expedited Appeal. Failure to file a timely appearance will remove the non-filing party from the appeal.

C. Deadlines

The deadlines are much shorter. The notice of appeal must be filed by DCS within five days, the court reporter has only ten days to prepare the Transcript, and parties have only five days to write "memoranda" to argue their position.

D. Issues Not Addressed in the Rule

One court official described Rule 14.1 as a "piece of Swiss cheese," explaining it should be placed over the existing rules and merely addresses those specific subjects it addresses. The appellate rules continue to govern all issues not addressed.

E. Standard of Review

Although "the statute creates in the juvenile court a presumption of correctness of the DCS final recommendations," if a juvenile court reaches a contrary conclusion the standard of review is clearly erroneous. In re T.S., 906 N.E.2d 801 (Ind. 2009).

Section III
Motions Practice
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Section III

Motions Practice

This section discusses many of the most common motions filed during an appeal and not discussed elsewhere in this manual. For example, Motions to Compel the clerk or court reporter to complete their duties regarding the record or transcript are discussed in Section I. Interlocutory Appeals, which require a motion to the court of appeals, are the entire subject of Section II. Notices of Additional Authority and Amended Briefs are intimately connected to briefing and therefore included in Section IV. Motions for Emergency Transfer and Motions to Publish are discussed in Section V. Finally, motions for oral argument are discussed Section VI.

What remains are several other motions that may prove important to the success of an appeal, or, at a minimum, are important to litigating an appeal. **Part A** begins with a discussion of the general requirements for motions, which is explained in Appellate Rule 34. It then turns to several specific motions.

Part B discusses Motions for Extension of Time. The Court of Appeals will generally give counsel at least one thirty-day extension of time if the motion is adequately supported with specific reasons. Longer extensions are disfavored, and multiple requests are unlikely to be granted.

Part C explains Motions to Dismiss, which come in two varieties. A defendant may seek a ***voluntary dismissal*** when there is nothing to appeal, or the appeal could do more harm than good. Counsel must include in any request for voluntary dismissal that the client has been consulted. If the State is the appealing party, you may seek an ***involuntary dismissal*** based on serious violations of the appellate rules or missed deadlines.

Part D discusses Motions to Remand, which request the appellate court to remand the case or some part of it to the trial court while the appeal is pending. Such motions are most appropriate when the trial court has made an error that it is likely to correct, counsel has filed a motion for modification of sentence that cannot be ruled upon unless jurisdiction is returned to the trial court, or when counsel seeks to develop a factual record to support a claim in the trial court through a Davis petition or Belated Motion to Correct Error.

Part E covers Stays and Appeal Bonds, a seldom sought but potentially significant form of relief to clients while an appeal is pending. Most defendants must immediately begin serving a sentence, but a stay or appeal bond allows them to remain free while the appeal is pending. Such requests require a showing that the case is likely to be reversed on appeal and are generally more appropriate for first time offenders who arguably pose the least danger to the community.

Part F turns to the related topic of Expedited Appeals. Although CHINS and TPR cases are automatically expedited by rule, counsel may want to consider seeking expedited review of other types of cases, such as juveniles incarcerated at the Department of Correction or defendants sentenced to a short term of incarceration that will likely be served before the appeal is decided.

Part G discusses Motions to Strike, through which counsel may seek to have the court strike a document or part of a document filed by opposing counsel on the grounds that it is inappropriate, immaterial, or scandalous. Such motions should be sparingly used and are most appropriate when opposing counsel has included irrelevant, unsupported, and prejudicial information in a motion or brief.

Part H explains Motions to Reconsider. Although counsel may ask the court to reconsider its ruling on any motion, such requests should be limited to the rare case where new information is available or the stakes are particularly high.

Finally, **Part I** briefly discusses the possibility of filing other motions that make reasonable requests of the court. Although the appellate rules are comprehensive, they do not anticipate every possible scenario. Counsel should not make a habit of filing novel motions but should file such motions when they are appropriate and important to an appeal.

Published Orders

As explained in most of the parts of this section that follow, there is little case law explaining the particulars of how many motions work. Most are resolved by unpublished orders that only the parties in that case will see. Appellate Rule 65(A) specifically authorizes motions to publish ***memorandum decisions*** **f**rom the Court of Appeals but does not forbid motions to publish ***orders***. Indeed, both the Indiana Supreme Court and Court of Appeals have published some orders on its own motion. See, e.g., Care Grp. Heart Hosp., LLC v. Sawyer, 93 N.E.3d 743 (Ind. 2018) ("We issue this published order separately to disapprove of repeated attempts by Appellee's attorneys to submit unauthorized supplemental merits briefs under the pretext of motions practice."); In re Estate of Hester, 780 N.E.2d 848 (Ind. Ct. App. 2002), trans. denied.

A motion to publish an order should be filed only when the order meets the usual criteria for publication of memorandum decisions, *i.e.*, the order (a) establishes, modifies, or clarifies a rule of law or (b) criticizes existing law. App. R. 65(A)(1). The publication of orders "could help increase the body of law that addresses issues related to motions practice. In doing so, it would remove some of the guesswork associated with motions practice in Indiana's appellate courts." Kent Zepick, Published Orders, The Appellate Advocate 2 (Summer 2006).

If a Motion is Denied and Dispositive, Raise it in Your Brief

If a motion is denied, counsel may and often should raise the issue again in briefing. See generally Davis v. State, 771 N.E.2d 647, 649 n.5 (Ind. 2002) (quoting Douglas E. Cressler, A Year of Transition in Appellate Practice, 35 Ind. L. Rev. 1133, 1144 (2002) ("If a party fails to obtain requested relief from a pre-briefing motion to dismiss (assuming the motion has colorable merit), the best practice is to raise the issue again in the party's brief on the merits."). The Court of Appeals may even reconsider its motions panel's decision to grant a motion to accept interlocutory jurisdiction, but the practice is disfavored. Means v. State, 201 N.E.3d 1158, 1165 (Ind. 2023)

Renewing an issue in your brief will allow a different panel of judges—those who have to write an opinion in the case—to consider the issue anew. With the court's heavy caseload, counsel should be sure to give the court of appeals an easy way to resolve the appeal by renewing such requests. See generally Miller v. Hague Ins. Agency, Inc. 871 N.E.2d 406, 408 (Ind. Ct. App. 2007) (reversing the motions' panel ruling allowing the appellant to file a belated brief while observing that "the filing of a

brief one day late has been considered a minor violation of our appellate rules" but "the filing of a brief thirty-eight days late is not").

A. MOTIONS: GENERAL REQUIREMENTS

I. The Rule

Rule 34. Motion Practice

A. Use of Motion. Unless a statute or these Rules provide another form of application, a request for an order or for other relief shall be made by filing a motion.

B. Motions Subject to Decision Without Response. The Court will not await a response before ruling on the following motions:

(1) to extend time;

(2) to file an oversize Petition, brief or motion;

(3) to withdraw appearance;

(4) to substitute a party; and

(5) to withdraw the record.

The Court will consider any responses filed before it rules on the motion. A response filed after ruling on the motion will automatically be treated as a motion to reconsider; any party may file a motion to reconsider a decision on a motion described in this Section within ten (10) days after the Court's ruling on the motion.

C. Response. Any party may file a response to a motion within fifteen (15) days after the motion is served. The fact that no response is filed does not affect the Court's discretion in ruling on the motion.

D. Reply. The movant may not file a reply to a response without leave of the Court. Any reply must be filed with the motion for leave, and tendered within five (5) days of service of the response.

E. Content of Motions, Responses and Replies. Except for the motions listed in Rule 34(B), a motion, response, or reply shall contain the following, but headings are not required:

(1) *Statement of Grounds.* A statement particularizing the grounds on which the motion, response, or reply is based;

(2) *Statement of Supporting Facts.* The specific facts supporting those grounds, including page citation to the Clerk's Record or Transcript or other supporting material;

(3) *Statement of Supporting Law.* All supporting legal arguments, including citation to authority;

(4) *Other Required Matters.* Any matter specifically required by a Rule governing the motion; and

(5) *Request for Relief.* A specific and clear statement of the relief sought.

F. Verification of Facts Outside the Record on Appeal. When the motion, response, or reply relies on facts not contained in materials that have been filed with the Clerk, the motion, response, or reply shall be verified and/or accompanied by affidavits or certified copies of documents filed with the trial court clerk or Administrative Agency.

G. Form of Motions, Responses and Replies.

(1) *Form; Citations; References.* Motions, responses and replies shall conform to the requirements for briefs under Rule 43(B)-(G).

(2) *Length.* Unless the Court provides otherwise, a motion or a response shall not exceed ten (10) pages or 4,200 words, and replies shall not exceed five (5) pages or 2,100 words. If the document exceeds the page limit, it must contain a word count certificate in compliance with Rule 44(F).

H. Oral Argument. Ordinarily oral argument will not be heard on any motion.

Other rules address broader requirements for filing appellate documents, including the inclusion of a signature and certificate of service. See generally Appellate Rules 24 & 68(H).

II. Practical Considerations

The court of appeals receives thousands of motions every year. Therefore, it is important that motions follow the rules and give the court sufficient reasons to rule in your favor. Common criticisms of appellate motions include:

- Failure to cite or follow the appropriate rules
- Too long with too much unhelpful boilerplate language
- Insufficient factual support—in the motion and/or in attachments
- Failure to verify when required
- Boring and unpersuasive

Following the general guidance of Rule 34 along with the specific guidance of the additional rules that follow will help enhance your motions' chances of success.

A. Form and Length of Motions

Unless the Court provides otherwise, motions and responses may not exceed ten (10) pages or 4,200 words. Replies may not exceed five (5) pages or 2,100 words. With rare exception, motions should be significantly shorter. Although counsel must support claim with citation to facts and authority, this can usually be done effectively in a few pages or less.

B. Content

Routine motions listed in Rule 34(B) may be especially short. All other motions should include four basic components, although headings for each are not required and usually not appropriate.

- Statement of Grounds: what is the basis of the motion?
- Statement of Supporting Facts: what facts support those grounds?
    - Citations to the Clerk's Record and/or Transcript should be included
- Statement of Supporting Law: what legal authorities (court rules and/or case law) and policy arguments support granting the motion?
- Requested Relief: what is the ***specific*** relief sought?

Counsel must also include a certificate of service under Appellate Rule 24 and a signature. For electronically filed documents, Appellate Rule 68(H) permits either: "(a) a graphic image of a handwritten signature, including an actual signature on a scanned document; or (b) the indicator "/s/" followed by the person's name."

C. Response/Reply

Parties may respond to a motion within fifteen (15) days after the motion was served. The moving party may not file a reply to the response unless granted leave by the Court. Counsel seeking to file a reply must tender a motion for leave and the reply within five (5) days of service of the response.

D. Verification Usually Required

Finally, any motion that relies on facts not contained in materials filed with the clerk must be verified. An acceptable verification is the following: "I affirm under penalties for perjury that the foregoing representations are true."

B. MOTION FOR EXTENSION OF TIME

I. The Rule

Rule 35. Motion For Extension of Time

A. Time for Filing. Any motion for an extension of time shall be filed at least seven (7) days before the expiration of time unless the movant was not then aware of the facts on which the motion is based. No motion for an extension of time shall be filed after the time for doing the act expires.

B. Content.

(1) *Required in All Motions.* All motions shall be verified and state

(a) The date of the appealed judgment or order.

(b) The date any motion to correct error was ruled on or deemed denied.

(c) The date the Notice of Appeal was filed.

(d) The time period that is sought to be extended, and the event which triggered it.

(e) The date the act is to be done, how that date was established, including, if relevant, the means of service, whether the current due date is pursuant to a previous extension of time, and if so, whether final.

(f) The due date requested. This date shall be a business day as defined by Rule 25.

(g) The reason, in spite of the exercise of due diligence shown, for requesting the extension of time, including, but not limited to, the following:

(i) Engagement in other litigation, provided such litigation is identified by caption, number and court;

(ii) The matter under appeal is so complex that an adequate brief cannot reasonably be prepared by the date the brief is due; or

(iii) Hardship to counsel will result unless an extension is granted, in which event the nature of the hardship must be set forth.

(h) If the motion is filed within seven (7) days before the expiration of time, the reasons why counsel was unaware of the need for the extension.

(2) *Criminal Appeals*. A motion in a Criminal Appeal shall also state, if applicable:

(a) the date the trial court granted permission to file a belated Notice of Appeal or a belated motion to correct error;

(b) the date of sentencing;

(c) the sentence imposed; and

(d) a concise statement of the status of the case, including whether the defendant has been released on bond, and whether the defendant has been incarcerated.

C. Proceedings in Which Extensions are Prohibited. No motion for extension of time shall be granted to file a Petition for Rehearing, a Petition to Transfer to the Supreme Court, a Petition for Review of the Tax Court decision by the Supreme Court, any brief supporting or responding to such Petitions, or in appeals involving termination of parental rights.

D. Restrictions on Extensions. Motions for extension of time in appeals involving worker's compensation, issues of child custody, support, visitation, paternity, adoption, and determination that a child is in need of services shall be granted only in extraordinary circumstances.

II. Practical Considerations

The text of Rule 35 has not always mirrored the Court of Appeals' practice in ruling on extensions. When Judge John Baker served as Chief Judge, for example, counsel would seldom be entitled to a thirty-day extension. Twenty days would likely be granted instead. Under most other Chief Judges, one thirty-day extension of time would be routinely granted upon a proper motion.

A. Extensions Prohibited in Some Cases

As Rule 35(C) makes clear, extensions are prohibited in all termination of parental rights' cases. Moreover, no extensions will be granted when filing or responding to a Petition for Rehearing or a Petition to Transfer. Although written in absolute terms, extensions have been granted, very rarely, in some of these proceedings. For example, if counsel encounters difficulty in securing a necessary part of the record, a Motion for New Briefing Deadline in a termination of parental rights' case could be granted. If counsel misses a transfer deadline, the Indiana Supreme Court has occasionally granted permission to file a belated petition or response—but likely with cautionary language about seeking future requests. In a truly extraordinary case discussed in Section 5, the Indiana Supreme Court permitted a petition to transfer to be filed several months after the deadline. Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015).

B. Extensions Must be Justified by "Extraordinary Circumstances"

In some cases, extensions may be granted in "extraordinary circumstances," as explained in Rule 35(D). As regards indigent appeals, children in need of services' (CHINs) fall into this category. Juvenile delinquency appeals do not fall within this category.

C. All Other Cases

In all other cases, extensions may be sought pursuant to the requirements of Rule 35(A) & (B).

1. Timing of the Motion

A Motion for Extension of Time to file a brief should be filed at least seven (7) days before the deadline for the brief. If you are filing the motion fewer than seven (7) days before the deadline, you must specifically explain "the reasons why counsel was unaware of the need for the extension" at least seven (7) days before the deadline. App. R. 35(B)(1)(h).

2. Contents of the Motion

Rule 35(B)(1) lays out the general requirements for all extensions while Rule 35(B)(2) includes additional requirements for motions in criminal appeals.

a. The Rule

According to the Rule, a motion for an extension in a criminal appeal must include the following:

- The nature of the appeal and date of the judgment or order (i.e., sentencing) being appealed
- The sentence imposed
- A brief explanation of the defendant's status, i.e., whether incarcerated, on bond, on probation, etc.
- The date the Notice of Appeal was filed
- The time period sought to be extended, the current due date, and how it was calculated
- An explanation of whether this is a first request for an extension or if others have been granted
- The new deadline requested (provide a specific date)
- The reason(s) for the extension. The rule mentions three possible reasons:
    i. Other litigation, including caption, cause number, and court
    ii. Complexity of the case being appealed
    iii. Hardship to counsel, including a specific explanation of "the nature of the hardship"
- The reason(s) why the motion is being filed less than seven (7) days before the deadline, if applicable

b. The Reality of Extensions

The requirements of the rule are fairly straightforward and easy to follow. In practice, however, the Court of Appeals has not always granted extensions routinely. When Judge Baker became Chief Judge in March of 2007, extensions were granted less frequently and for less time than desired.

When Judge Margret Robb became Chief Judge in 2011 and Judge Vaidik in 2014, however, the granting of at least one thirty-day extension has become fairly routine. That practice has continued with Chief Judges Bradford and Altice. Counsel will usually be entitled to at least one thirty-day extension if adequate reasons are provided. A second request, if necessary, should generally be for a shorter period of time. Fifteen days appears to be the unwritten maximum for a second request.

3. Reply Briefs

Under Chief Judge Baker, the Court took an especially tough stance on extensions for filing a reply brief, saying, "The court will never grant an extension for a Reply Brief, unless counsel seeks only a one- or two-day extension for extraordinary reasons." This policy, too, appears to have relaxed, although only an extension of 30 days or fewer is likely to be granted.

D. If You Blow the Deadline: Don't Ask for an Extension

Rule 35(A) makes clear: "No motion for an extension of time shall be filed after the time for doing the act expires." If you miss a deadline, do not file a motion to extend that deadline. Instead, you must file a Motion to File a Belated Brief, as explained in Section I.D. of this manual. The court of appeals dismissed an appeal in which the brief was filed, after given permission by the motions panel, thirty-eight (38) days late. Miller v. Hague Ins. Agency, Inc. 871 N.E.2d 406, 408 (Ind. Ct. App. 2007) (concluding that "the filing of a brief one day late has been considered a minor violation of our appellate rules" but "the filing of a brief thirty-eight days late is not"). Be sure to cite Rule P-C.R.-2, Section 3, in support of your request—or the Adoption of O.R. case if the appeal is not a criminal direct appeal. Moreover, you might also cite the Sixth Amendment right to the effective representation of counsel, which is a subtle hint that the case may return to the court in a couple of years through a claim of ineffective assistance.

E. Be Sure to Include a Verification

As explained in part A, counsel must include a verification in any motion that "relies on facts not contained in materials that have been filed with the Clerk. . . ." App. R. 34(F). A motion for extension of time will always fall into this category and should therefore include a verification affirming under penalties of perjury that the facts asserted in the motion are true.

C. MOTION TO DISMISS

I. The Rule

Rule 36. Motion To Dismiss

A. Voluntary Dismissal. An appeal may be dismissed on motion of the appellant upon the terms agreed upon by all the parties on appeal or fixed by the Court.

B. Involuntary Dismissal. An appellee may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction. Motions to affirm are abolished.

II. Practical Considerations

Counsel may move to dismiss an appeal voluntarily or may seek to dismiss an appeal involuntarily, i.e., against the wishes of the opposing party.

A. Voluntary Dismissal

1. Must be With Consent of Client

Appointed counsel should rarely seek to dismiss an appeal—and may generally do so only with the express approval of the client. The court of appeals is unlikely to grant a motion to dismiss filed by appointed counsel unless it is verified and includes a representation that the motion is being filed with the client's consent. (As an alternative, counsel could file a motion signed by the client.) Moreover, as explained in Section IV.B., it is not appropriate to file an Anders brief in Indiana.

2. Appropriate Circumstances

Dismissal of an appeal ***may*** be appropriate in four circumstances.

- **There is not an appealable issue.** For example, if a plea agreement provides a set term that affords no discretion to the trial court, the sentence may not be challenged on appeal. Childress v. State, 848 N.E.2d 1073, 1079 n.4 (Ind. 2006). However, Garza v. Idaho, 139 S. Ct. 738 (2019), requires counsel to file a notice of appeal whenever a client requests—and Indiana does not allow Anders briefs.

- **The desired relief was obtained on remand.** If the court grants a motion to remand and the trial court provides the desired relief, appellate counsel should promptly file a motion to dismiss the appeal.

- **The client no longer wishes to appeal.** Counsel should discuss this with the client, explain that the right to appeal will be lost forever, and secure a signed waiver.

- **An appeal may do more harm than good.** If the trial court or Department Correction made an error that works to your client's benefit, appealing may well bring attention to the error. The State may cross-appeal. Filing a motion to dismiss is appropriate if, after discussing the potential downside to the appeal, the client decides not to appeal. This may be true when considering a sentencing challenge,

which allows the appellate court to ***increase*** a sentence on appeal. Akard v. State, 937 N.E.2d 811 (Ind. 2010).

B. Involuntary Dismissal

1. Responding to the State's Motion

Sometimes an appellee will seek to dismiss an appeal through a motion to dismiss. Common bases are a lack of jurisdiction, usually because the Notice of Appeal was not timely filed or the absence of a final judgment. Mootness may also be raised.

You should be sure to respond to any motion to dismiss filed by the State. If the State has a good point, such as a blown deadline for the Notice of Appeal, you should consider filing a Motion to Remand, if the deadline was missed through no fault of the defendant. As explained in part D, a remand would allow the trial court to make the required finding to allow the appeal to go forward.

If the State argues mootness, you should almost always contest the motion. Article 7, Section 6 of the Indiana Constitution guarantees an "absolute right to one appeal." Appeals of convictions are never moot because the stigma of a conviction persists long after a sentence is served. See generally Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019) (rejecting State's argument that defendant's release from prison after violating community corrections renders his case moot because "to the extent that Violating probation is now part of Bennett's record and has future impact on him, we remand to correct that"). Moreover, in civil commitment cases Indiana courts have consistently held that "a moot case may be decided on its merits when it involves questions of great public interest that are likely to recur." See E.F. v. St. Vincent Hosp. and Health Care Ctr., Inc., 188 N.E.3d 464, 467 (Ind. 2022) (collecting cases). Similarly, contempt proceedings are especially prone to excesses or abuses because of their informal nature and the absence of a jury trial. Nevertheless, lengthy terms of incarceration can result. Such cases are of great public interest and are likely to recur. See Jones v. State, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), trans. denied. Finally, our supreme court has recognized an exception to the mootness doctrine for cases "capable of repetition, yet evading review." Matter of Tina T., 579 N.E.2d 48, 52 (Ind. 1991). Specifically, the mootness doctrine does not apply when the claimed harm "would never be of such duration to afford full appellate review . . . ." Id.

2. Filing a Motion to Dismiss When the State is the Appellant

If the State is the Appellant, you may file a motion to dismiss in some circumstances. The most common, as explained in Part I, is the failure to timely file a Notice of Appeal or failure to compel the completion of the clerk's record or transcript. As with any motion, you should carefully document the facts that support your request to dismiss and include any attachments necessary to resolve the case.

The State may appeal in a criminal or juvenile delinquency proceeding in only limited circumstances. Ind. Code § 35-38-4-2; State v. I.T., 4 N.E.3d 1139, 1142 (Ind. 2014). The State's power to appeal is available only in "unusual cases where the power to appeal was expressly conferred." State v. McMillan, 274 Ind. 167, 172, 409 N.E.2d 612, 616 (1980) (citations omitted); see also McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009) ("The State identifies no provision of law that authorizes it to challenge . . . ."). The Indiana Supreme Court has held the State may appeal an illegal sentence. State v. Lotaki, 4 N.E.3d 656 (Ind. 2014).

Subsection (5) of the statute allows appeals "[f]rom an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution of one (1) or more counts of an information or indictment." The grant of a motion to suppress is "tantamount to a dismissal of the action" and "appealable as a final judgment" under this statute. State v. Williams, 445 N.E.2d 582, 584 (Ind. Ct. App. 1983). The court of appeals dismissed a State's appeal because its notice of appeal was filed 52 days after a suppression order. State v. Hunter, 904 N.E.2d 371, 373-74 (Ind. Ct. App. 2009).

D. MOTION TO REMAND

I. The Rule

Rule 37. Motion To Remand

A. Content of Motion. At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings. The motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice.

B. Effect of Remand. The Court on Appeal may dismiss the appeal without prejudice, and remand the case to the trial court, or remand the case while retaining jurisdiction, with or without limitation on the trial court's authority. Unless the order specifically provides otherwise, the trial court or Administrative Agency shall obtain unlimited authority on remand.

II. Practical Considerations

After the filing of the Notice of Completion of the Clerk' Record, jurisdiction lies in the court of appeals. App. R. 8. The trial court can take limited action in a case "to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment." City of New Haven v. Allen County Bd. of Zoning Appeals, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998). Trial courts may also rule on matters unrelated to the judgment being appealed. In re Guardianship of Hickman, 811 N.E.2d 843, 848 (Ind. Ct. App. 2004). Sometimes, the appellant may have good reason to want to return to the trial court to make a request or further develop the record for appeal. This may be done through a Motion to Remand, which could seek limited relief from the trial court, such as a modification of sentence, or potentially dispositive relief, such as a new trial based on newly discovered evidence.

A. Timing/Deadline

A Motion to Remand may be filed any time after the court of appeals assumes jurisdiction over an appeal. If the Clerk has not yet filed her notice of completion, counsel must file any motions in the trial court. See I.D. (discussing Belated Motions to Correct Error).

Although the rule does not specify a deadline, counsel should file a motion to remand as early as possible in the appellate process after counsel has had an opportunity to investigate the claim sufficiently to decide that a remand would be appropriate. Waiting until shortly before a brief is due or after an extension has been granted may reduce the chances of a remand being granted because it is more difficult to show that remand would "promote judicial economy." App. R. 37(A).

B. Content

1. Promote Judicial Economy

The key requirement of any motion for remand is that it "will promote judicial economy or is otherwise necessary for the administration of justice." Putting an appeal on hold is not a matter the court takes lightly. Therefore, a motion must include some allegation of a problem that the trial court is

able to fix. A motion for remand should specifically explain why the issue better is resolved—or only resolved—by the trial court on remand.

2. Must be Verified

Rule 37(A) specifically requires that a motion to remand be verified. A typical verification is the following: "I affirm under penalties for perjury that the foregoing representations are true."

C. Examples

Remands can take many forms, so long as the requirements of promoting judicial economy or otherwise being necessary for the administration of justice are satisfied.

1. Allow the Trial Court to Correct Something

A general and broad basis for remand is to allow the trial court to correct something. Before filing such a motion, counsel should carefully consider the prospects that the trial court will correct the issue rather than creating a record to make it worse. Because these cases are not resolved by opinions, they are generally under the radar.

In one case, appellate counsel discovered while preparing his brief challenging the revocation of probation that the trial judge, who had been recently elected, had served as a prosecutor in the case at an earlier hearing. Counsel knew the trial judge had recused in many similar cases and thought it likely this was an oversight that would be corrected if the judge was given a chance. The court of appeals ordered a remand, and the trial judge vacated the revocation of probation and recused himself from further proceedings.

In another case, the trial court remarked at sentencing for a probation violation that it would give the defendant all the credit time to which he was entitled. A specific number of days was not entered until sometime after the hearing. The number of days was not correct, but appellate counsel believed the trial judge was likely to correct the issue—and it would be much more easily corrected in the trial court than attempting to raise the issue on appeal with a somewhat incomplete record. The court of appeals ordered a remand, and the trial court corrected the credit time.

2. Pursue a Modification of Sentence

Indiana Code section 35-38-1-17 allows defendants the opportunity to file a motion for modification of sentence but limits the ability of the trial court to grant a motion filed more than 365 days unless the State agrees to the modification. In most counties and most cases, prosecutors will not agree to a modification. Therefore, a modification must be sought within a year, which ironically is often how long it takes for an appeal to be resolved.

This may present a problem because trial courts may not have the authority to modify a sentence while an appeal is pending. App. R. 8 (explaining that the Court on Appeal acquires jurisdiction once the Clerk issues its Notice of Completion of Clerk's Record); cf. Clark v. State, 727 N.E.2d 18, 21-22 (Ind. Ct. App. 2000) (holding that trial courts retain jurisdiction to conduct probation revocation proceedings while an appeal is pending).

Before a modification is decided by the trial court, it is appropriate to file a motion for remand to provide the trial court with jurisdiction to rule on the modification. This may be done once a hearing is set on the motion. In one case, the court of appeals granted the motion, held the appeal in abeyance until the trial court had ruled on the motion, and directed appellate counsel to file a status report that included the trial court's ruling within ten days of the scheduled hearing. Piercefield v. State, 49A05-0701-CR-00067 (order dated July 9, 2007). The court further directed counsel to include an updated CCS and "an indication whether Appellant will seek an additional Transcript in order to raise issues arising from the Modification hearing and order. Thereafter, this Court will resume jurisdiction and set the briefing schedule. Id.

3. Davis Petition

As explained in Section IV.B., raising a claim of ineffective assistance of counsel on direct appeal is almost always a bad idea. Defendants get only one shot at proving ineffective assistance of counsel, and this is almost always best done through a post-conviction proceeding at which a factual record to support the claim may be developed. Woods v. State, 701 N.E.2d 1208, 1210 (Ind. 1998).

If appellate counsel wants to pursue such a claim and needs to develop additional evidentiary support, "the proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings." Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). This is often called a Davis or Davis/Hatton petition. Id. (citing Hatton v. State, 626 N.E.2d 442 (Ind. 1993); Davis v. State, 267 Ind. 152, 368 N.E.2d 1149, 1151 (Ind. 1997)). When such a request is filed with the appellate court, the court of appeals must make a preliminary determination that the motion has sufficient merit. Id. If it does, the entire case is remanded to the trial court for consideration of the petition for post-conviction relief. If the PCR is denied, the appeal can be reinstated, and issues related to the direct appeal and PCR may be raised in what will become a consolidated appeal. Id.

This is a dangerous strategy that should only be invoked when development of an issue in the trial court is likely to lead to relief. The Supreme Court observed in Woods that a Davis petition should not be used as a routine matter but may be appropriate "where the claim asserted arguably requires a certain level of fact finding not suitable for an appellate court." Id. (quoting Lee v. State, 694 N.E.2d 719, 721 n.6 (Ind. 1998)). Appellate counsel often lacks knowledge of the nuances of post-conviction proceedings and will be burning the client's only ticket to post-conviction relief.

4. Belated Motion to Correct Error

As explained in Rule PC2 and Section I.B, a defendant may seek leave of the trial court to pursue a Belated Motion to Correct Error if the delay in filing the motion was not the fault of the defendant and the defendant has been diligent in pursuing it. Such requests, however, may be made only when jurisdiction remains in the trial court. After the notice of completion of the clerk's record has been filed, jurisdiction passes to the court of appeals. App. R. 8. Defendants who want to pursue a Belated Motion to Correct Error must seek remand to the trial court to pursue relief. See generally Prewitt v. State, 819 N.E.2d 393, 401 (Ind. Ct. App. 2004) (rejecting the State's argument that claims of newly discovered evidence should have been raised in a Motion to Correct Error immediately after sentencing and holding that a Rule 37 remand "for the purpose of conducting further investigation, discovery, and presentation of argument and evidence to the trial court" on the claim was appropriate).

For example, when this author received a voicemail from the alleged victim about significant evidence in a case, remand was sought and granted by the Court of Appeals. Trial Rule 60(B)(2) allows a trial court to grant relief from a judgment based on "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct error[] under Rule 59." A motion to correct error must be filed within 30 days of entry of final judgment under Trial Rule 59(C), but a Trial Rule 60(B)(2) motion may be filed within a year of judgment. In granting remand, the Court of Appeals ordered the case remanded to the trial court to pursue Trial Rule 60(B) proceedings. Jones v. State, 73A04-1604-CR-00748.

D. Responding to State's Motion for Remand

Although not common, the State might file a motion to remand, usually in response to an issue raised in the Appellant's Brief. If remand is appropriate and likely to help—or at least not hurt—the defendant, appellate counsel may decide not to contest the remand. More likely, however, the State is seeking remand because it knows it is likely to lose on the available record. Therefore, the better strategy is to file a response opposing the State's Motion or Remand, explaining why requiring the trial court to hold a hearing or do something else would not promote judicial economy but rather would frustrate it and would needlessly delay the appeal.

E. Effect of Remand

If the court of appeals grants a motion for remand, it may either (1) dismiss the appeal without prejudice or (2) remand the case while retaining jurisdiction. A motion for remand should specifically request one or the other, although the court will do what it prefers. The court will usually stay the appeal and retain jurisdiction if the issue is one that is unlikely to prove dispositive (for example, a Davis petition or modification of sentence, in which other appellate issues will remain and need to be resolved). The court is likely to dismiss the appeal without prejudice, however, if the claim is one that is likely to make the appeal unnecessary.

E. MOTION TO STAY/APPEAL BONDS

I. The Rule

Rule 39. Motion to Stay

A. Effect of Appeal. An appeal does not stay the effect or enforceability of a judgment or order of a trial court or Administrative Agency unless the trial court, Administrative Agency or Court on Appeal otherwise orders.

B. Motion in Trial Court or Administrative Agency. A motion for stay pending appeal may not be filed in the Court on Appeal unless a motion for stay was filed and denied by the trial court or by the administrative agency if it has authority to grant a stay. If the administrative agency does not have such authority, application for stay may be made directly to the Court on Appeal.

C. Motion in Court on Appeal. A motion for a stay pending appeal in the Court on Appeal shall contain certified or verified copies of the following:

(1) the judgment or order to be stayed;

(2) the order denying the motion for stay;

(3) other parts of the Clerk's Record or Transcript that are relevant;

(4) an attorney certificate evidencing the date, time, place and method of service made upon all other parties; and

(5) an attorney certificate setting forth in detail why all other parties should not be heard prior to the granting of said stay.

D. Emergency Stays. If an emergency stay without notice is requested, the moving party shall submit:

(1) an affidavit setting forth specific facts clearly establishing that immediate and irreparable injury, loss, or damage will result to the moving party before all other parties can be heard in opposition;

(2) a certificate from the attorney for the moving party setting forth in detail the efforts, if any, which have been made to give notice to the other parties and the reasons supporting his claim that notice should not be required; and

(3) a proposed order setting forth the remedy being requested.

E. Bond. If a stay is granted, the Court on Appeal may fix bond in accordance with Rule 18.

F. Length of Stay. Unless otherwise ordered, a stay shall remain in effect until the appeal is disposed of in the Court on Appeal. Any party may move for relief from the stay at any time.

II. Practical Considerations

If a defendant is sentenced to prison, jail, or a community corrections program, the trial court will almost always order that the defendant begin serving that sentence immediately. Beyond incarceration, other public defender clients may also face the immediate loss of liberty through a requirement that they register as a sex offender or their involuntary commitment to a psychiatric facility. Because an appeal will usually take several months, if not a year or longer, a stay of the trial court's order is often desirable.

Surprisingly, staff attorneys at the Indiana Court of Appeals report that few defendants seek a stay or appeal bond. Although stays and appeal bonds require a rather substantial showing, they have been granted in appropriate cases.

A. Stay or Appeal Bond?

Rule 39 simply addresses stays, and ultimately that is what counsel seeks in a criminal case. Counsel should ask the court to stay the sentence until the appeal has been completed. As mentioned in Rule 39(E), however, the appellate court "may fix bond" if a stay is granted. In criminal cases, a statute specifically addresses appeal bonds. A court is unlikely to grant a stay without imposing some sort of appeal bond. In non-criminal cases, however, such as contempt or civil commitment cases, counsel may simply request a stay.

B. Must File a Motion in the Trial Court

Whether captioned a request for a stay or a request for an appeal bond, the motion must begin in the trial court. App. R. 39(B). This is true even if the clerk has filed the notice of completion, passing jurisdiction to the court of appeals. App. R. 8. If the request is not first made in the trial court, the court of appeals will deny it.

1. Stay Factors

The trial court and appellate court will consider four factors, the same as those that apply to requests for preliminary injunctions, in deciding whether to grant a stay: "(1) irreparable harm, (2) likelihood of success on merits, (3) balance of harms, and (4) public interest." Doe v. O'Connor, 781 N.E.2d 672, 674 (Ind. 2003).

2. Appeal Bond Criteria

Indiana Code sections 35-33-9-1 and -3 explain the procedures for seeking an appeal bond in a criminal case. Class A felonies and non-suspendable offense are not eligible for an appeal bond. In all other cases, courts will consider three factors: (1) the probability of reversible error at trial, (2) the risk of flight, and (3) the potential dangerousness of the defendant. Tyson v. State, 593 N.E.2d 175, 178 (Ind. 1992).

C. Motion in Court of Appeals

If the motion for a stay or appeal bond is denied in the trial court, the claim may be appealed to the Indiana Court of Appeals. The motion must include certified or verified copies of the following:

- the judgment or order to be stayed
- the order denying the motion for stay
- any relevant parts of the Clerk's Record or Transcript that are available
- an attorney certificate
    - evidencing the time, date, place, and method or service on opposing counsel
    - explaining in detail why other parties should not be heard before the granting of a stay

D. Emergency Stays

Motions filed with the court of appeals will generally not be ruled upon until the fifteen (15) day period for a response has passed. App. R. 34(C). Although the court will sometimes request an earlier response in cases involving stays or appeal bonds, an emergency motion is the best way to secure an expedited decision from the court. According to Rule 34(D), a motion for emergency stay should include the following additional information:

- an affidavit establishing that immediate and irreparable injury will result to the moving party before the other party can be heard in opposition
- an attorney certificate detailing the efforts to give notice to the other parties
- a proposed order setting forth the remedy requested

When filing an emergency motion, counsel may want to call a staff attorney at the court of appeals to apprise them of the filing, which will allow the staff attorney an opportunity to arrange for a panel of judges to review the motion on an expedited basis.

E. Successful Cases

A stay or appeal bond is not likely to be granted in most cases in which a public defender is appointed. First, most cases do not present a high likelihood of reversible error. If counsel does not have a strong argument for reversible error, a stay or appeal bond should not be sought. Second, even in cases where reversal seems likely, counsel will have difficulty establishing that the defendant is not dangerous or that a stay is in the "public interest" if the defendant has a lengthy criminal history. Appeal bonds and stays have been successful primarily for first-time offenders.

Finally, a motion is more likely to be successful when it is reasonable. For example, if the defendant has been convicted of child solicitation on the Internet, counsel should propose, as a condition of the appeal bond, that the defendant has no Internet access and perhaps be required to report weekly to the probation office. See, e.g., Laughner v. State, 82A01-0104-CR-141 (ordering $50,000 appeal bond to defendant with no criminal history with special conditions restricting Internet access and requiring reporting to probation); but see Monteleone v. State, 21A-CR-1226 (ordering trial court to "immediately release Appellant on her own recognizance with no bond or surety").

Other examples of successful requests for stays or appeal bonds include the following:

Doe v. O'Connor, 781 N.E.2d 672 (Ind. 2003) (stay of new statute requiring publication of home addresses and photographs of sex offenders)

Boss v. State, 49A05-1106-CR-00320 (ordering $10,000 appeal bond for defendant convicted of misdemeanors who had no criminal history)

G.B. v. State, 49A02-0004-JV-251 (stay of order for juvenile to register as sex offender)

Turney v. State, 27A02-0010-CR-644 (ordering $20,000 appeal bond for defendant convicted of sexual misconduct with a minor who had no criminal history and including and attached a letter from the prosecutor suggesting that a Brady violation had occurred)

Isom v. State, 06A04-0610-CR-607 (granting $500 appeal bond for defendant with no criminal convictions who was convicted of A misdemeanor public indecency and sentenced to 120 days in jail)

In re A.L.P., 49A02-0402-JV-127 (contempt finding and 48-hour jail sentence stayed on emergency motion the same day of contempt finding).

F. MOTION FOR EXPEDITED APPEAL

I. The Rule

Rule 21. Order in Which Appeals are Considered

A. Expedited Appeals. The court shall give expedited consideration to interlocutory appeals and appeals involving issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute.

B. Motion for Expedited Consideration. By motion of any party, other appeals that involve the constitutionality of any law, the public revenue, public health, or are otherwise of general public concern or for other good cause, may be expedited by order of the court.

II. Practical Considerations

Cases involving children, including CHINS and TPR cases, are automatically expedited under Rule 21(A). Oddly, the rule does not apply to juvenile delinquency cases, even those in which the child is in the "custody" of the Department of Correction. In such cases and even some criminal cases, counsel may consider filing a motion for expedited consideration under Rule 21(B).

A. Timing of the Motion

Rule 21(B) does not specify a deadline for filing a Motion for Expedited Consideration. Ideally, counsel will file the motion early in the appellate process, especially if seeking an expedited schedule for preparation of the transcript and shortened deadlines for briefing. Rule 14, which governs interlocutory appeals, specifically mentions the possibility of shortening deadlines and requires such a request to be filed "within ten (10) days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal." App. R. 14(F)(2).

B. Grounds for Expediting Appeals

As regards criminal appeals, Rule 21(B) specifically mentions two particular grounds that might justify an expedited appeal.

1. Constitutionality of a Statute

First, if the case involves the "constitutionality of any law," especially a newly enacted one of broad applicability in the state, counsel might seek an expedited appeal. Such cases are likely strong candidates for emergency transfer to the Indiana Supreme Court under Rule 56(A).

2. General Public Concern

Second, more routine criminal cases may qualify for expedited review if counsel can convince the court that they involve "the public revenue" (incarceration is not cheap) or "are of general public concern" (such as a serious error has occurred, and the conviction is likely to be reversed). Counsel may want to file a Motion for Appeal Bond and Motion for Expedited Review at the same time, hoping to persuade the court that at least one is appropriate.

a. Denial of Bail

An appeal of the denial of bail is likely the strongest candidate for expedited consideration. See generally Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995) (holding that the denial of bail is a final judgment that may be appealed). If deadlines are not shortened, the appeal is likely to take nine months or longer, by which time the issue will likely be moot.

b. Short Sentence

Another type of case that might secure expedited review is a case involving a relatively short sentence that will likely be served before the appeal can be completed. The court of appeals will generally not shorten deadlines or promise expedited consideration in such cases, but it has directed that the State will not be given an extension of time to file its brief. Cf. Haggard v. State, 810 N.E.2d 751 (Ind. Ct. App. 2004) (court expedited consideration of excessive sentence when reversal would require release within weeks).

c. Juvenile Delinquency Cases (when the child is incarcerated)

A compelling argument can be made for expediting consideration of juvenile delinquency cases in which the child is incarcerated at the Department of Correction. Rule 21(A) automatically expedites most cases involving children, including child support cases.

Finally, as explained in the Interlocutory Appeal section, beginning in 2009, the Department of Child Services may pursue an expedited appeal when a juvenile court does not follow its recommendation for services. This is purely an appeal about money and litigated on severely shortened deadlines under Rule 14.1. If an issue of money is entitled to expedited review, why should the child's liberty interest not be considered under the same deadlines? Counsel should consider requesting that the DCS appeal be consolidated with the underlying case and litigated under the same expedited deadlines. Counsel must be ready to file briefs and responses in only five days, however.

d. Other Possibilities

This list should not be seen as exhaustive. For example, expedited appeals have been granted in a civil commitment case, although one of those cases was not resolved by the Indiana Supreme Court for almost a year and a half. In re Civil Commitment of T.K. v. Dep't of Veterans Affairs, 49A02-1310-MH-878.

G. MOTION TO STRIKE

I. The Rule

Rule 42. Motion to Strike

Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after the service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter.

II. Practical Considerations

It is easy to be indignant when the other side says something inappropriate in a motion or brief. Nevertheless, motions to strike should be used sparingly and not "focus on picky, non-important issues that could be resolved during arguments." Michael W. Hoskins, Striking Motions to Strike, Ind. Lawyer, at 8 (May 30, 2007) (quoting former staff attorney at the Indiana Court of Appeals). Most experienced appellate practitioners rarely file motions to strike, opting instead to respond to the issue in a reply brief. Id. That said, a motion to strike can be an opportunity to file a final reply to an argument for which the rules do not otherwise permit a response. For example, the Court of Appeals granted a motion to strike the State's Notice of Additional Authority that included a lengthy discussion that failed "to properly explain" the new case and left the defendant "without a procedural basis for responding to the implications made in the notice without leave of this Court." Ashaque v. State, 49A02-1404-CR-286 (January 5, 2015, Motion to Strike). See also Bluitt v. State, 19A-CR-01386 (February 27, 2020, order granting motion to strike State's references to information from probable cause affidavit not admitted into evidence at trial).

A. Appropriate Uses

1. Irrelevant Information or Information Unsupported by the Record

A motion to strike is most appropriate when opposing counsel includes irrelevant information in a motion or brief. See, e.g., Thornton-Tomasetti Eng'rs v. Indianapolis-Marion County Pub. Library, 851 N.E.2d 1269, 1280 n.3 (Ind. Ct. App. 2006) (striking matters that were "irrelevant and impertinent to [the court's] disposition of the issues in this appeal"); Carter-McMahon v. McMahon, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004) (striking statements in brief that were "unsupported by citations to the transcript/appendix and/or are irrelevant factual assertions"). This is particularly true when the information is included in a reply brief, and there would otherwise be no opportunity to respond. See, e.g., Bowlers Country Club, Inc. v. Royal Links USA, Inc., 846 N.E.2d 732, 733 n.1 (Ind. Ct. App. 2006) (striking portion of reply brief that included false assertion).

2. Inflammatory/Accusatory Language

Courts have also stricken portions of briefs or motions that use inflammatory language toward the court or opposing counsel. See, e.g., In re Wilkins, 777 N.E.2d 714, 716 (Ind. 2002) (disciplining appellate lawyer who included the following sentence in a petition to transfer: "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that

conclusion (regardless of whether the facts or the law supported its decision)."), sanction reduced to public reprimand at 782 N.E.2d 985 (Ind. 2003); State v. Hoovler, 673 N.E.2d 767, 768 (Ind. 1997) (granting a motion to strike a petition for rehearing in which counsel "assault[ed] by name the members of the Court who voted to reverse as being in 'dereliction of his sworn duty to uphold the Constitution,' as 'equally culpable,' and as assuming power to 'repeal' the Constitution. Counsel elaborates on these assaults with liberal use of terms like 'absurd' and 'fabricated.'"); see also Indiana Dep't of Envtl. Mgmt. v. Med. Disposal Servs., 729 N.E.2d 577, 581 n.10 (Ind. 2000) (striking accusatory and hyperbolic language for its inappropriate tone and lack of respect toward opposing party).

3. Don't Be on the Receiving End

As a final point, counsel should avoid crossing lines that are likely to generate a motion to strike from the other side. In short, make a persuasive argument supported by the facts and law. Do not resort to attacks on opposing counsel or, worse yet, the trial court or appellate judges.

H. MOTION TO RECONSIDER

Rule 34(B) notes that "any part may file a motion to reconsider a decision on a motion described in this Section within ten (10) days after the Court's ruling on the motion." If good cause exists, counsel may request the court of appeals to reconsider its ruling on any motion. According to a former staff attorney at the court of appeals, "[d]espite the wording of Rule 34(B), the Court does in fact reconsider rulings on motions outside Title VI, such as motions to compel the filing of the notice of completion of the clerk's record, and even motions not listed in the appellate rules, such as motions for *pro hac vice* admission." See Kent Zepick, Rule 34(B) & Motions to Reconsider, The Appellate Advocate, at 3 (Winter 2005).

A. Deadline

The Rule requires that motions to reconsider be filed within ten (10) days of the court's ruling. Ten days means just that; the period is not extended to allow for mailing of the court's order and an extension of time may not be requested.

B. Ground for Reconsideration

Neither the rule nor case law shed much light on what considerations will weigh in a decision to reconsider. Although a Petition for Rehearing is in many ways a motion to reconsider, counsel can point to specific shortcomings in the court's opinion that should be corrected in a Petition for Rehearing. Most motions, however, are denied by order without any reasons stated, which makes it difficult to argue specific points of error.

New developments are likely the best ground for filing a motion to reconsider. As noted in Section II, the court of appeals has sometimes granted a motion to reconsider the denial of a motion for interlocutory appeal. In the case discussed there, the county prosecutor and Attorney General both agreed—or at least had no objection—after the original denial of an interlocutory appeal.

Although counsel should make the best case possible in the initial motion, sometimes counsel holds back, believing a motion is routine and will be granted. This is particularly true with Motions for Extension of Time, which used to be routinely granted. The appropriate response to the denial of a motion when strong grounds for it exist is a motion to reconsider that acknowledges the original motion's shortcomings and further includes an explanation of the additional grounds and a statement that counsel will not make the same mistake in the future. If less than thirty days is needed, a request for fewer days will likely go a long way in enhancing the chances that the motion to reconsider will be granted.

C. Seldom Ask

Although you may believe that every motion you file should be granted, the court is not likely to agree. Routinely requesting reconsideration of the denial of motions will likely earn you a reputation with the court—a reputation that you do not want. Ask for reconsideration sparingly—in those cases or on those issues where it is truly appropriate.

I. OTHER MOTIONS

I. The Rule

Rule 1. Scope

These Rules shall govern the practice and procedure for appeals to the Supreme Court and the Court of Appeals. The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.

II. Practical Considerations

As Rule 1 explains, appellate courts may "permit deviations from these Rules" in any case—either on its own or on motion from a party. This rule should not be invoked willy-nilly in any case in which appellate counsel wants something not provided for by the Rules. The Rules were carefully crafted after a long process and are regularly amended after a careful process. That said, the Rules cannot cover every possible situation or nuance. The key question to ask when counsel is considering filing a unique motion not specifically addressed by the Rules is whether the request is reasonable and supportable. If you are confused about how to proceed in a given situation and cannot find the answer in the rules, you may consider filing a "Motion for Guidance" or "Motion Seeking Clarification," which clearly sets out the concerns and asks for direction from the court.

The appellate courts have the power to do just about anything they wish, if they are adequately persuaded. For example, after hearing oral argument in a challenge to the revocation of probation, the court issued an order later the same day, ordering the defendant's immediate release. The opinion acknowledged that Appellate Rule 65(E) generally requires certification of an opinion before the trial court may act but concluded "courts have inherent authority to require immediate compliance with their orders and decrees in order to give effective relief." Ripps v. State, 15A01-1109-CR-436 (Ind. Ct. App. May 4, 2012) (unpublished order). But see DeWees v. State, 180 N.E.3d 261, 217 (Ind. 2022) (urging appellate courts to exercise "prudence and restraint" when deviating from Appellate Rule 65(E)).

Section IV
Briefs and Appendices
Table of Contents

Section IV

Briefs and Appendices

This is the longest and most important section of this manual. Cases will almost always be won or lost based on the briefs. Therefore, it is crucial that counsel raise the best issues and argue them effectively.

This is easier said than done. Counsel must scour the record, conduct thoughtful research, argue issues thoughtfully, and fine-tune the brief to present a persuasive and cogent argument.

Drafting a brief is only one part of a lengthy and often recursive process. Each step, whenever or however frequently it occurs, is important.

Communicating With Your Client and Trial Counsel

As emphasized throughout this manual, client communication is essential, albeit different in the appellate setting than in trial courts. As explained in the Introduction and Part B of this section, appellate counsel should communicate early in the appellate process with the client and trial counsel. This is essential to ensuring appellate counsel has the necessary parts of the Transcript and is raising the best issues.

Assembling the Appendix

Within thirty (30) days of the filing of the Notice of Appeal, counsel should receive notice of completion of the Clerk's Record. The Clerk's Record is essentially the trial court's file as well as a CCS. It is your responsibility to assemble this into an Appendix, which must be filed when your brief is filed. Because your brief will cite information from the Appendix, it is important to begin assembling it early in the appellate process. If something is missing, counsel will have time to secure it.

Researching Issues

Different lawyers tackle the early stages of an appeal differently. Because appellate claims must be supported by the Record on Appeal, it is essential to carefully review both the Clerk's Record and Transcript. If there has been a significant development since trial or one that does not appear in the record, counsel could consider filing a motion to correct error or Davis petition seeking to stay the appeal while developing a fuller record for post-conviction review. However, a Davis petition is usually not advisable as explained in Section III(D) and Part B of this section.

While reviewing the Record, counsel must also conduct exhaustive and effective research. IPDC manuals are an excellent starting point for research, but research must also include an independent search for relevant cases and statutes. For each issue, counsel should carefully consider the basis for the claim: federal and state constitutional provisions, case law, statute, or court rule. Counsel should remain mindful of the obligation to disclose directly adverse authority.

As the research runs its course, counsel must select the issue(s) to be raised. Issues with a good chance of leading to reversal are the best candidates, although sometimes it is important to raise an issue to preserve it for possible later review in federal court on a habeas corpus petition. Counsel do not have an obligation to raise frivolous issues, even at the insistence of a client. But Indiana does not allow for the filing of Anders briefs as in federal court. Rather, appointed counsel must file an advocative brief in every direct appeal.

Finally, counsel should seldom, if ever, raise a claim of ineffective assistance of counsel on direct appeal. Such claims are almost always best saved for a post-conviction proceeding. If the claim is raised on direct appeal, it is not available at post-conviction, when it is more likely to succeed based on a more complete record and careful preparation by post-conviction counsel.

Writing Successful Briefs

The **Appellant's Brief** is truly the main event in any appeal. Although motions and oral arguments may have some influence some of the time, almost every appeal will succeed or fail based on the briefs. Therefore, it is imperative that careful drafting go into every brief. Counsel must review and follow the rules for each section of the brief.

If the defendant prevailed in the trial court and the State appeals, defense counsel should be sure to file an **Appellee's Brief**. Failing to do so will allow the court of appeals to reverse the defense win under a relaxed standard.

Finally, if you are representing the Appellant, you should almost always file a **Reply Brief** that responds to the State's brief. If the State raises an issue on cross-appeal, or argues that an issue raised has been waived, you must file a reply brief, or the court of appeals will review the issue under a standard highly deferential to the State. Although otherwise optional, a reply brief is an invaluable opportunity to get the last word. Because the court of appeals relies heavily on the work of law clerks, many of whom may be fresh of out law school, it is important to have the last word and rebut the State's strongest points.

Beyond Briefs: Addenda, Amendments, and Additional Authority

Although the briefs should fully support and advance your position on appeal, there are a few other tools to consider in the briefing process. For example, counsel may file an Addendum to a brief that includes highly selective documents from the Record on Appeal. Because all documents and exhibits are now digital, the addendum is rarely useful. If counsel wants to be sure the judges review a picture, they can embed it in the body of the brief with a citation to the record. A citation to the Appendix or Exhibit volume will also allow easy access.

Finally, although briefing is the main event, it is not necessarily the end of the case. Counsel should regularly read new cases and follow other legal developments. If a significant case is issued after an appeal has been briefed, counsel should consider filing an amended brief or additional authority. Additional authority is appropriate to cite and briefly explain a new case that fits within an existing issue in the brief. An amended brief may be appropriate to raise a new issue based on the recent case or legal development and is often used if counsel later discovers a significant error or omission after a brief is filed.

A. APPENDIX

I. The Rules

Rule 49. Filing of Appendices

A. Time for Filing. Any party shall file its Appendix on or before the date on which the party's brief is filed. Any party may file a supplemental Appendix without leave of court until the final reply brief is filed. Any party must seek leave of court to amend a filed appendix. If an appeal is dismissed before an Appendix has been filed and transfer or rehearing is thereafter sought, an Appendix may be filed contemporaneously with the Petition for Rehearing or Transfer and the Briefs in Response.

B. Failure to Include Item. Any party's failure to include any item in an Appendix shall not waive any issue or argument.

C. Retendered Appendices. If an appendix is received but not filed in accordance with Appellate Rule 23(D), all volumes of the Appendix shall be retendered.

Rule 50. Contents of Appendices

* * *

B. Appendices in Criminal Appeals

(1) *Contents of Appellant's Appendix.* The appellant's Appendix in a Criminal Appeal shall contain a table of contents and copies of the following documents, if they exist:

(a) the Clerk's Record, including the chronological case summary;

(b) [Deleted, eff. January 1, 2011]

(c) any instruction not included in appellant's brief under Rule 46(A)(8)(e), or the Transcript of the instruction, when error is predicated on the giving or refusing of any instruction;

(d) any other short excerpts from the Record on Appeal, in chronological order, such as pertinent pictures or brief portions of the Transcript, that are important to a consideration of the issues raised on appeal;

(e) any record material relied on in the brief unless the material is already included in the Transcript;

(f) a verification of accuracy by the attorney or unrepresented party filing the Appendix. The following is an acceptable verification:

"I verify under penalties of perjury that the documents in this Appendix are accurate copies of parts of the Record on Appeal."

(2) *Appellee's Appendix.* The contents of the appellee's Appendix shall be governed by Section (A)(2) of this Rule, except the appellee's Appendix shall not contain any materials already

contained in appellant's Appendix. The Appendix may contain additional items that are relevant to either issues raised on appeal or on cross-appeal.

C. Table of Contents. A table of contents shall be prepared for every Appendix. The table of contents shall specifically identify each item contained in the Appendix, including the item's date. The Table of Contents shall be submitted as Appendix Volume 1 in accordance with Rule 51(F).

D. Supplemental and Other Appendices. All supplemental and any other appendices shall be governed, to the extent applicable, by Sections A, B, C, E, and F, and shall not duplicate materials contained in other appendices, unless necessary for completeness or context.

E. Cases with Multiple Appellants or Appellees. In cases involving more than one appellant or appellee, including cases consolidated for appeal, each side shall, where practicable, file joint rather than separate appendices to avoid duplication.

F. Transcript. Because the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B), parties should not reproduce any portion of the Transcript in the Appendix.

Rule 51. Form and Assembly of Appendices

A. Copying. For conventionally filed appendices, the copies shall be on 8 1/2 by 11 inch white paper of a weight normally used in printing and typing. The copying process used shall produce text in a distinct black image on only one side of the paper. Color copies of exhibits that were originally in color are permitted and encouraged.

B. Order of Documents. Documents included in an Appendix shall be arranged in the order listed in Rule 50.

C. Numbering. Each Appendix volume shall be independently and consecutively numbered at the bottom without obscuring the page numbers existing on the original documents. Each volume shall begin with numeral one on its front page.

D. Volumes. All Appendices shall be submitted separately from the brief. An Appendix shall consist of a table of contents (see Rule 51(F)) and one or more additional volumes, and each Appendix volume must be limited in size to the lesser of two hundred fifty (250) pages or fifty megabytes (50 MB). The front page shall be included in the two hundred fifty (250) page limit of this rule. Conventionally filed volumes shall be bound with single staple or binder clip. They shall not be bound in book or pamphlet form.

E. Front Page. Each volume of an Appendix shall have a front page that conforms substantially to Form #App.R. 51-1.

F. Table of Contents. An Appendix shall contain a single table of contents for the entire Appendix, which shall be submitted as Appendix Volume 1, regardless of the number of volumes.

Appellate Rule 23(F) includes important information about the confidentiality of documents on appeal. Rule 23(F)(3)(b) explains the requirement of a separate "Public" and "Non-Public" (or Confidential) Volume of the Appendix.

The Court on Appeal will review only those claims supported by the Record on Appeal, which includes the Transcript and Clerk's Record. The relevant portions of the Clerk's Record must be submitted to the appellate court in a document called the Appendix. Before the adoption of the Appellate Rules in 2001, these documents were compiled by the clerk. Now the onus is on counsel to compile them into an Appendix.

Even though the rules suggest that claims are not waived by failing to include documents in the Appendix, preparing the Appendix correctly and thoroughly is an important part of every appeal. Failing to do so creates additional work down the road for the court and possibly you. It may also diminish the court's view of your credibility and competence. If an Appendix is not filed or an Appendix is missing documents required by rule, the modern practice is to order compliance with the rules. If an appellant inexcusably fails to comply with an appellate court order, then more stringent measures, including dismissal of the appeal, may be available as the needs of justice might dictate. Cf. Johnson v. State, 756 N.E.2d 965, 967 (Ind. 2001) (reversing court of appeals' dismissal of an appeal because Appellant failed to file an Appendix).

All attorneys must file the Appendix and other filings electronically as a PDF document. Counsel should familiarize themselves with Adobe Acrobat or another program that allows ease of compiling, numbering, and modifying a PDF file.

A. Deadlines

The Appellant's Appendix must be filed with or before the Brief of the Appellant. App. R. 49(A). An extension of time to file a brief therefore applies to the filing of an Appendix.

B. Volume Size, Table of Contents, and Mirror Image

Counsel must prepare a Table of Contents that includes a listing of "each item contained in the Appendix, including the item's date." App. R. 50(C). Simply listing "clerk's portion 1-49" is not sufficient. Rembert v. State, 832 N.E.2d 1130, 1131 n.2 (Ind. Ct. App. 2005). Counsel has been chastised in several opinions for failing to prepare a proper table of contents. See, e.g., C.L.M. v. State, 874 N.E.2d 386, 389 n.4 (Ind. Ct. App. 2007) (remarking that the "failure to specifically identify each item contained in [the appellant's] appendix has hindered our review on appeal"); Perry v. State, 845 N.E.2d 1093, 1094 n.2 (Ind. Ct. App. 2006) (chastising counsel for failing to comply with Rule 50(C), which "made it difficult to find relevant portions of the record, such as the charging informations, guilty plea, sentencing order, and other documents").

The final page of Volume 1 must be a signed verification page. App. R. 50(B)(1).

No more than 250 pages may be included in each volume. App. R. 51(D).

If the Appendix includes any confidential documents, counsel must prepare a separate "Public" and Non-Public" (or Confidential) volume, except for Volume 1 (the Table of Contents). Beside the name of the document in Volume 1, counsel should note which documents are confidential. Those documents will not be included in the "Public" Volume; those pages should instead include "a header, label, or stamp that states, 'CONFIDENTIAL PER Indiana Rules on Access to Court Records, Rule 5(B)' or 'EXCLUDED FROM PUBLIC ACCESS PER ACR RULE 5(B)'" App. R. 23(F)(3)(b)(ii)(3).

C. Documents Included & Page Numbering

The Rules require the inclusion of the "the Clerk's Record, including the chronological case summary." App. R. 50(B)(1)(a). This is in essence the entire file from the trial court. App. R. 2(E). Rule 51(B) directs counsel to arrange the documents in the order listed in Rule 50, which simply specifies "the Clerk's Record, including the chronological case summary." App. R. 50(B)(1)(a). Standard practice is to include the CCS first, followed by the documents from the clerk's record from the oldest filing to the most recent.

1. Exclude the Transcript

Although the pre-2011 Rules mentioned including key parts of the Transcript, that portion of the rule was amended recently to make clear that no part of the Transcript should be included in the Appendix.

2. Exclude Any Document that is not Part of the Trial File

Counsel may not include any documents that were not part of the Clerk's Record. If you do, the State will likely file a motion to strike, which will be granted. See, e.g., Herron v. State, 808 N.E.2d 172 (Ind. Ct. App. 2004); Carr v. State, 799 N.E.2d 1096, 1097 n.2 (Ind. Ct. App. 2003) (granting State's motion to strike pages in appellant's appendix that were "not part of the record before the trial court"). The claim(s) supported by these documents will then fail, and counsel may face sanctions for including a false verification.

3. Number All Pages Consecutively

A page number must be included at the bottom of each page. This should be in the same location on each page and distinctive from the numbering that already appears on the bottom of some of the pages. Numbering should rest with each volume. App. R. 51(C) ("Each volume shall begin with numeral one on its front page.").

4. Seeking an Exemption

Strict adherence to Rule 50(B) will result in the inclusion of many irrelevant documents, such as subpoenas to witnesses, jury summonses, and routine motions that have nothing do with the issue(s) raised on appeal. Counsel may seek relief from the requirements of including all of these documents by filing a written request well before the Appendix is due. A sample motion is available on the IPDC website.

5. Include a Verification

The last page of Volume 1 (the Table of Contents) must include a verification of the accuracy of the documents included. App. R. 50(B)(1)(f). You may use the following language: "I verify under penalties of perjury that the documents in this Appendix are accurate copies of parts of the Record on Appeal." You should take the verification seriously—it is an affirmation under penalties for perjury. Do not include anything that is not in the Clerk's Record.

D. The Pre-Sentence Investigation (PSI) Report and Other Confidential Documents

When challenging the sentence on appeal, a copy of the Pre-Sentence Investigation (PSI) report must be included in the Appendix. Perry v. State, 845 N.E.2d 1093, 1094 n.2 (Ind. Ct. App. 2006) ("Additionally, the appendix does not include a copy of the presentence report. Although pursuant to Indiana Appellate Rule 49(B) this has not caused waiver of Perry's sentencing claims, the presentence report is a vital document that should be included in the appendix in any appeal that raises sentencing issues.").

The PSI is a confidential document that requires special treatment on appeal. As explained in Part B, confidential documents must be excluded from the "Public" Volumes of the Appendix.

In addition, counsel must file a Notice of Exclusion that explains the basis for the exclusion of each document. Sample Form 11-5, located at the end of the Appellate Rules, is a helpful guide.

E. Certificate of Service/Service on AG Required

Before electronic filing, a copy of the Appendix in a criminal case need not be served on the Attorney General. Crabtree v. Estate of Crabtree, 837 N.E.2d 135, 137 n.1 (Ind. 2005) ("The exception providing that the appendix need not be served on the attorney general applies only to criminal appeals."). The Deputy Attorney General assigned to the case would check out the Appendix and Transcript once he or she enters their appearance. Appellate Rule 24(A)(4) now requires that an Appendix or Supplemental Appendix filed electronically be served on the Attorney General.

In civil cases (such as a termination of parental rights or civil commitment appeal), you must also serve a copy of the Appendix on all adverse parties. App. R. 24(A)(3).

F. Civil Appeals

The discussion above has focused on criminal appeals. Appellate Rule 2(G) includes a detailed list of trial court designations, which are considered criminal for purposes of appeal. Counsel pursuing an appeal of a child in need of services (CHINs) case, termination of parental rights (TPR), or civil commitment should consult Rule 50(A), which permits the selective inclusion of certain documents. As noted above, service of the Appendix on all opposing counsel is required in such cases.

G. Amended or Supplemental Appendices

Under Appellate Rule 49(A), counsel can later include an omitted document by filing "a supplemental Appendix without leave of court until the final reply brief is filed." However, if the Appendix includes a document that should have been omitted, counsel "must seek leave of court to amend a filed appendix."

H. Appellee's Appendix

If you are the Appellee in an appeal brought by the State, you may file an Appellee's Appendix if the State has omitted a document that is part of the Clerk's Record and relevant to the issues on appeal. App. R. 50(B)(2); cf. Niemeyer v. State, 865 N.E.2d 674, 676 (Ind. Ct. App. 2007) (quoting State's contention that failure to include PSI in appendix had "hindered" the court's review before noting that

the State could have filed its own appendix under Rule 50(B)(2) with the PSI to prevent the court's review from being hindered).

The Appellee's appendix must not include any documents already included in the Appellant's Appendix.

B. THE SEARCH FOR ISSUES

Different lawyers tackle an appeal in different ways. You should do what works best for you, although some common principles are always worth considering.

I. Communicate with Your Client and Trial Counsel

Open communication with both your client and trial counsel is essential to effective representation on appeal.

A. Client Communication

Within days of your appointment, you should write your client a letter. As of 2019, all mail sent to the Department of Correction must be in white envelopes. Introduce yourself and let your client know what to expect in the ensuing weeks and months. If your client received an executed sentence at the DOC, you may locate their precise location through the DOC's helpful website: https://www.in.gov/apps/indcorrection/ofs/ofs. If your client is not in custody, contact information appears in the Pre-Sentence Investigation report or trial counsel may have useful information.

Once the Transcript is completed and filed, the appellate clock is ticking; your brief is due in thirty (30) days. The deadline runs from the date the clerk serves notice of completion of the transcript—which may be earlier than the day the notice is recorded by the Clerk. Always be mindful of this date. It is important that you talk with your client early in this period to be sure you have all the relevant proceedings, and an idea of what issues concern the client. You may schedule an attorney visit at the DOC by calling the Superintendent's Office at the institution where your client is housed. Otherwise, a phone call from your client may suffice, or some counsel have used the prison-approved email system. Phone calls and emails are monitored by DOC staff; an in-person visit will allow for a private conversation. Whatever the mode of communication, it is essential that counsel make contact and provide clients information about the appellate process and an opportunity for input. The first communication with a client should ***not*** be sending the filed Appellant's brief.

It can be important to communicate with a client before raising a sentencing challenge. Indiana's appellate courts may ***increase*** a sentence on appeal when the defendant requests a sentence revision. McCullough v. State, 900 N.E.2d 745 (Ind. 2009); but cf. Akard v. State, 937 N.E.2d 811 (Ind. 2010) (vacating sentence increase ordered by the Court of Appeals). If counsel has any concerns that a sentence might be increased on appeal, this possibility must be explained to the client, and counsel must then follow the client's stated wishes.

You have an ongoing duty to communicate with your client and keep them apprised of the case. When you are working on the brief, communication is especially important. Once the brief is filed, there is usually not much to discuss. When you mail a copy of the brief, explain the deadlines for the State to file its brief and let your client know you will mail a copy of it when filed. Once your reply brief is filed, explain that the court will issue a written decision, which takes at least a few weeks and may take a few months. If this is not clear, some clients will call or write asking when they have a court date.

Finally, it is important to realize the respective roles of counsel and client in an appeal. At trial, clients must make certain decisions, such as pleading guilty or waiving a jury trial. Counsel has an

important role in providing advice, but these decisions are ultimately the client's. In the appellate realm, counsel has considerably more control. See Jones v. Barnes, 463 U.S. 745 (1983). Although appointed counsel must file an advocative brief on behalf of their client, there is no duty to raise a frivolous issue. If a client insists that you raise one or more frivolous claims, it is important to explain why the claims have no merit and why raising them will detract from the issues being raised. Most clients will accept this. If they do not, you should hold your ground and not raise frivolous issues.

B. Trial Counsel

Early in the appellate process, appellate counsel should also consult with trial counsel. If your appointment requires you to file the Notice of Appeal, it is imperative that you talk with trial counsel to make sure you have requested all the necessary parts of the Record on Appeal. See Part I(C). If something has not been transcribed, you should promptly file a Supplemental Notice of Appeal. Id.

After reviewing the Transcript and Clerk's Record, you should also speak with trial counsel about potential issues. Trial counsel will likely have a good idea of potential issues for appeal and will generally be eager and willing to help. Finally, you should ask to review trial counsel's file for any additional information that might be helpful to the appeal.

II. Review the Record Carefully

Although the client and trial counsel are good sources of information and potential appellate issues, there is no substitute for a thorough and independent review of the Transcript and Clerk's Record by appellate counsel. If there is no support for a claim in the record, it cannot be raised on appeal. (The possibility of creating an additional record through a so-called Davis petition is explained in Part III (D) of this manual.)

The following list is by no means exhaustive but offers a starting point for considering potential appellate issues. You should carefully review all parts of the record for anything that strikes you as wrong. Make a list of these potential claims for later consideration. Do not rule out plausible claims right away.

A. Guilty Plea or Trial?

A threshold question is whether the appeal follows a trial or guilty plea. The Indiana Supreme Court has long held that defendants who plead guilty may not challenge their conviction(s) on appeal. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996); see also Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004) ("[D]efendants who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy."); but see Douglas v. State, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007) (allowing defendant who pleaded guilty without plea agreement to raise *ex post facto* claim thoroughly litigated in the trial court). The notable exception is the defendant who seeks to withdraw a guilty plea before sentencing. See Ind. Code § 35-35-1-4(b). These motions fall into three categories, and their denial may be challenged on direct appeal. See Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). Any other conviction-related issue after a guilty plea must be raised through a petition for post-conviction relief.

Limitations on Sentencing Challenges

If a plea agreement provides a set term that affords no discretion to the trial court, the sentence may ***not*** be challenged on appeal. Childress v. State, 848 N.E.2d 1073, 1079 n.4 (Ind. 2006). However, Garza v. Idaho, 139 S. Ct. 738 (2019), requires counsel to file a notice of appeal whenever a client requests it, and Indiana does not allow Anders briefs. Moreover, a "defendant's waiver of appellate rights is only valid if the sentence is imposed in accordance with the law. Thus, if a sentence imposed is illegal, and the defendant does not specifically agree to the sentence, the waiver-of-appeal provision is invalid." Haddock v. State, 112 N.E.3d 763, 767 (Ind. Ct. App. 2018), trans. denied.

If, however, the plea agreement provides any discretion to the trial court, the length and even the location (DOC, community corrections, etc.) of the sentence may be challenged on appeal. This is true even if the plea agreement provided for a cap or range of years. Childress, 848 N.E.2d at 1079-80; see generally Davis v. State, 851 N.E.2d 1264, 1269 (Ind. Ct. App. 2006) (reducing six-year executed sentence at DOC for repeat drunk driver who caused serious injury to another motorist to four year sentence with "the time remaining on her sentence to be served through Community Corrections").

Plea agreements may include provisions that provide for waiver of the right to challenge a sentence on appeal. In the wake of Creech v. State, 887 N.E.2d 73 (Ind. 2008), many county prosecutors began including such waivers in every plea agreement. The Indiana Supreme Court held in Creech that these provisions are valid even in the absence of a colloquy on the record with the defendant. In very limited circumstances, however, the court of appeals has found waiver provisions invalid in light of other comments made during the guilty plea or sentencing hearing. See Ricci v. State, 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008), trans. denied ("Unlike Creech, the trial court here clearly and unambiguously stated at the plea hearing that it read the plea agreement and that, according to its reading of the agreement, Ricci had not surrendered the right to appeal his sentence. Neither the prosecutor nor the defense attorney contradicted this statement."); Bonilla v. State, 907 N.E.2d 586, 590 (Ind. Ct. App. 2009) ("In light of the contradictory and confusing information Bonilla received at his guilty plea hearing, especially since English was not his native tongue, we conclude that he did not waive the right to appeal his sentence.").

B. The Search for Errors

As a general rule, claims are forfeited on appeal if they were not first raised in the trial court. Therefore, counsel is well-advised to begin the search for appellate issues on errors that were preserved by an objection in the trial court.

1. Preserved Errors

a. Pretrial Motions are Just a Start

Although an objection at trial is generally required to preserve an error, counsel will often raise issues in a pretrial motion. A good place to begin searching for potential issues is the Clerk's Record. For example, trial counsel may have filed a motion to sever the charges or a motion to dismiss the charging information based on a defect, late amendment, or vagueness.

b. Pretrial Hearings are also a Start

Although preliminary in nature, pretrial hearings also provide a good source of issues for appeal. As discussed in Section I, counsel should request a transcript of pretrial hearings and has "a duty to thoroughly review the entire record of . . . proceedings, including the transcripts from . . . pre-trial hearings." Wilson v. State, 94 N.E.3d 312, 321 (Ind. Ct. App. 2018), trans. denied. Pretrial hearings also

preview the State's argument and the trial court's rationale, which can be useful in crafting an appellate argument. These may include motions to suppress evidence based on an illegal search or seizure, motions to suppress statements to police based on involuntariness or improper advisements, and motions in limine that preliminarily restrict the admission of certain evidence.

These are seldom final rulings that preserve the error for trial. Therefore, it is also important to review the transcript for objections at trial.

c. Objections at Trial Matter Most

It is likely that counsel lodged objections at trial. As noted above, pretrial rulings are generally not preserved for appeal unless the objection was renewed at trial. In addition to the issues discussed above, defense counsel may have lodged objections to any number of rulings on the admission or exclusion of evidence, arguments by the prosecutor, or jury instructions.

2. Unpreserved Errors

Some claims may be raised on appeal even in the absence of an objection at trial. The purpose of requiring an objection at trial is to allow the trial court an opportunity to fix things. See, e.g., Spears v. State, 811 N.E.2d 485, 488 (Ind. Ct. App. 2004) (addressing challenge to failing to replace juror after extra-judicial contact, a situation in which a timely objection would have permitted a proper inquiry, admonishment, or corrective action, such as removal). As noted below, there are a few exceptions to this general rule. Also, Indiana has long recognized the fundamental error doctrine under which unpreserved claims may be raised and lead to reversal when there "has been a 'blatant violation of basic principles' that denies a defendant 'fundamental due process.'" Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003).

a. Sentencing Claims

Indiana's appellate courts routinely "review many claims of sentencing error . . . without insisting that the claim first be presented to the trial judge." Kincaid v. State, 837 N.E.2d 1008, 1010 (Ind. 2005) (simply noting that "an appellant in a criminal case must raise a particular sentencing claim in his or her initial brief on direct appeal in order to receive review on the merits"). The broad language of Kincaid suggests this rule may be applied to any sentencing claim. This is especially true of a claim that a sentence is inappropriate under Appellate Rule 7(B), which cannot be presented to the trial court. Moreover, the court of appeals had applied Kincaid in rejecting the State's waiver argument in an appeal of probation conditions. Piercefield v. State, 877 N.E.2d 1213, 1218 (Ind. Ct. App. 2007), trans. denied.

Some sentencing claims have been couched in terms of fundamental error. Rhoades v. State, 698 N.E.2d 304, 307 (Ind. 1998) ("A sentence that exceeds statutory authority constitutes fundamental error."). However, the more appropriate approach is simply that an objection is not required to preserve the error. Arguing such a claim as fundamental error may require counsel to meet a higher threshold for reversal. But see Collins v. State, 835 N.E.2d 1010, 1018 (Ind. Ct. App. 2005) ("In the aggregate, the incarceration and probationary periods exceed the statutorily prescribed maximum, and thus constitute fundamental error."); Hardley v. State, 893 N.E.2d 1140, 1145-46 (Ind. Ct. App. 2008) (sentences were required to be served consecutively the trial court committed fundamental error when it found otherwise).

Similarly, some restitution claims have been addressed as fundamental, although the issue is better raised as a sentencing claim that does not require an objection in the trial court. See, e.g., Lohmiller v. State, 884 N.E.2d 903 (Ind. Ct. App. 2008) (finding fundamental error where trial court ordered defendant pay restitution as part of probation but State failed to allege Carrol County was victim under statute and award was not based on evidence of actual damages); Gil v. State, 988 N.E.2d 1231, 1235-36 (Ind. Ct. App. 2013) (trial court committed fundamental error where it imposed restitution without evidence of value of stolen property or other damages caused by defendant).

b. Double Jeopardy

Although cases seldom address it explicitly, common practice is to allow double jeopardy claims to be raised on appeal even if they were not explicitly raised in the trial court. Although some cases have specifically invoked the fundamental error doctrine, the better approach is simply to argue a double jeopardy violation is similar to a sentencing error, *i.e.*, one that does not require an objection at trial. See, e.g., Guyton v. State, 771 N.E.2d 1141 (Ind. 2002); Richardson v. State, 717 N.E.2d 32 (Ind. 1999). As explained above, however, a guilty plea will generally forfeit any claimed violation of double jeopardy. See, e.g., Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004); Games v. State, 743 N.E.2d 1132, 1134-35 (Ind. 2001); but see Jordan v. State, 676 N.E.2d 352, 354 (Ind. Ct. App. 1997) (explaining exception to general rule when plea agreement calls for "imposition of consecutive sentences when the court was without statutory authority to impose consecutive sentences").

c. Constitutionality of a Statute

Although the issue receives inconsistent treatment, there is favorable authority for the proposition that the "constitutionality of a statute may be raised at any stage of the proceeding," including for the first time on appeal. Plank v. Cmty. Hosps. of Indiana, Inc., 981 N.E.2d 49 (Ind. 2013) (appellate courts not prohibited from considering constitutionality of statute even though issue has otherwise been waived and indeed reviewing court may exercise discretion to review constitutional claim *sua sponte*) (quoting Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992)); but cf. Wiggins v. State, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000), trans. denied (finding constitutional arguments waived on appeal because they were not raised in a timely motion to dismiss).

d. Fundamental Error

As noted above, the fundamental error doctrine allows defendants to raise unpreserved claims when there "has been a 'blatant violation of basic principles' that denies a defendant 'fundamental due process.'" Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003). More recently, the Indiana Supreme Court explained:

> Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible. In other words, to establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not *sua sponte* raising the issue because alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. The element of such harm is not established by the fact of ultimate conviction but rather depends upon whether [the defendant's] right to a fair

> trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled.

Ryan v. State, 9 N.E.3d 663, 668 (Ind. 2014) (internal citations and quotation marks omitted). This is arguably a vague standard, but decisional law provides some useful examples of fundamental error.

(1) Jury Instructions: Wrong Burden of Proof

Thomas v. State, 442 N.E.2d 700 (Ind. Ct. App. 1982) (instructing the jury that the State must prove its case by a preponderance of the evidence)

Hall v. State, 937 N.E.2d 911, 913 (Ind. Ct. App. 2011) (instructing the jury that it could convict on a lesser *mens rea* than that provided in the statute)

(2) Jury Instructions: Attempted Murder

Many attempted murder convictions have been reversed because of the failure of the trial court to instruct that the defendant had the "specific intent to kill." Jones v. State, 868 N.E.2d 1205, 1210 (Ind. Ct. App. 2007). Such claims may be found to constitute fundamental error "where intent was vigorously contested and/or the instructions did not sufficiently inform the jury on specific intent." Id.

(3) Conviction for Uncharged Offenses

Yarbrough v. State, 497 N.E.2d 206 (Ind. 1986) ("Indiana courts consistently have found it to be fundamental error to convict a defendant for an offense which includes an element not included in the charge.").

Garcia v. State, 433 N.E.2d 1207 (Ind. Ct. App. 1982) (observing "where the charge does not comport with the defendant's ultimate conviction, the error which results is of so fundamental a nature that it need not be raised by the defendant but should be addressed *sua sponte* on appeal").

(4) Comments on Defendant's Silence or Invocation of Counsel

Wilson v. State, 514 N.E.2d 282 (Ind. 1987) (fundamental error for State to elicit testimony about defendant's exercise of his right to remain silent and consult with an attorney as evidence of his sanity).

R.J.H. v. State, 12 N.E.3d 879, 882 (Ind. Ct. App. 2000) (observing that comments on defendant's post-Miranda silence under Doyle v. Ohio, 426 U.S. 610 (1976) "may be fundamental error" but only when violation "so substantial and blatant as to render his trial unfair").

(5) Judicial Misconduct or Overreaching

Kennedy v. State, 258 Ind. 211, 280 N.E.2d 611 (1972) (improper judicial intervention denied defendant fair trial by impartial judge and was fundamental error);

> cf. Abernathy v. State, 524 N.E.2d 12 (Ind. 1988) (observing that attorneys "may be reluctant to object to the judge's actions in the presence of the jury, fearing that an apparent conflict with the judge would cause more damage. . . . Here, Abernathy made appropriate objections outside the jury's presence to preserve his allegation of error").

Merritt v. State, 822 N.E.2d 642, 644 (Ind. Ct. App. 2005) (trial court's voir dire example of constructive possession that was fundamental error because it was "so strikingly similar to the facts of this case" such that "the jury could easily have been tainted resulting in an unfair trial").

(6) Prosecutorial Misconduct

Sailors v. State, 593 N.E.2d 202 (Ind. Ct. App. 1992) (prosecutor's repeated comments during closing argument that jury was "the second jury to consider the matter" and that indictment was "returned by six of your fellow citizens").

Cooper v. State, 854 N.E.2d 831 (Ind. 2006) (reversing sentence of life without parole based on prosecutor's "drumbeat repetition assailing defendant's character").

Miller v. State, 916 N.E.2d 193 (Ind. Ct. App. 2009) (prosecutor played irrelevant and prejudicial YouTube video during closing argument).

Brummett v. State, 10 N.E.3d 78, 91 (Ind. Ct. App.), on reh'g, 21 N.E.3d 840 (Ind. Ct. App. 2014) (finding fundamental error based on the cumulative effect of "prosecutorial misconduct by improperly distinguishing between the role of the defense and the prosecution, by improperly vouching for the State's witnesses, and by asking argumentative and inflammatory questions"), aff'd in relevant part, 24 N.E.3d 965 (Ind. 2015)

(7) Admission of Evidence

Gutierrez v. State, 961 N.E.2d 1030 (Ind. Ct. App. 2012) (reversing for fundamental error in admitting improper vouching testimony).

R.W. v. State, 975 N.E.2d 407 (Ind. Ct. App. 2012) (trial court committed fundamental error when it admitted videotaped confession because confession itself was erroneously admitted and it was only evidence concerning intent necessary for an attempted burglary true finding).

S.D. v. State, 937 N.E.2d 425 (Ind. Ct. App. 2010) (juvenile statement to police without meaningful consultation with his parents).

(8) Waiver of Jury Trial

Horton v. State, 51 N.E.3d 1154, 1160 (Ind. 2016) (trial court's failure to confirm defendant's personal waiver of jury trial before proceeding to bench trial was fundamental error.)

3. Harmless Error

As a final point, not every error is one that should be raised on appeal. All errors are not created equal, nor will all errors lead equally to reversal.

Structural errors lead to automatic reversal and should always be raised. These are errors "so basic to a fair trial that their infraction can never be treated as harmless error." Gray v. Mississippi, 481 U.S. 648, 668 (1987). Relatively few errors fall into this category. Id. ("The right to an impartial adjudicator, be it judge or jury, is such a right").

Non-structural errors will lead to reversal only if they are found not to be harmless. Harmless error comes in two basic brands: ***federal constitutional error*** and ***non-constitutional error***.

A violation of the federal constitutional will result in reversal unless the State can show the error was harmless beyond a reasonable doubt. Debro v. State, 821 N.E.2d 367, 375 (Ind. 2005) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Errors not grounded in the federal constitution, however, are subject to a lower standard. Appellate courts will affirm a trial court on a non-constitutional error if the error's "probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Ind. Appellate Rule 66(A); Fleener v. State, 656 N.E.2d 1140 (Ind. 1995). In such cases the party that violates an evidentiary rule bears the burden of demonstrating its harmlessness on appeal. See Osborne v. State, 754 N.E.2d 916, 926 (Ind. 2001) (Boehm, J., concurring in result and joined by Shepard, C.J., and Dickson, J.).

The following are a few examples, among many, of errors that were held not to be harmless by Indiana appellate courts:

> Hernandez v. State, 45 N.E.3d 373, 379 (Ind. 2015) (trial court's error in failing to give final jury instruction on defense of necessity was not harmless).
>
> Oaks v. Chamberlain, 76 N.E.3d 941, 951 (Ind. Ct. App. 2017) (trial court's erroneous exclusion of impeachment testimony that went to central questions of case was not harmless), trans. denied.
>
> Thornton v. State, 25 N.E.3d 800, 805 (Ind. Ct. App. 2015) (trial court's violation of confrontation clause in admitting detective's testimony of alleged accomplice's out of court statements was not harmless where jury was unable to reach verdict on all but one charge, and defendant was unable to cross-examine alleged accomplice).
>
> Gil v. State, 988 N.E.2d 1231, 1234 (Ind. Ct. App. 2013) (trial court's failure to provide defendant with written statement of probation terms, and where defendant never acknowledged he understood probation term was not harmless).
>
> D.G. v. State, 947 N.E.2d 445, 449 (Ind. Ct. App. 2011) (failing to assess blind six-year-old victim's competency at juvenile delinquency proceedings involving child molestation allegation was not harmless error).

C. An Issue to Avoid: Ineffective Assistance of Counsel

Many years ago, defendants had to raise claims on ineffective assistance on direct appeal when the claim was available. If counsel waited until post-conviction relief, the court would likely find the claim waived. See, e.g., Johnson v. State, 502 N.E.2d 90 (Ind. 1986). That rule is no longer valid.

In Woods v. State, 701 N.E.2d 1208 (Ind. 1998), the Indiana Supreme Court held that a "claim of ineffective assistance of trial counsel may be presented for the first time in a petition for postconviction relief. However, if ineffective assistance of trial counsel is raised on direct appeal, it will be foreclosed in postconviction proceedings." Id. at 1210. A claim of ineffective assistance of counsel may be raised just once: on direct appeal or on post-conviction. The court made clear that a post-conviction proceeding is the preferred forum to raise an ineffectiveness claim. Id. at 1219.

If your client is facing a long sentence, you should ***not*** raise an ineffectiveness claim unless there are extraordinary circumstances, such as an error by counsel on the face of the record that is so

significant it will surely lead to a reversal. See, e.g., Garland v. State, 719 N.E.2d 1184, 1186 (Ind. 1999) (trial counsel failed to object on proper grounds to Bruton violation). Moreover, counsel should not attempt to raise claims of trial counsel ineffectiveness as fundamental error. See, e.g., Jewell v. State, 877 N.E.2d 864, 873 (Ind. Ct. App. 2007) (finding claims that defense counsel failed to cross-examine and impeach, investigate, and file notice of alibi were "more appropriately addressed as ineffective assistance of counsel" and addressing them as such).

Defendants serving a sentence at the DOC are entitled to appointed counsel through the State Public Defender when litigating a petition for post-conviction relief. Although it sometimes takes the State Public Defender a couple of years or longer to investigate and litigate a case, the office does a thorough job and is much better positioned to effectively argue an ineffective assistance of counsel claim, complete with the development of a record that does not exist on direct appeal. Cf. Woods, 701 N.E.2d at 1216 ("When the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight.").

If, however, an indigent client was convicted of a misdemeanor or sentenced to a short probationary term, raising an ineffectiveness claim presents less of a concern. A claim of ineffectiveness in a contempt case could be pursued on direct appeal. See, e.g., Jones v. State, 847 N.E.2d 190 (Ind. Ct. App. 2006). Because your client will not be entitled to court-appointed counsel once they are released, this may be the only opportunity to raise the claim.

D. Strategies and Sources for Legal Research

After talking with your client and trial counsel and thoroughly reviewing the Record on Appeal, it is time to jump into your legal research. Although the amount of time necessary to research issues will vary from case to case, this is not something that should be done a few days before a brief is due. Moreover, it should involve more than cutting and pasting a legal standard from an old brief that addressed the same issue.

1. IPDC Manuals and Website

An excellent—and easy—starting point for determining if a potential claim is viable is the library of IPDC practice manuals and its website. The manuals likely to be helpful in preparing an appeal are as follows:

- Confessions Handbook: offers a useful starting point in researching state and federal claims to challenge confessions.
- Pretrial/Criminal Trial Law Manuals: offers a systematic and comprehensive analysis of pretrial and criminal trial issues.
- Evidence: includes citations to controlling and persuasive authority organized around the Indiana Rules of Evidence.
- Juvenile Delinquency: provides a comprehensive overview of procedures and precedent relevant to delinquency proceedings from their beginning to end.

- Search and Seizure Handbook: a detailed outline for litigating search and seizure issues including novel arguments from other jurisdictions.

- Sentencing: provides a thorough overview of the relevant statutes and precedent for numerous types of sentencing challenges.

2. Other Treatises

The Indiana Practice series can be particularly helpful in researching many issues. Professor Kerr's treatise on Criminal Procedure includes detailed information on both search and seizure issues and trial issues. Judge Miller's treatise on Evidence is similarly comprehensive and includes useful federal precedent. Beyond these Indiana-specific volumes, there are a number of useful national treatises that could be consulted in any law school library or on Westlaw. Professor LaFave's treatises are well-regarded and among the most often cited.

3. Cases

If you begin with the practice manuals and treatises, it is likely you will quickly get a handle on the legal landscape of an issue and find the most important cases. The treatises may not be completely updated, though, so it is important to consult Lexis or Westlaw to find any other, more recent cases. This could be done by Shepardizing (Lexis) or KeyCiting (Westlaw) a couple of the leading cases to look for recent citations. In addition, you should do one or more searches using key terms to look for recent cases.

a. Argue Federal and State Constitutional Claims Separately

In looking for cases, you should consider the constitutional basis of claims. In some instances, the Indiana Constitution offers more protection than the U.S. Constitution. See, e.g., Litchfield v. State, 824 N.E.2d 1356 (Ind. 2005) (discussing trash searches). Know the difference between the federal and state provisions; research and argue them separately. As a majority of the Indiana Supreme Court recently explained: "While the rights protections of the state and federal constitutions often run parallel, they do not always mirror one another exactly, and they derive from independent sources of authority. For these reasons, claims brought under each charter warrant separate arguments." State v. Ruiz, 123 N.E.3d 675, 678 (Ind. 2019). The opinion cited Litchfield v. State, 824 N.E.2d 356, 359–64 (Ind. 2005), and a book about the importance of state constitutional arguments: Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018). Although the failure of trial counsel to raise a state constitutional claim will usually result in waiver of the claim on appeal, Mahl v. Aaron, 809 N.E.2d 953, 958 (Ind. Ct. App. 2004), the justices are often interested in getting to the merits of the case, despite perfect preservation in the record below. After all, the "constitutionality of a statute may be raised at any stage of the proceeding," including for the first time on appeal. Morse v. State, 593 N.E.2d 194, 197 (Ind. 1992).

b. Disclose Directly Adverse Authority

You must be mindful of your ethical obligation to disclose "directly adverse" legal authority under Professional Conduct Rule 3.3(a)(2). You should not just collect the favorable cases. If a case seems directly adverse, you should include it in your research and brief. The other side and the court will likely find it. You do not want to be seen as evasive or unethical. See, e.g., In re Thonert, 733 N.E.2d 932 (Ind. 2000) (imposing public reprimand for failing to disclose adverse authority).

c. Do Not Cite Unpublished Indiana Decisions Issued Before January 1, 2023

Indiana Appellate Rule 65 was recently amended to allow counsel to cite memorandum (unpublished) decisions for persuasive value. But this applies only to memorandum decisions issued on or after January 1, 2023. Do not cite unpublished Indiana decisions issued before that date—no matter how helpful they may be to your claim. Except in the very narrow circumstances of res judicata, collateral estoppel, and law of the case, a memorandum decision issued before January 1, 2023 "**must not be cited to any court** . . . ." Ind. Appellate Rule 65(D)(2) (emphasis added). The Court of Appeals has previously "emphatically" said that it "will strike from a brief any citations to not-for-publication decisions, unless they fit an exception in Appellate Rule 65(D)." Gonzalez v. Evans, 15 N.E.3d 628, 639 n.7 (Ind. Ct. App. 2014).

4. Statutes, Court Rules, and Other Sources

Although cases frequently provide the governing law on an issue, statutes and court rules are often important sources of law as well. Effective legal research will look for any statute or court rule on point. Title 35 of the Indiana Code deals exclusively with criminal law and procedure.

Indiana has also adopted Rules of Criminal Procedure that are available online: http://www.in.gov/judiciary/rules/criminal/index.html The Indiana Jury Rules may be useful when confronted with jury-related issues on appeal: http://www.in.gov/judiciary/rules/jury/index.html

Briefs need not cite only traditional legal sources. For example, a dictionary such as a standard English dictionary can provide important support for an argument about interpreting statutory language. See, e.g., Brown v. State, 868 N.E.2d 464, 467 (Ind. 2007) ("In our evaluation of the defendant's vagueness claim, which hinges upon how ordinary people understand statutory language, we prefer to consult standard dictionaries, not a specialized legal dictionary as cited by the State.").

Counsel should be wary of citing sources like Wikipedia, however. Hardin v. Hardin, 964 N.E.2d 247, 249 n.1 (Ind. Ct. App. 2012) (concluding "we would caution against relying on Wikipedia as a source in an appellate brief, especially when there are other, more demonstrably reliable sources also available online").

E. No Anders Briefs in Indiana

Some cases are a challenge. Despite careful review of the record, lengthy discussions with your client and trial counsel, and exhaustive legal research, there may appear to be no viable issues for appeal. As discussed above, appointed appellate counsel does not have a duty to raise frivolous issues, even if a client insists. For the reasons explained below, however, counsel may not file an Anders brief in a weak case.

For forty years, federal practice has provided a procedure by which appointed counsel may withdraw if an appeal is deemed "wholly frivolous." Anders v. California, 386 U.S. 73 (1967). In Packer v. State, 777 N.E.2d 733 (Ind. Ct. App. 2002), the Indiana Court of Appeals seemed to adopt the same approach in Indiana:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must,

> however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court - not counsel - then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 737 (quoting Anders, 386 U.S. at 744).

In Mosley v. State, 908 N.E.2d 599 (Ind. 2009), the Indiana Supreme Court disapproved Packer and made clear that Anders briefs have no place in Indiana appellate practice. "[I]n any direct criminal appeal as a matter of right, counsel must submit an advocative brief in accordance with Indiana Appellate Rule 46." Id. at 602. The court explained that requiring such briefs—"no matter how frivolous counsel regards the claims to be—is quick, simpler, and places fewer demands on the appellate courts." Id. at 608. The court emphasized "in those few cases that offer no colorable argument of trial court error whatsoever, counsel may still be able to solicit a sentence revision or even a change in the law." Id. Counsel must be cautious in raising a sentencing challenge in light of McCullough v. State, 900 N.E.2d 745 (Ind. 2009), which permits the appellate court to ***increase*** sentences on appeal.

Finally, although Mosley is a criminal case, the need to file an advocative brief very likely applies to other types of cases in which counsel has been appointed, such as juvenile delinquency or termination of parental rights cases. The Supreme Court has stressed the high stakes in termination cases; "[f]ew forms of state action are both so severe and so irreversible." Santosky v. Kramer, 455 U.S. 745, 759 (1982). The Indiana Supreme Court has held that appointed counsel should not proceed with a termination appeal if the client cannot be located and has not provided clear direction, In re I.B., 933 N.E.2d 1264 (Ind. 2010), which is quite different from counsel deciding not to pursue an appeal. The right to waive an appeal belongs to the client—not to appointed counsel.

C. BRIEF OF APPELLANT

I. The Rule

Rule 46. Arrangement and Contents of Briefs

A. Appellant's Brief. The appellant's brief shall contain the following sections under separate headings and in the following order:

(1) *Table of Contents.* The table of contents shall list each section of the brief, including the headings and subheadings of each section and the page on which they begin.

(2) *Table of Authorities.* The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited. The authorities shall be listed alphabetically or numerically, as applicable.

(3) *Statement of Supreme Court Jurisdiction.* When an appeal is taken directly to the Supreme Court, the brief shall include a brief statement of the Supreme Court's jurisdiction to hear the direct appeal.

(4) *Statement of Issues.* This statement shall concisely and particularly describe each issue presented for review.

(5) *Statement of Case.* This statement shall briefly describe the nature of the case, the course of the proceedings relevant to the issues presented for review, and the disposition of these issues by the trial court or Administrative Agency. Page references to the Record on Appeal or Appendix are required in accordance with Rule 22(C).

(6) *Statement of Facts.* This statement shall describe the facts relevant to the issues presented for review but need not repeat what is in the statement of the case.

(a) The facts shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)

(b) The facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed.

(c) The statement shall be in narrative form and shall not be a witness by witness summary of the testimony.

(d) In an appeal challenging a ruling on a post-conviction relief petition, the statement may focus on facts from the post-conviction relief proceeding rather than on facts relating to the criminal conviction.

(7) *Summary of Argument.* The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(8) *Argument.* This section shall contain the appellant's contentions why the trial court or Administrative Agency committed reversible error.

(a) The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.

(b) The argument must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues. In addition, the argument must include a brief statement of the procedural and substantive facts necessary for consideration of the issues presented on appeal, including a statement of how the issues relevant to the appeal were raised and resolved by any Administrative Agency or trial court.

(c) Each argument shall have an argument heading. If substantially the same issue is raised by more than one asserted error, they may be grouped and supported by one argument.

(d) If the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C).

(e) When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto.

(9) *Conclusion.* The conclusion shall include a precise statement of the relief sought and the signature of the attorney and *pro se* party.

(10) *Word Count Certificate* (if necessary). See Rule 44(F).

(11) *Certificate of Service.* See Rule 24(D).

(12) *Appealed Judgment or Order.* Any appealed judgment or order (including any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal) shall be submitted with the brief as a separate attachment. These documents shall be contained within conventionally filed briefs.

II. Technical and Substantive Requirements

The rule is very clear about the sections that must be included in a brief. The judges and their clerks see hundreds of briefs each year and will quickly know if your brief does not conform to these guidelines. Non-compliance may result in dismissal of an appeal. Galvan v. State, 877 N.E.2d 213, 215 (Ind. Ct. App. 2006) ("Due to flagrant violations of the appellate rules, we dismiss Galvan's appeal. We have warned Galvan's attorney . . . on at least three occasions regarding his inadequate appellate advocacy."). Even short of dismissal, though, failure to follow the rules will hamper the court's ability to address your claims. Therefore, it is essential to understand and comply with the guidelines for each part of the brief.

A. Front Page and Electronic Briefs

Beginning in 2016, lawyers must file all appellate briefs electronically. Appellate Rule 43 includes specific information about the proper form of briefs, including margins, fonts, and spacing. Of particular note is Rule 43(I): "The front page of the document shall conform substantially to Form #App.R. 43-1." The first page will look like the previous cover of a conventional brief, although it will be white. The most significant change from conventional briefs is the requirement of a header: "Each page, except for the front page, of the document shall contain a header that lists the name of the party(ies) filing the document and the document name (e.g., "Brief of Appellant Acme Co." or "Appellee John Doe's Brief in Response to Petition to Transfer"). The header shall be aligned at the left margin of the document." App. R. 43(H).

B. Table of Contents/Table of Authorities

The first page inside the cover of a brief is the Table of Contents. It should list each section of the brief and the page on which that section begins. It serves as a useful resource to the judges and their clerks in attempting to find a specific part of the brief; therefore, it is essential that you make sure it is accurate.

The rule requires that the Table of Contents include "the headings and subheadings of each section." This means exactly what it says. Do not simply include that the Argument section begins on page 6 with the next entry that the conclusion on page 16. Include each argument heading and subheading that appears between these pages.

A Table of Authorities must be included next. Like the Table of Contents, the Table of Authorities serves as an important resource to the judges and their clerks. It must list "each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited." Although the rule does not specify, traditional practice is to include the following sections within the Table of Authorities: Cases, Constitutional Provisions, Statutes, Court Rules, and Other Authorities. Within each category, the sources cited should be listed alphabetically (cases) and numerically (statutes and rules). Some lawyers break the list of cases into categories, although this is not necessary and usually not advisable.

Programs such as Corel WordPerfect and Microsoft Word will generate a Table of Authorities if you mark the cases and follow the required process. If you use Westlaw, its Drafting Assistant will search your document and automatically generate a Table of Authorities for you. Manually copying and pasting the cases from the brief into the table takes more time but also allows a final, substantive check on what cases were included and some brief consideration of why.

After finishing the Table of Authorities and seemingly being done with the brief, an important near-final step is to Shepardize (Lexis) or KeyCite (Westlaw) all cases cited. You can install Westlaw's Drafting Assistant as an add-in to Microsoft Word. It will underline the citations in your document that Westlaw has flagged as having received severely negative treatment. You may have copy and pasted a paragraph from an old brief or written something a few weeks ago. The case may no longer be good law; take this final opportunity to correct any citations to overruled case law or repealed statutes.

C. Statement of Supreme Court Jurisdiction

As explained in the Introduction to this manual, nearly every appeal will be filed with the Indiana Court of Appeals. In these cases, counsel should not include a statement of jurisdiction.

The following appeals must be filed with the Indiana Supreme Court: death penalty, life without parole cases under Indiana Code section 35-50-2-9, cases in which a trial court has declared a statute unconstitutional, and cases in which the Indiana Supreme Court has granted a petition for emergency transfer under Rule 56(A). Ind. Appellate Rule 4(A)(1)(a)&(b). In these cases, counsel should include a short (one-sentence) explanation of the court's jurisdiction with a citation to appropriate authority. For example, "This Court has jurisdiction over this appeal because a sentence of life without parole was imposed under Indiana Code section 35-50-2-9. Ind. Appellate Rule 4(A)(1)(a)."

D. Statement of Issues

Word for word, the Statement of the Issues is probably the most important section of a brief. It is the first substantive section of the brief and should frame everything that follows. The rule requires this section to "concisely and particularly describe each issue presented for review." App. R. 46(A)(4).

Concision and particularity are often at odds with each other. "Did the trial court abuse its discretion in sentencing the defendant?" is concise, but it is not particular. "Did the trial court abuse its discretion in sentencing John Jones to the maximum sentence of eight years for forgery when it failed to find that this sentence would present a hardship to his family and failed to consider his stable employment as a mitigating circumstance?" is too particular—and not particularly persuasive.

1. Be Succinct—and Persuasive

You should strive for a happy medium: one sentence that captures the essence of the issue—and is persuasively written. After reading this issue statement, the judges should be thinking, if not muttering, "yes." The statement will usually have a legal component and a factual component. For example, "Is the maximum sentence of eight years inappropriate for a defendant with no criminal history who pleaded guilty to forging a $200 check to secure money to feed his family?" This question effectively marshals the facts relevant to the nature of the offense and character of the offender and appropriately includes the proper legal theory "inappropriateness" under Rule 7(B). You should rarely, if ever, cite a rule, statute, or case in the Statement of Issues.

2. Be Careful about Grouping Issues

The Statement of Issues should separately number each issue. If you are challenging a sentence on the basis that the trial court's sentencing statement was inadequate and on the basis that the resulting sentence is inappropriate, you will likely want to include two separate issue statements. Each of these is evaluated under a different legal standard, and you have two different ways to win. See generally Anglemyer v. State, 868 N.E.2d 482, 494 (Ind.), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007).

3. Be Purposeful in Ordering the Issues

The order of your issues is important. You will seldom want to raise more than a few issues on appeal. Raising several weak issues will only water down the one or two strong issues.

The court has limited time. An effective brief will begin with the strongest issue to grab the court's attention. Beginning with a weak issue and including a strong issue as number seven is unlikely to capture (or keep) the court's attention. Structuring the issues based on the chronology of a case (jury selection issue early; sentencing issue at the end) may be easier to follow, but you should avoid beginning the brief with a weaker issue or burying your best issue somewhere later in the brief.

E. Statement of the Case

The Statement of the Case must inform the court of three things: (1) the nature of the case, (2) the course of proceedings relevant to the issues presented for review, and (3) the disposition of these issues in the trial court. App. R. 46(A)(5). Some lawyers, especially in complicated appeals, will separate the Statement of the Case into these three categories—or perhaps even more categories—with headings. Whether you include headings or not, this section must inform the court of the procedural aspects of the case you are appealing. This section should be "devoted strictly to the procedural posture" of the case without any "editorializing." Wright v. State, 772 N.E.2d 449, 453 (Ind. Ct. App. 2002).

1. Include Only Information Relevant to the Issues Presented

Too often, the Statement of the Case rambles for paragraphs with all sorts of information about when charges were filed, routine motions for discovery were served, or other information that has nothing to do with the issues being appealed. This is a waste of your time to write—and a waste of the court's time to read.

Simply focus on the procedural facts relevant to the issue you are appealing. If you are appealing a sentence imposed after a guilty plea, this section will be very short. If you are appealing several issues that arise out of the denial of a motion to dismiss, motion to suppress, and other matters, this section might be quite lengthy.

2. Do Not Quote the Charges, Sentencing Statement, or Anything Else

There is seldom any reason to quote anything in the Statement of the Case. You can simply mention "the State filed an information charging Smith with five counts of battery." Nothing is accomplished by quoting any, much less all, of those charges. Even if sentencing is at issue in the appeal, there is no need to quote the trial court's sentencing statement. The rule simply requires you to include "the disposition of these issues by the trial court." In the sentencing context, this would be a simple statement that "the trial court sentenced Smith to twenty years in the Department of Correction with five years suspended to probation." The entire sentencing order must be submitted with the brief as a separate attachment, however, pursuant to Appellate Rule 46(A)(12). Each judge will be able to read it there.

3. Cite the Appendix or Transcript

The rule explicitly requires "[p]age references to the Record on Appeal or Appendix" in the form prescribed by Rule 22(C). If the information cited appears in both the Transcript and Appendix, you should cite both sources. If it appears in only one place, simply cite that source.

F. Statement of Facts

The judges will often be familiar with the law relevant to your appeal. Unless you are appealing a high-profile case that received a lot of media attention, the judges will know nothing about the facts of the case. Therefore, the Statement of Facts is often a critical part of the brief. Although it is your prime opportunity to tell ***your client's story***, this must be done with care and precision toward the goal of informing the court of the relevant facts. See Schaefer v. Kumar, 804 N.E.2d 184, 196 n.13 (Ind. Ct. App. 2004) (criticizing counsel for Statements of Facts that were "transparent attempts to discredit either the judgment or the opponent's argument and were clearly not intended to be a vehicle for informing this court.").

1. Focus on Relevant Facts

The rule instructs counsel to "describe the facts relevant to the issues presented" without repeating what's in the Statement of Case. For example, in an appeal challenging only the refusal of a jury instruction regarding the jury's right to determine the law, the crime facts are not relevant. On the other hand, the crime facts are quite relevant in challenging the appropriateness of a sentence, which considers the "nature of the offense" in addition to the defendant's character. App. R. 7(B).

A good guide in deciding which facts to include is the Argument section. If you rely on facts to support your argument, they should be in the Statement of Facts. See generally Black v. State, 829 N.E.2d 607, 609 n.1 (Ind. Ct. App. 2005) (observing that "information regarding events during trial relating to the issue" of improper limitation on voir dire questions "should have been included" and thanking State for providing the information). If certain facts have no bearing on the Argument, they should not be in the Statement of Facts unless you have a good reason to include them, as discussed below.

2. Tell an Interesting Story

Ideally, the Statement of Facts presents an interesting and compelling version of events favorable to your client. This is not always possible, such as when the Transcript includes few favorable things to include. Regardless of how badly the Transcript might read, this section should always look different from the State's Statement of Facts. Although you must be accurate and address unfavorable facts, this section should give the best spin possible to the facts.

Presenting a list of numbered facts will seldom be interesting or engaging. The rule requires a statement "in narrative form," and the court of appeals has made clear that numbered facts do not satisfy this rule. Armstrong v. Keene, 861 N.E.2d 1198, 1200 n.1 (Ind. Ct. App. 2007).

3. Do Not Provide a Witness-by-Witness Summary

A corollary to telling an interesting story is not boring, annoying, or confusing your reader with a witness-by-witness summary of the trial. The rule explicitly forbids this—and with good reason. A witness-by-witness summary is not engaging and will almost always include superfluous information. The court of appeals has chastised counsel on many occasions for violating this rule. See, e.g., Johnson v. State, 831 N.E.2d 163, 166 n.2 (Ind. Ct. App. 2005) (noting it had reminded counsel "on numerous prior occasions" that witness-by-witness summary does not satisfy rule, which instead requires "a coherent story").

4. Be Accurate and Cognizant of the Standard of Review

Rule 3.3(a) of the Rules of Professional Conduct forbid counsel from making "a false statement of fact." It should go without saying that the Statement of Facts must not include any false statements. Beyond that, it should not include any incomplete or misleading statements of fact. There is an important difference between telling a favorable story for your client and telling a misleading one that omits critical, adverse facts. Just as counsel must disclose adverse authority under Rule 3.3, counsel should also include unfavorable facts relevant to the issues raised. Failing to do so will undermine your credibility.

Appellate Rule 46(A)(6)(b) specifically requires that the facts "be stated in accordance with the standard of review appropriate to the judgment or order being appealed." For example, in reviewing a claim of sufficiency of the evidence, an appellate court "considers only the probative evidence and reasonable inferences supporting the judgment to assess whether a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." Brown v. State, 868 N.E.2d 464, 470 (Ind. 2007). This does not mean you cannot include favorable facts or put a positive spin on them. See generally Srivastava v. Indianapolis Hebrew Congregation, Inc., 779 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2002) (observing that rule's language suggests "the door is open to providing facts which are not favorable to the judgment, but are necessary to decide the case based on the standard of review"). It simply means that you must include those facts most favorable to the judgment; you cannot simply pick out the best ones for your client. Defendants do sometimes prevail under this standard, as the defendant did in Brown.

5. Do not be Argumentative

The Statement of Facts is just that—a statement of ***facts***. It is not a place to make an argument. See generally Ramsey v. Review Bd., 789 N.E.2d 486, 488 (Ind. Ct. App. 2003) (observing that "[t]he statement of facts must also be devoid of argument" and finding issues presented on appeal waived because of numerous violations of appellate rules); Kirk v. Kirk, 759 N.E.2d 265, 266 n.1 (Ind. Ct. App. 2001) (reminding counsel of Professional Conduct Rule 3.5, comment to which states "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence and theatrics.").

Avoid drawing inferences from the facts or characterizing them in this section. There are more subtle ways to engender empathy for your client's position by telling a persuasive story.

6. Cite the Transcript or Appendix

Rule 46(A)(6)(a) specifically requires that "facts shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)." Each sentence of the section should end with a citation to the Record on Appeal to comply with this rule and to allow the court to verify your factual support easily. If every fact is supported by a citation from the Record on Appeal, there is no chance that facts outside the record will be included.

The court of appeals has stricken the Statement of Facts in a brief that failed to include citations to the Transcript or Appendix and included irrelevant facts. See, e.g., Carter-McMahon v. McMahon, 815 N.E.2d 170, 173 n.1 (Ind. Ct. App. 2004).

7. Edit for Clarity and Persuasiveness

After crafting an interesting but fair and comprehensive version of your client's story, it is important to carefully edit and fine-tune it. By this point, you are intimately familiar with the facts, but your goal is to convey the facts to the court, which has not read the Transcript. For that reason, it is often useful to have someone else read this section—indeed, your entire brief—to see if it makes sense and is compelling. If the facts are incomplete or confusing, many judges will put down your brief and look to the State's brief. Finally, carefully consider the placement of facts. The primary point of emphasis is the beginning of a section (or a paragraph) and the end. Try to begin and end with favorable facts. Bury the negative ones in the middle.

G. Summary of the Argument

Many judges have stated publicly that the Summary of the Argument is the most important section of the brief. They read it first to get an overview of the case. If the section is a "succinct, clear, and accurate statement of the arguments made in the body of the brief," as the rule requires, the summary of the argument can go a long way in advancing your claims.

1. Provide the Big Picture with Specific Reasons

Your argument may span ten, twenty, or more pages. The summary should not exceed one or two pages in most cases. Simply answer the questions, "What is this case about and why should my client win?" Include the most important and specific reasons in a paragraph or two for each issue.

2. Check for Flow and Organization

The summary of the argument should be easily readable as an independent section. Many judges will start with it. It should not be disjointed or confusing.

The summary should also track the order of the argument section. If it does not, one or the other should be revised.

3. Do More than Repeat Argument Headings

The rule explicitly states that the Summary of the Argument "should not be a mere repetition of the argument headings." This does not mean that a topic sentence in the summary may not sound a lot like one of your argument headings. Rather, it means that the section must do more than merely repeat those headings.

4. Omit Citations to Authority

Although not explicitly addressed in the rule, common practice is to omit citations to cases, statutes, and other authorities in the summary of the argument. If a case is particularly significant and well-known, e.g., Batson or Miranda, counsel may mention it without a full citation. Trying to delve into the nuances of particular cases or statutes in the summary of the argument is not advisable. It is unlikely to lead to a succinct or clear summary of the argument.

H. Argument

The Argument section will invariably be the longest and most time-consuming section to write. Part B of this section provides an overview of how you might approach issue selection and research. All that work must eventually make it onto paper in the Argument section, which should be divided into one or more argument headings for each issue or sub-issue. Beyond that, Rule 46(A)(8) provides a few specifics about what must be included.

1. Cogent Reasoning with Citations

Each argument must be "supported by cogent reasoning." This includes citations to supporting authorities (cases, statutes, rules, etc.) and the relevant pages of the Appendix or Transcript.

a. Constitutional claims: federal and state

If a claim is grounded in the federal constitution, be sure to cite the relevant sections of the constitution along with case law that has interpreted that provision. This is necessary to preserve the claim for possible review later in federal court through a habeas corpus petition. Simply citing the constitutional provision is not a cogent argument. Not explaining how the cases apply to your set of facts similarly fails to meet the requirement of a cogent argument.

As explained in Part B, it is important to separate federal and state constitutional claims and argue each separately. Again, simply citing a state constitutional provision is not sufficient. Failing to argue how the state provision differs from the federal provision will likely result in waiver of the claim.

b. Disclose and Respond to Directly Adverse Authority

Be mindful of your ethical obligation to disclose "directly adverse" legal authority under Professional Conduct Rule 3.3(a)(2). You should not cite only the favorable cases. If a case seems directly adverse, you should include it in your brief. The other side and the court will likely find it. This will be the best, and only, opportunity to explain why the case does not doom your claim.

c. Beware of Footnotes

Arguments should be made in text, not in footnotes. See, e.g., 21st Amendment, Inc. v. Indiana Alcohol & Tobacco Commission, 84 N.E.3d 691, 696 n.2 (Ind. Ct. App. 2017). Footnotes are appropriate to explain something tangential to the issue raised but are not appropriate to make arguments. Moreover, because most judges read briefs on a tablet or laptop, footnotes take the reader away from the important body of your brief, which could mean the reader returns in the text in a place that misses an important part of your argument. This is especially concerning when a footnote spills over to a second page.

2. Standard of Review and Key Facts, Including Their Resolution Below

a. Standard of Review

The argument for each issue must include "a concise statement of the applicable standard of review." This should not be viewed as a mechanical requirement satisfied by a quick search and parrots the standard used in the first case that pops up. Careful thought should be given to what the appropriate standard of review should be, and counsel should argue for that standard with appropriate citation to authority.

In essence the standard of review refers to the level of deference to the lower court's ruling; how wrong must the trial court be to warrant reversal? On factual issues, appellate courts give a great deal of deference; on legal claims, the appellate court gives little or no deference. Not surprisingly, "sometimes standards of review decide cases." Robinson v. State, 5 N.E.3d 362, 363 (Ind. 2014).

For example, de novo review is appropriate in reviewing determinations of probable cause or reasonable suspicion. Ornelas v. United States, 517 U.S. 690 (1996). Deferential review leads to varied results, but independent review is necessary to control and clarify legal principles. De novo review in such cases provides law enforcement officers with a clear set of rules to be applied in the future. Id.

Although most evidentiary rulings involve factual matters in which discretion is generally afforded to the trial court, a ruling may be reviewed "de novo because it turns on a misunderstanding of a rule of evidence, specifically the hearsay rule." Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998); see also Powell v. State, 714 N.E.2d 624 (Ind. 1999) (holding that a question may be hearsay).

Finally, the standard of review in sentencing claims varies based on the type of challenge brought. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence -- including a finding of aggravating and mitigating factors if any -- but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

However, a challenge to the appropriateness of the sentence is reviewed under a less deferential, almost *de novo* standard. Id. at 491 ("Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize[] independent appellate review and revision of a sentence imposed by the trial court"); see also Cunningham v. State, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984) ("We are in as good a position as the trial court to make these determinations based on the record before us in a proper case. All the material available to the trial court is equally available to us on appeal.").

b. Resolution of Claims in the Trial Court

In addition to the standard of review, the Argument for each issue must include the key "procedural and substantive facts necessary for consideration of the issues presented on appeal, including a statement of how the issues . . . were raised and resolved by [the] . . . trial court." App. R. 46(A)(8)(b). Although important, this information can be dull and should usually not be the opening salvo of each issue. But be sure to include the information somewhere in the Argument. If an issue was not raised in the trial court, it might be necessary to argue it as fundamental error, as explained in Part B. If the issue was raised below and the State or trial court said something that bears particularly poorly

on their position, consider including that information. In some cases, a judge's erroneous explanation can lead to reversal. See generally Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019) ("Had the trial court not made the statement at sentencing . . . we would be in a different position.").

3. Argument Headings

Each issue raised must have its own argument heading a/k/a point heading. Headings provide an important visual cue to your readers, allowing them to break the lengthy argument into understandable pieces. In addition, the headings should be persuasive, advancing your position in a single sentence.

a. Spacing and Typeface

Argument headings should be single-spaced and set apart somehow from the rest of the text. Bold is preferable to ALL CAPS, which research shows is the most difficult to read (and many view AS YELLING AT THEM). For ease of reading, you should also indent and align your text on the left margin rather than centering it.

b. Complete Sentences

Many lawyers will make their argument headings an affirmative statement of the Issues Presented. For example, if the Issue Presented is "Whether the criminal confinement statute is unconstitutionally vague as applied to a Defendant who merely lied about a radio contest, which led individuals to leave their workplace to go to his home," the argument heading could read "The criminal confinement statute is unconstitutionally vague as applied to a Defendant who merely lied about a radio contest, which led individuals to leave their workplace to go to his home." Regardless of the language used, an argument heading should be a complete sentence.

c. Sub-Headings

Finally, if the argument for a particular issue is several pages long or has separate components, consider including sub-point headings. These will help guide the reader through the argument by breaking it into its most important pieces. Full sentences are less important here.

4. Citations for Evidentiary Rulings

Rule 46(A)(8)(d) makes special mention of evidentiary rulings, requiring counsel to include a citation "to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C)." The rule does not require, as do jury instructions in (e) below, verbatim quotations of the objections made. Nevertheless, it is important to cite the precise pages where the objections were made and ruled upon. A pretrial motion is usually not sufficient to preserve an error; therefore, it is important to cite the point(s) at which the objection was made at trial.

Finally, if counsel is raising a claim that the trial court erroneously excluded evidence, citation should be made to the offer of proof in the trial court. See generally State v. Wilson, 836 N.E.2d 407, 409 (Ind. 2005) ("The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling.").

5. Verbatim Quotations for Instructional Errors

Unlike subsection (d), which does not require verbatim quotations of evidentiary objections, subsection (e) explicitly requires counsel challenging a jury instruction to quote the instruction "verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." App. R. 46(A)(8)(e). Failure to comply with this requirement may lead to waiver of the claimed error. See, e.g., Hall v. State, 769 N.E.2d 250, 254 (Ind. Ct. App. 2002) (finding an instructional error waived based on non-compliance with Rule 46(A)(8), citing both subsection (a) and (e)); cf. Snell v. State, 866 N.E.2d 392, 395 n.1 (Ind. Ct. App. 2007) (observing that the appellant had failed to include the language of tendered instructions in her brief and failed to cite pages of Appendix where the instructions could be found, but observing that the State had cited the relevant pages—and not applying waiver).

Compliance with this rule is easy, and non-compliance is risky. If you fail to comply with the rule and the State argues waiver in its brief, the best course of action would be to file an amended brief that includes the verbatim instruction and objections. See Section IV.G, infra.

I. Conclusion & Signature

The conclusion will almost always be the shortest section of your brief. It should also be the easiest section to write. In a single sentence provide a "precise statement of the relief sought." For example, "For the foregoing reason, John Smith respectfully requests this Court vacate his conviction for burglary." If the error is one that requires a new trial, "For the foregoing reasons, John Smith respectfully requests this Court reverse his burglary conviction and remand the case for a new trial." If you are asking for something else, be precise—and be sure it is the proper remedy for the type of error alleged. "For the foregoing reasons, John Smith respectfully requests this Court revise his sentence for burglary to the advisory term of ten years."

Be specific. Do ***not*** simply ask the court to "reverse the trial court" or "for all proper and just relief in the premises," whatever that may mean. Moreover, do not include a lengthy summary of your arguments.

You must also include "the signature of the attorney." With electronically filed documents, Appellate Rule 68(H) permits either: "(a) a graphic image of a handwritten signature, including an actual signature on a scanned document; or (b) the indicator "/s/" followed by the person's name."

Finally, as with all filed documents, include a certificate of service as required by Appellate Rule 24(D).

J. Appealed Order

You must attach some sort of document from the Appendix when you file your brief, as required by Rule 46(A)(12). After uploading your brief, the field below will allow upload of a separate attachment. Once filed, each judge will be able to review both the brief and attachment, which will also be available to the public unless the document is confidential.

If you do not attach something, the staff in the clerk's office will refuse to accept the filing.

1. Non-Sentencing Claims

If you are challenging the denial of your request to suppress evidence, attach the trial court's written order denying your motion (if there is one). Sometimes, however, it can be a challenge to find something to attach. You may be raising a sufficiency challenge; the trial court did not address this in any sort of "written opinion, memorandum of decision or findings of fact and conclusions . . . ." In such a case, you could simply append the abstract of judgment. You must attach something.

2. Sentencing Claims

In cases in which you are challenging a sentence, you should include the written sentencing order. If your claim on appeal revolves around improprieties in the sentencing statement, quotations from the transcript may be more helpful to the judges—and potentially your client. Indiana appellate courts are not limited to examining the written sentencing statement but may also examine the trial court's oral sentencing statement. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) ("The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.").

3. Multiple Claims

Finally, if you are raising multiple claims, you will likely have more than one document to attach. Appellate Rule 46(A)(12) does not limit you to a single attachment. If the judge entered separate orders addressing two claims you have raised on appeal, upload both documents as attachments to your brief.

D. BRIEF OF APPELLEE

I. The Rule

Rule 46. Arrangement and Contents of Briefs

B. Appellee's Brief. The Appellee's Brief shall conform to Section A of this Rule, except as follows:

(1) *Agreement with Appellant's Statements.* The appellee's brief may omit the statement of Supreme Court jurisdiction, the statement of issues, the statement of the case, and the statement of facts if the appellee agrees with the statements in the appellant's brief. If any of these statements is omitted, the brief shall state that the appellee agrees with the appellant's statements.

(2) *Argument.* The argument shall address the contentions raised in the appellant's argument.

(3) *Rule 46(A)(12).* Items listed in Rule 46(A)(12) may be omitted.

II. Practical Considerations

If you find yourself in the enviable position of prevailing in the trial court, the State may appeal. The single most important piece of advice: be sure to file a response. If you are trial counsel and do not feel competent to litigate the appeal, make sure counsel is appointed. Failing to file an appellee's brief will allow the court to reverse the trial court upon a mere showing of *prima facie* error. Newman v. State, 719 N.E.2d 832, 838 (Ind. Ct. App. 1999).

A. Agreement with the Appellant's Statements

The appellate rules specifically allow for the omission of several sections of an appellee's brief if the appellee includes a statement that it agrees with or adopts the Appellant's statements in that section of the brief. This is often done with the Statement of the Case. If the State has accurately summarized the relevant procedural aspects of the case, save yourself and the court some time by simply agreeing with its Statement of the Case.

An appellee should seldom, if ever, agree with the appellant's Statement of Issues or Statement of Facts. As explained in Part C above, considerable time and energy should be spent crafting these sections to make them subtly persuasive. If the State has done its job, you do not want to agree with sections that seek to persuade the court about the State's view of the issues or facts. Rather, you should carefully craft a Statement of Issues that address the same issues but is written in a way persuasive to your client and a Statement of Facts that includes the legally significant facts and any helpful emotional facts crafted in a manner consistent with the standard of review and persuasive to your client's point of view.

Finally, be sure not to regurgitate the trial court's findings of facts, even if they are particularly favorable. Doing so fails to satisfy the requirement that the facts be in "narrative form." GMC v. Sheets, 818 N.E.2d 49, 51 n.1 (Ind. Ct. App. 2004).

B. Argument

Your argument must address the issues raised by the State, even if you think some of them are silly or not particularly persuasive. If an argument is not supported by cogent reasoning, you may argue that point and cite authority urging the court to find the issue waived. The court of appeals is fairly generous in finding arguments to meet this standard, however, so rely on this approach sparingly—and always respond to the merits of the argument as well.

Finally, adopt an affirmative tone rather than being defensive. It is easy to quote the State's argument and then respond to it, but this is seldom effective. Quoting the State's argument presents it yet again to the court—in the State's language. Avoid "the State argues [quoting the argument]," and instead simply argue the point you'd like to make. Adopt an affirmative tone in responding to the State's argument without again making it.

C. No Appealed Order

Rule 46(B)(3) makes clear that an appellee does not need to append the appealed order. If the State has failed to attach the order as required under Rule 46(A)(12), however, you may and should append the order(s) for the court's convenience.

E. REPLY BRIEF OF APPELLANT/CROSS-APPEALS

I. The Rule

Rule 46. Arrangement and Contents of Briefs

C. Appellant's Reply Brief. The appellant may file a reply brief responding to the appellee's argument. No new issues shall be raised in the reply brief. The reply brief shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service. See Rule 24(D).

D. Cross-Appeals.

(1) *Designation of Parties in Cross-Appeals.* When both parties have filed a Notice of Appeal, the plaintiff in the trial court or Administrative Agency shall be deemed the appellant for the purpose of this Rule, unless the parties otherwise agree or the court otherwise orders. When only one party has filed a Notice of Appeal, that party is the appellant, even if another party raises issues on cross-appeal.

(2) *Appellee's Brief.* The Appellee's Brief shall contain any contentions the appellee raises on cross-appeal as to why the trial court or Administrative Agency committed reversible error.

(3) *Appellant's Reply Brief.* The Appellant's Reply Brief shall address the arguments raised on cross-appeal.

(4) *Cross-Appellant's Reply Brief.* The Cross-Appellant's Reply Brief may only respond to that part of the appellant's reply brief addressing the appellee's cross-appeal.

(5) *Scope of Reply Briefs.* No new issues shall be raised in a reply brief. A reply brief under this section shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service. See Rule 24(D).

II. Practical Considerations

When you receive the State's brief in an appeal, you should review it carefully and decide whether to file a reply. Just as the State gets to go both first and last in closing arguments at trial, the Appellant bears the burden of proof on appeal and also gets to go first and last. The State seldom waives rebuttal argument at trial; appellants should seldom waive the opportunity to file a reply brief.

A. Remember Your Audience

Counsel will not know at the briefing stage which Court of Appeals' judges will be assigned to decide any given case. They may all be long-time criminal practitioners or trial judges that grasp the nuances of your case, or they may be civil lawyers who have never tried a criminal case and have little understanding of the particulars of the issues raised. In any event, it is likely that a law clerk will do most of the drafting of the opinion. The law clerk could be one of the career clerks that is intimately familiar with the issues and diligent in reviewing the record, or the law clerk may have just graduated

from law school and not seen or read a criminal case since their first year of law school. Therefore, it is almost always best to file a reply if the State raises any point that is disputable.

B. Purpose: Respond--Not Raise New Issues

The express language of the rule provides: "No new issues may be raised in the reply brief." App. R. 46(C). Case law is in accord. Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005). If you failed to raise a significant issue in your initial brief, such as one premised on a newly issued case, the proper remedy is to seek leave to amend your brief under Rule 47.

C. Keep it Relatively Short and Specific

The State will argue many things. Some of them are crucial points and some are far less important. Do not respond point-by-point to every paragraph of the State's brief. Rather, address the most significant points. For example, if the State argues that a claim is waived, be sure to address it. Failure to file a reply brief could lead the Court of Appeals to address the issue under the prima facie error standard, which will make it considerably easier for the State to prevail. See Buchanan v. State, 956 N.E.2d 124, 127 (Ind. Ct. App. 2011). Moreover, if the State argues that a specific case or statute definitely resolves the issue, argue why that is not correct. Be specific and cite authority. Finally, depending on the structure and arguments in the State's brief, you may want to change the point headings from your original brief to tailor them to the arguments being raised in the reply brief, especially when the State raises something not mentioned in your brief, such as waiver of a claim that was not raised in the trial court.

D. Be Sure to Respond to a Cross-Appeal

If the State raises one or more issues on cross-appeal in its brief, it is imperative to file a reply brief that responds to the cross-appeal. The failure to do so allows the cross-appellant to prevail upon a mere showing of *prima facie* error. Lewis v. Marion County Office of Family & Children, 814 N.E.2d 1022, 1029 (Ind. Ct. App. 2004).

F. ADDENDUM TO BRIEF

I. The Rule

Rule 46. Arrangement and Contents of Briefs

H. Addendum to Brief. Any party or any entity granted *amicus curiae* status may elect to file a separate Addendum to Brief. An Addendum to Brief is not required and is not recommended in most cases. An Addendum to Brief is a highly selective compilation of materials filed with a party's brief at the option of the submitting party. If an Addendum to Brief is submitted, it must be filed and served at the time of the filing and service of the brief it accompanies. An Addendum to Brief may include, for example, copies of key documents from the Clerk's Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony from the Transcript, or full text copies of statutes, rules, regulations, etc. that would be helpful to the Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief. An Addendum to Brief may not exceed fifty (50) pages in length and should ordinarily be much shorter in length. The Addendum to Brief shall have a front page that is styled similarly to the brief it accompanies (see Form App. 43-1), except that it shall be clearly identified as an Addendum to Brief, and the first document in the Addendum to Brief shall be a table of contents. An Addendum to Brief may not contain argument. All pages of the Addendum to Brief, including the front page (see Rule 43(I)) and table of contents, shall be consecutively numbered at the bottom beginning with numeral one; however, the front page, table of contents, and certificate of service shall not be included in the fifty (50) page length limit of this rule.

II. Technical and Substantive Requirements

Before electronic filing, an Addendum was potentially a significant tool in some appeals. Although each judge receives a copy of your brief, it was unlikely in a paper world that most judges would consult the Transcript or Appendix in most cases. Therefore, the Addendum would allow counsel to highlight key documents (beyond the appealed order that is an attachment to your brief under Rule 46(A)(12)) or other exhibits that you believed each judge should see.

In the e-filing era, however, judges will read your brief on a screen and have relatively quick and easy access (with a few clicks) to the Appendix and Transcript. In a rare case with an especially important document, counsel might want to file an Addendum for even quicker and easier access. But in most cases, as the text of the rule makes clear, an Addendum is “not recommended.”

A. Deadlines

An Addendum must be filed at the same time as the brief it is accompanies.

B. Front Page

An Addendum must include a front page similar to the brief it supports but be titled “Addendum to Appellant’s Brief.”

C. Documents Included & Page Numbering

The Addendum cannot exceed fifty (50) pages; it should be much shorter. Include only essential documents from the Appendix or excerpts of the Transcript.

1. Include a Table of Contents

The first page inside the cover of the Addendum must be a table of contents that lists all the documents that follow.

2. Number Pages

You should number the pages consecutively, "including the front page (see Rule 43(I)) and table of contents."

3. Include a Verification and Certificate of Service

The Addendum must be served on opposing counsel just as the brief it supports. The last page should therefore include a verification similar to that for an Appendix and a certificate of service similar to that included at the end of your brief.

D. Appropriate Cases

An Addendum should be used selectively in those cases where it is important that its contents are viewed by all the judges in the case. If the material you seek to include is already in your brief (such as a jury instruction, which must be quoted verbatim as explained above), do not file an Addendum. If, however, a certain exhibit is crucial to your case, an Addendum is the appropriate means to allow each judge to view it. If your brief references an ordinance or regulation that may be judicially noticed but is not easily available to the court, consider including it in an Addendum. See, e.g., City of Crown Point v. Misty Woods Props., LLC, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (denying a motion to strike an Addendum that included an ordinance that was not part of the Clerk's Record).

Instead of an Addendum, counsel might consider embedding an exhibit, such as a picture, within the body of the brief. Although Appellate Rule 46 does not explicitly address the issue, many lawyers have included exhibits within a brief. See, e.g, T.H. v. State, 86 N.E.3d 420, 423 (Ind. Ct. App. 2017) (embedding a highly contested estimate for vehicle repairs).

Addenda may sometimes be appropriate when filing a Reply Brief or Petition for Rehearing. They can effectively point out an error in what the Attorney General is arguing, or the court of appeals found. For example, if you and the State disagree about the meaning of crucial testimony or procedures in the trial court, an Addendum is an effective way to allow the judges to read it for themselves. For example, in a juvenile delinquency appeal, the Appellant argued that the juvenile court erred by incorporating all the testimony from a child hearsay hearing into the denial hearing. After incorporation, the State simply rested. The Attorney General responded that there was no separate child hearsay hearing but rather everything that had occurred was part of the denial hearing. To support that incorporation had occurred, the Appellant prepared a short Addendum that included portion of the transcript where the prosecutor referred to the hearing as a "child hearsay hearing" as

well as the State's motion requesting such a hearing. The court of appeals agreed with the Appellant's view. L.H. v. State, 878 N.E.2d 425, 429 n.3 (Ind. Ct. App. 2007).

G. AMENDED BRIEFS

I. The Rule

Rule 47. Amendment of Briefs and Petitions

On motion for good cause, the Court may grant leave for a party to file an amended brief or Petition. The motion shall describe the nature of and reason for the amended brief or Petition. The movant shall tender with the motion the amended brief or Petition titled as such on the front page. Except as the Court otherwise provides, the filing of an amended brief or Petition has no effect on any filing deadlines.

II. Technical and Substantive Requirements

The court of appeals is generally quite generous in allowing counsel to file an amended brief, generally granting 90% or more of requests filed each year. The rule requires "good cause," and counsel must file a motion explaining why "good cause" exists to allow the amended brief.

The rule should not be casually invoked as a de facto extension of time because counsel was careless in putting together the brief. If there was a problem, however, it is better to try to cure it with an amended brief than suffer later when an opinion is issued.

The (now former) Indiana Supreme Court administrator has written that a motion to file an amended brief should include at least three basic pieces of information: "(1) a description of the desired amendment(s); (2) some indication of why the amendment(s) are necessary, and (3) information showing why the movant failed to place the desired amendment(s) in the original" document. Kevin S. Smith, Extensions of Time and Motions to Amend, The Appellate Advocate 3 (Spring 2006).

A. Appropriate Cases

Counsel may consider seeking leave to file an amended brief in two general sets of circumstances.

1. Counsel Messed Up

The client should not have to pay for the sins of the lawyer. If you messed something up and learn of the error before an opinion is issued, an amended brief is the most effective way to remedy the error. Some examples include:

- Filed the wrong (not-quite-final) version of the brief.
- Discovered something wrong with the brief after filing.
- Failed to quote an instruction, and the State has argued waiver.
- Raised a weak ineffective assistance of counsel claim and now realize this will burn the client's only ticket to post-conviction relief.

2. The Law Changed after Filing the Brief

If the law changed or a significant new case was issued after you filed your original brief, an amended brief is a better option than simply filing a Notice of Additional Authority. As explained in Part H below, additional authority may only bolster an argument already raised in a brief. A significant new

case may create an entirely new or different issue, which must be included in your brief or an amended brief.

B. Tender an Amended Brief with the Motion

The rule requires the moving party to "tender with the motion the amended brief or Petition titled as such on the front page."

H. ADDITIONAL AUTHORITIES

I. The Rule

Rule 48. Additional Authorities

When pertinent and significant authorities come to the attention of a party after the party's brief or Petition has been filed, or after oral argument but before decision, a party may promptly file with the Clerk a notice of those authorities setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, with a parenthetical or a single sentence explaining the authority.

II. Technical and Substantive Requirements

Diligent counsel will keep abreast of new case developments after the filing of a brief, including the weeks or months during which a case is fully briefed and pending a decision.

A. When Appropriate: Bolstering a Claim, not Raising a New Claim

As explained above, an amended brief is the appropriate vehicle to raise an issue that was not raised in your initial brief to the court of appeals. A Notice of Additional Authority simply supplements an argument with an additional case or other authority that supports an argument already briefed. Do ***not*** attempt to raise a new issue through a Notice of Additional Authority.

In Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005), the Court of Appeals made clear that Rule 48 cannot be used to

> allow a party who failed to present an issue in his appellant's brief to bypass the general rule that un-raised issues may not be presented for the first time in a reply brief by filing a citation to additional authority. Instead, as we read the Rule, where a party has properly presented an issue, he may supplement his brief by providing citations to additional authority to support the argument previously raised.

B. Timing

Rule 48 places no limitation on the timing of additional authority. Common sense, professional courtesy, and effective advocacy do. Ideally, counsel should file additional authority shortly after the new authority is issued by the court or discovered by counsel. Diligent appellate counsel will check the websites of the Indiana Supreme Court and Court of Appeals daily (or at least weekly) for new published opinions that may be relevant to pending cases.

1. Before Oral Argument

After a case is set for oral argument, counsel will often discover one or more cases that are relevant to the issue(s) to be discussed at oral argument. Counsel should alert the court to these authorities before the argument by filing a Notice of Additional Authority. This should be done at least a week in advance to give the judges plenty of time to consider the new authorities as they prepare for oral argument.

A Notice of Additional Authority filed the day before an oral argument or, worse yet, the morning of oral argument may not reach the judges before the argument. If it does, they may not have the time or inclination to review the authorities and may be understandably frustrated with counsel for such a late filing.

At the January 30, 2009, oral argument in A.B. v. State, 49A02-0806-JV-490, a Deputy Attorney General served Appellant's counsel immediately before the argument. According to the clerk's docket, the notice had been Rotunda filed the previous evening. Judge Bradford, a member of that panel, chastised counsel because Indiana courts do not practice law by ambush. Although an old case may not come to counsel's attention until after the brief is filed, there is seldom an excuse for bringing it to the court's (and opposing counsel's) attention any less than one week before oral argument.

2. After Oral Argument

Counsel should be cautious in filing additional authority after oral argument has been held. If a significant new case was issued or statute amended after oral argument, filing additional authority is entirely appropriate. However, the court of appeals has granted a motion to strike when counsel attempted to use Rule 48 as a surrebuttal to arguments raised at oral argument, citing cases that were issued well before the brief was filed and could have been included in the brief. Raess v. Doescher, 857 N.E.2d 439 (Ind. Ct. App. 2006) (published order).

C. Limited to One-Sentence

A Notice of Additional Authority cannot drone on and on about the importance of a case or other cited authority. Rather, after citing the authority, Rule 48 specifically limits the notice to "a parenthetical or single sentence explaining the authority." There are certainly creative ways to use punctuation and other devices to craft a lengthy sentence, but it should still be ***one*** sentence.

D. Explain Where it Fits

A Notice of Additional Authority must include "a reference either to the page of the brief or to a point argued orally to which the citations pertain." Your brief might be twenty pages or longer. It is important to let the court know precisely where and how the additional authority fits.

E. Supplemental Brief

Indiana used to allow advocates to file "Notes on Oral Argument" for the limited purpose of answering questions from oral argument. Kent Zepick, Notes on Oral Argument (citing Wiltrout, *Indiana Practice*, Sec. 2738 (1967)). In 2012, the Indiana Supreme Court made clear such a filing "without leave of court" is no longer allowed. Reed v. Reid, 969 N.E.2d 589 (Ind. 2012). More recently, after lengthy filings under a number of different captions, the Indiana Supreme Court issued an order to "amplify *Reed*'s admonition: After transfer briefing is closed, further arguments on the merits—by any name—may be filed only by leave of this Court or in the limited form Rule 48 authorizes for notices of additional authority." Care Grp. Heart Hosp., LLC v. Sawyer, 93 N.E.3d 743, 745 (Ind. 2018).

In a rare case where a truly unexpected or significant issue arises during oral argument, counsel may request permission of the court to file a post-argument submission. If the court appears amenable during the oral argument, counsel should promptly file a Motion for Leave to File Post-Argument

Submission and tender the proposed submission with the request for leave. Examples from Purvi Patel v. State, 71A04-1504-CR-166 are available on the IPDC website.

Section V
After the Appellate Opinion is Issued
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Section V

After the Appellate Opinion is Issued

Prompt action is required as soon as you receive an opinion from the Indiana Court of Appeals. You should read the opinion carefully and make a tentative decision about the best course of further action. Whatever the decision, you must promptly advise your client of the decision. Lawyers have been disciplined for failing to notify clients promptly of appellate decisions, especially when it precludes the client from being able to seek further review. In re Roberts, 842 N.E.2d 1293 (Ind. 2006).

There are three primary options after receiving an adverse opinion from the court of appeals:

- Seek rehearing.
- Seek transfer.
- Do not seek further review, while providing the client with timely and appropriate information about his or her options to do so.

While deciding the appropriate course of action in a case involving an unpublished decision from the court of appeals, you should also consider whether to file a motion to publish. Keep in mind the varying deadlines. A motion to publish must be filed within fifteen days; rehearing is due within thirty days; and a petition to transfer is due in forty-five days (unless rehearing was sought, in which case the petition is due in thirty days).

Petitions for Rehearing/Petitions for Transfer

Petitions for Rehearing and Petitions to Transfer are explained separately in the sections that follow. Each has a very different purpose, and careful thought should be given to which should be pursued. As explained in more detail in those sections, rehearing is usually appropriate when the court of appeals' opinion misstates the record in a significant way or when the court of appeals has made a mistake that it is likely to fix. It is not a place to argue trivial points or to rehash an argument that was squarely addressed. Transfer is appropriate to raise issues of broad statewide importance that warrant the Indiana Supreme Court's intervention. Filing a petition to transfer is also necessary to preserve federal constitutional claims that might later be pursued in a petition for habeas corpus.

In cases in which a colorable claim for rehearing or transfer is presented, counsel should file the appropriate petition—even if the county will not reimburse the costs of the filing. Counsel may seek the assistance of the Public Defender Council in researching the claim or may seek its assistance in finding an attorney to pursue transfer or assist in the drafting of the petition. Joel Schumm, who runs the Appellate Clinic at Indiana University Robert H. McKinney School of Law (Indianapolis), may also be able to help.

A petition for rehearing is not a prerequisite to a petition to transfer. Each serves a unique purpose. Therefore, when an opinion offers a partial victory to each side, one side might pursue

rehearing while the other pursues transfer. In such situations, the briefing deadlines must be followed for each petition. Ind. Appellate Rule 55. As a practical matter, however, the Indiana Supreme Court will not review the transfer filings until after the court of appeals has resolved the rehearing issues.

No Further Review

Categorically refusing to file transfer or rehearing in all cases is simply not appropriate. See generally ABA Criminal Justice Prosecution Function and Defense Function Standard 4-8.3. Adverse decisions not only affect a client's liberty but also may affect many defendants in the future who could be harmed by the application of the precedent to their cases.

If a case presents no grounds for further review, it is imperative to communicate promptly with your client, advising him or her of their right to seek rehearing and/or transfer (either pro se or by retaining another lawyer) as well as the strict deadlines for seeking further review. In October of 2007, the clerk's office adopted the following policy:

> **Procedure for Processing Pro Se Petitions for Transfer or Rehearing When an Attorney is Listed as Representing the Pro Se Filer**
>
> When a pro se Petition for Transfer or for Rehearing has been filed, and there is an attorney of record listed in the appeal, the Case Managers in the Clerk's Office have been instructed to:
>
> (1) File the pro se Petition as of the post-mark date;
>
> (2) Call the attorney of record, as a courtesy, and let him/her know that a Petition for Transfer or Rehearing has been filed.
>
> **There is no need for the attorney of record to file a Motion to Withdraw Appearance!**
>
> **If the pro se individual files a Petition for Transfer or Rehearing and the attorney of record later files either a timely Petition for Transfer or Petition for Rehearing, the attorney's petition will be filed, and the pro se petition will be "unfiled" and returned to the pro se individual. The Court will not receive a copy of the pro se Petition.

The Clerk of Courts confirmed in August 2019 that this procedure is still correct, although his office does not call counsel of record to let them know when a pro se petition has been filed.

Thus, you should not withdraw your appearance simply because you believe your client may file a petition for rehearing or a petition to transfer pro se. Rather, you should provide your client with early notice of your intention not to pursue transfer or rehearing and the deadlines for filing. It would be helpful to include a copy of the applicable appellate rules and encourage the client to contact you with questions.

Motions to Publish Memorandum Decisions

If the court of appeals decision was an unpublished one, you should consider whether to move to publish the opinion. As explained in the following section, the odds of a grant of transfer are much

higher with a published decision. Therefore, you might consider moving to publish a decision in which your client lost and may not want to publish a decision in which your client prevailed.

Certification of Opinions and the Importance of Following Through

Finally, it is important to remember that trial courts are not to take any action in a case until the opinion is certified. Ind. Appellate Rule 65(E). Certification does not occur until rehearing and transfer are concluded—or the time for seeking rehearing and transfer has expired. The appellate clerk will make an entry on its docket when an opinion is certified as final and will send a copy of the opinion with a certification sheet attached to the opinion to the trial court.

In rare cases, you might be able to secure release after a favorable opinion from the Court of Appeals. In Ripps v. State, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012), the Court of Appeals ordered a defendant released immediately after hearing oral argument in a probation revocation appeal that it decided would be reversed: "courts have inherent authority to require immediate compliance with their orders and decrees in order to give effective relief."

Most trial courts will promptly and correctly institute any relief ordered on appeal after receiving a certified opinion. This may require setting a new trial, reducing a sentence, or vacating one or more convictions. If the court does not promptly take action as required by the appellate opinion, you might mention the issue to court staff or may find it necessary to file a motion with the trial court.

If the trial court refuses to take action as required by the appellate opinion, the proper remedy is a motion in aid of appellate jurisdiction. See generally Tyson v. State, 593 N.E.2d 175, 179 (Ind. 1992) (observing writs are sometimes necessary "to enforce a decision"). Moreover, if the trial court orders the improper relief on remand, a writ may also be appropriate but "only in those comparatively few instances where it would serve the interest of judicial economy or serve to prevent an irreparable harm." KeyBank N.A. v. Michael, 770 N.E.2d 369, 374 (Ind. Ct. App. 2002), trans. denied. Finally, judges who fail to take action ordered by the appellate court may also be subject to disciplinary action. See In re Newman, 858 N.E.2d 632 (Ind. 2006).

A. PETITIONS FOR REHEARING

I. The Rule

Rule 54. Rehearings

A. Decisions From Which Rehearing May be Sought. A party may seek Rehearing from the following:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) an order dismissing an appeal; and

(4) an order declining to authorize the filing of a successive petition for post-conviction relief.

A party may not seek rehearing of an order denying transfer.

B. Time for Filing Petition. A Petition for Rehearing shall be filed no later than thirty (30) days after the decision. Rule 25(C), which grants a three-day extension of time for service by mail or third-party commercial carrier, does not extend the due date, and no extension of time shall be granted.

C. Brief in Response. No brief in response to a Petition for Rehearing is required unless requested by the Court, except that the Attorney General shall be required to file a brief in response to the Petition in a criminal case where the sentence is death. A brief in response to the Petition shall be filed no later than fifteen (15) days after the Petition is served or fifteen (15) days after the Court issues its order requesting a response. Rule 25 (C), which provides a three- day extension for service by mail or third-party carrier, may extend the due date, however, no other extension of time shall be granted.

D. Reply Brief Prohibited. Reply briefs on Rehearing are prohibited.

E. Content and Length. The Rehearing Petition shall state concisely the reasons the party believes rehearing is necessary. The Petition for Rehearing and any brief in response are governed by Rule 44.

F. Form and Arrangement. The form and arrangement of the Petition for Rehearing and any brief in response shall conform generally to Rule 43 and shall include a table of contents, table of authorities, statement of issues, argument, conclusion, word count certificate, if needed, and certificate of service.

The focus of Appellate Rule 54 is primarily technical and procedural. It tells us when rehearing can be sought, the deadlines, and the technical requirements of the petition. Decisional law sheds some additional light on petitions for rehearing, and the practical experience of appellate lawyers provides some clues on how best to use this tool.

II. Technical Requirements: Deadlines and Content

A. Deadlines

Petitions for rehearing must be filed within thirty (30) days of an adverse decision. Thirty days means thirty days; there are no extra three days for service by mail. Extensions of time are not allowed. Ind. Appellate Rule 35(C).

B. Form and Content

A petition for rehearing must include the following sections: table of contents, table of authorities, statement of issues, argument, conclusion, and certificate of service. If the petition exceeds ten pages, it must also include a word count certificate. Ind. Appellate Rule 44(D) & (E).

III. Substantive and Practical Considerations

In Griffin v. State, 763 N.E.2d 450 (Ind. 2002), the Indiana Supreme Court summarized some key points regarding petitions for rehearing.

- A petition for rehearing gives an appellate court the "opportunity to correct its own omissions or errors."
- It is limited only to "points raised in the original brief."
- It should not "ask the court generally to re-examine all the questions in the record, or all the questions decided against the party filing it."
- Errors "must be articulated with precision."

More recently, the court took a broader view in granting rehearing essentially to overrule a previous 3-2 opinion after a change in membership. Hopper v. State, 957 N.E.2d 613 (Ind. 2011). The dissent aptly noted that "although declaring a rehearing petition must . . . go beyond a mere assertion that the original ruling was erroneous, the majority nonetheless entertains and effectively grants the State's petition even though the State's claim is that this Court's original opinion was wrongly decided." Id. at 624 (Rucker, J., dissenting).

A. Petitions for Rehearing in the Court of Appeals

After receiving a decision that is less than total victory, appellate counsel has three basic options: (1) do nothing and let the court of appeals' opinion be the final word (unless the State seeks further review); (2) file a petition for rehearing with the court of appeals; or (3) file a petition to transfer with the Indiana Supreme Court.

A petition for rehearing is not a prerequisite for transfer. The types of issues raised on rehearing are generally different from those raised on transfer. See Part B., infra.

1. Reasons to file a petition for rehearing

Although most petitions for rehearing are denied, the appellate courts have granted petitions in some cases and either reversed their earlier decision or offered important clarification of a point. See, e.g., J.J. v. State, 858 N.E.2d 244 (Ind. Ct. App. 2006) (reversing juvenile adjudications in a published decision on rehearing after earlier affirming them in an unpublished memorandum decision); Branum v. State, 829 N.E.2d 622, 623 (Ind. Ct. App. 2005) (holding that "on remand, the trial court must determine whether Branum has the financial ability to comply with the support order before any contempt finding is made"). Moreover, a claim may be better received on transfer if the Indiana Supreme Court sees that the error was first brought to the attention of the Indiana Court of Appeals on rehearing.

Rehearing is most appropriate in the following four instances.

a. The court of appeals failed to address an issue that was raised and argued in the briefs.

The court may inadvertently skip over an issue or may explicitly note that it is not addressing it. For example, if the court remands the case for resentencing, it will probably not address a claim of inappropriateness under Appellate Rule 7(B). This is not grounds for rehearing, as the 7(B) claim may be obviated by the remand. If, however, an issue was fully briefed, not addressed, and not appropriately addressed only on remand, rehearing is appropriate to provide the court an opportunity to address the issue. See, e.g., Brown v. State, 856 N.E.2d 739 (Ind. Ct. App. 2006), vacated on transfer (granting rehearing to address a proportionality claim that was "fully raised before the trial court as well as this Court" when it would "serve the interests of judicial economy"). By unpublished order, the Indiana Supreme Court recently granted transfer in Ervin v. State, 49A02-1002-CR-000123, a case in which the Appellant raised three issues, but the court of appeals addressed only two. Rehearing had been sought and denied in that case, but another panel could address the issue differently. In any event, the court of appeals should be given an opportunity to fix an overlooked issue before you seek transfer.

b. A significant new legal issue arose after briefing was completed in your appeal.

As noted in Griffin, petitions for rehearing are generally limited to "points raised in the original brief." If a new legal development surfaces after a brief is filed, counsel should consider filing an amended brief under Appellate Rule 47. If, however, an important decision is issued near the time of the court of appeals' decision, a petition for rehearing may be appropriate to bring that issue to the court's attention. For example, in the wake of the confusion regarding sentencing claims immediately after Blakely v. Washington, 542 U.S. 296 (2004), many lawyers filed petitions for rehearing, and the court of appeals seemed willing to grant the petitions to address these issues. See, e.g., Wickliff v. State, 816 N.E.2d 1165 (Ind. Ct. App. 2004), trans. denied. The court may even grant rehearing to address a recent Seventh Circuit case, even though it is not binding. See, e.g., Jackson v. State, 830 N.E.2d 920 (Ind. 2005).

c. The court's opinion is likely to cause future confusion.

A published opinion from the court of appeals will likely be cited in the future. Therefore, if it is written in a way that is likely to cause future confusion, a petition for rehearing may be appropriate to allow the court an opportunity to "clarify" its decision. See, e.g., Williams v. State, 840 N.E.2d 433, 440-41 (Ind. Ct. App. 2006) (granting State's petition for rehearing to strike words "significant" and "due to"

and replace them with "combined" and "of" to make clear that maximum sentence in a case was inappropriate in light of "the combined mitigating weight of Williams' guilty plea and documented mental illness"); Schumm v. State, 868 N.E.2d 1202, 1204 (Ind. Ct. App. 2007) (correcting earlier statement that a tendered instruction was not a pattern instruction and thanking counsel for bringing the matter to the court's attention). As explained below, it may be better in some cases to raise such a claim on transfer.

d. The court of appeals has misstated the facts in a material way.

Judges at the court of appeals rely on law clerks, who often write drafts of the facts and verify the record citations. It is unlikely that the judge who authors an opinion will review the transcript or appendix; it is extremely unlikely that the two panel judges who vote on the opinion will consult the record. Therefore, a misstatement of the record will go unnoticed if not disclosed to the judges through a petition for rehearing. If the factual misstatement is not material, the court may deny the petition or grant it for the limited purpose of addressing the "slight inaccuracy," which "has no impact on our analysis of the case." Wells v. State, 853 N.E.2d 143 (Ind. Ct. App. 2006). This basis for rehearing may be the least likely to lead to relief, although such petitions may be particularly important to clients depending on the nature of factual inaccuracy.

2. Reasons not to file a petition for rehearing

Appellate counsel may find several faults with the court of appeals' opinion, but some of these complaints are likely better not raised at all or raised in a petition to transfer.

a. The court of appeals ignored an important case that was cited in the brief.

If a brief cites and discusses an important case, the court of appeals will likely address it in some fashion in its opinion. If the case is on point and conflicts with other authority (either from the court of appeals or supreme court), this is grounds for a petition for transfer. If the court ignored the case the first time around and ruled adversely, giving the court another opportunity to address the case is probably not worthwhile. The issue is set up well for transfer.

b. The decision breaks new ground and will cause chaos.

If the court of appeals issues an opinion that seems likely to wreak havoc on trial courts or otherwise in the criminal justice system, a petition for rehearing may be appropriate. However, this will give the panel a chance to mitigate the damage. If it is truly an atrocious decision (and is published), skipping right to transfer is probably the better route.

c. This panel really did not like the defendant.

Sometimes disdain for a client is oozing off the pages of an appellate decision. If the three judges who issued a decision seem particularly hostile to a client or the claims raised, rehearing is unlikely to bear any fruit. If rehearing is granted, the court will at best acknowledge an error but still find it is not one of consequence.

B. Petition for Rehearing to the Indiana Supreme Court

Many of the same considerations outlined above apply in filing petitions for rehearing to the Indiana Supreme Court. The primary difference is that the Supreme Court's decision is probably the last

word. Although seeking certiorari to the United States Supreme Court is an option, the odds of the Court granting a petition are a fraction of one percent.

1. On transfer, the court did not address an issue raised in the court of appeals.

When the Indiana Supreme Court grants transfer, it "shall have jurisdiction over the appeal and all issues as if originally filed in the Supreme Court." Ind. Appellate Rule 58(A). Although the court will sometimes summarily affirm or adopt part of the court of appeals' decision, Ind. Appellate Rule 58(A), it must address in some fashion every issue raised in the brief to the court of appeals. When it fails to do so, a petition for rehearing is appropriate and will likely be granted. See, e.g., Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006) (noting failure to address issues raised in court of appeals and granting rehearing to address one dispositive issue leading to reversal); Trimble v. State, 848 N.E.2d 278 (Ind. 2006) (addressing two issues raised in court of appeals and not addressed in supreme court's original opinion).

2. The court misstated a material fact or legal requirement.

If the Indiana Supreme Court rendered a decision that misstates a material fact or legal requirement, a petition for rehearing may be in order. See, e.g., Corcoran v. State, 827 N.E.2d 542, 544 (Ind. 2005) (observing defendant "accurately points out that this statement misstates the requirements of Indiana Criminal Rule 24(H)" but concluding that "mistake does not affect our analysis or conclusion").

3. The decision creates a conflict or is likely to cause future confusion.

If the court issues a decision that creates a conflict with other decisions or decides a new question in a way that is likely to cause future problems, a petition for rehearing is appropriate to give the court an opportunity to address the issue. The petition in Anglemyer v. State, 868 N.E.2d 482 (Ind.), on reh'g, 875 N.E.2d 218 (Ind. 2007), provides an example of this.

4. The membership of the court has changed.

Although much less likely, it is possible that a 3-2 opinion of the Indiana Supreme Court could be undone with a change in membership. Hopper v. State, 957 N.E.2d 613 (Ind. 2011), which is discussed above, is one example of such a change, albeit to the benefit of the State.

C. Response to Rehearing

If the State files a Petition for Rehearing, a response may be appropriate. A response is never required, but one court of appeals' opinion noted that the State had failed to respond to a defendant's petition and therefore applied a *prima facie* standard of review, just as it does when a party fails to file an appellee's brief. Aguilar v. State, 820 N.E.2d 762, 763-64 (Ind. Ct. App. 2005), vacated on other grounds by 827 N.E.2d 31 (Ind. 2005). This decision appears to be in direct conflict to the language of Appellate Rule 56(C), which does not require a response. Nevertheless, it is possible a future panel of the court of appeals may take the same approach in the future.

The same technical requirements apply to a response to rehearing. However, it must be filed within fifteen days of the filing of the petition for rehearing. Ind. Appellate Rule 54(C). It should include the same sections as the petition for rehearing: table of contents, table of authorities, statement of

issues, argument, conclusion, certificate of service, and a word count, if needed. Ind. Appellate Rule 54(F).

Even though not required, filing a response to a State's petition for rehearing will usually prove useful to the court in deciding that the petition should be denied. Moreover, an effective response may deter the State from filing a petition to transfer once rehearing is denied.

D. Effect of rehearing being granted

An appellate court may grant a general rehearing or rehearing on a particular point. Appellate lawyers should be specific in their request to the court. If a general rehearing is granted, "the case stands before the court as if it had never been decided." Griffin, 763 N.E.2d at 450. If rehearing is granted only on a particular point, "the original opinion will be modified as to that point only." Id.

B. PETITIONS TO TRANSFER

I. The Rules

Rule 57. Petitions to Transfer and Briefs

A. Applicability. This Rule applies to Petitions to Transfer an appeal from the Court of Appeals to Supreme Court after an adverse decision by the Court of Appeals.

B. Decisions From Which Transfer May be Sought. Transfer may be sought from adverse decisions issued by the Court of Appeals in the following form:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) any amendment or modification of a published opinion or a not-for-publication memorandum decision; and

(4) an order dismissing an appeal.

Any other order by the Court of Appeals, including an order denying a motion for interlocutory appeal under Rule 14(B) and an order declining to authorize the filing of a successive petition for post conviction relief, shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.

C. Time for Filing Petition. A Petition to Transfer shall be filed:

(1) no later than forty-five (45) days after the adverse decision if rehearing was not sought; or

(2) if rehearing was sought, no later than thirty (30) days after the Court of Appeals' disposition of the Petition for Rehearing.

Rule 25(C), which provides a three day extension for service by mail or third-party commercial carrier, does not extend the due date, and no extension of time shall be granted.

D. Brief in Response. A party may file a brief in response to the Petition no later than twenty (20) days after the Petition is served. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, may extend the due date; however, no other extension of time shall be granted.

E. Reply Brief. The petitioning party may file a reply brief no later than ten (10) days after a brief in response is served. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, may extend the due date; however, no other extension of time shall be granted.

F. Form and Length Limits. A Petition to Transfer, brief in response, and any reply brief are governed by Rules 43 and 44. No separate brief in support of the Petition to Transfer shall be filed.

G. Content and Arrangement of Petition to Transfer. The Petition to Transfer shall concisely set forth:

(1) *Question Presented on Transfer.* A brief statement identifying the issue, question, or precedent warranting Transfer. The statement must not be argumentative or repetitive. The statement shall be set out by itself on the first page after the cover.

(2) *Table of Contents*. A table of contents containing the items specified in Rule 46(A)(1).

(3) *Background and Prior Treatment of Issues on Transfer.* A brief statement of the procedural and substantive facts necessary for consideration of the Petition to Transfer, including a statement of how the issues relevant to transfer were raised and resolved by any Administrative Agency, the trial court, and the Court of Appeals. To the extent extensive procedural or factual background is necessary, reference may be made to the appellate briefs.

(4) *Argument.* An argument section explaining the reasons why transfer should be granted.

(5) *Conclusion.* A short and plain statement of the relief requested.

(6) *Word Count Certificate*, if necessary. See Rule 44(F).

(7) *Certificate of Service.* See Rule 24(D).

H. Considerations Governing the Grant of Transfer. The grant of transfer is a matter of judicial discretion. The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer.

(1) *Conflict in Court of Appeals' Decisions.* The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.

(2) *Conflict with Supreme Court Decision.* The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important issue.

(3) *Conflict with Federal Appellate Decision.* The Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals.

(4) *Undecided Question of Law.* The Court of Appeals has decided an important question of law or a case of great public importance that has not been, but should be, decided by the Supreme Court.

(5) *Precedent in Need of Reconsideration.* The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) *Significant Departure from Law or Practice.* The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.

Rule 58. Effect of Supreme Court Ruling on Petition to Transfer

A. Effect of Grant of Transfer. The opinion or not-for-publication memorandum decision of the Court of Appeals shall be final except where a Petition to Transfer has been granted by the Supreme Court. If transfer is granted, the opinion or not-for-publication memorandum decision of the Court of Appeals shall be automatically vacated except for:

(1) those opinions or portions thereof which are expressly adopted and incorporated by reference by the Supreme Court; or

(2) those opinions or portions thereof that are summarily affirmed by the Supreme Court, which shall be considered as Court of Appeals' authority.

Upon the grant of transfer, the Supreme Court shall have jurisdiction over the appeal and all issues as if originally filed in the Supreme Court.

B. Effect of the Denial of Transfer. The denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court. No Petition for Rehearing may be filed from an order denying a Petition to Transfer.

C. Supreme Court Evenly Divided. When the Supreme Court is evenly divided upon the question of accepting or denying transfer, transfer shall be deemed denied. When the Supreme Court is evenly divided after transfer has been granted, the decision of the Court of Appeals shall be reinstated.

The focus of Rules 57 and 58 is primarily technical and procedural. It gives the deadlines and technical requirements of the petition and effect of transfer being granted or denied. Unlike Rule 54 for rehearing, however, Rule 57(H) provides six "principal considerations" in granting transfer. Counsel should remain ever mindful of these considerations in the drafting of a petition to transfer, response, or reply.

II. Technical Requirements: Deadlines and Content

A. Deadlines

Petitions for transfer must be filed within forty-five (45) days of an adverse decision. This deadline was previously thirty days; it was extended effective January 1, 2019. However, if rehearing was sought and granted or denied, the deadline is thirty (30) days from the ruling on rehearing. The other side seeking rehearing does not toll or affect the deadline to seek transfer. Extensions of time are not allowed according to Appellate Rule 35(C). However, the supreme court has allowed extensions or late filings in rare circumstances (weather, severe illness—or an acknowledgement that counsel blew a deadline). An especially unusual belated request was granted in Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015) (petition filed 8 months late).

B. Form and Content

A petition for transfer must include the following sections: questions presented on transfer, table of contents, background and prior treatment of issues on transfer, argument, conclusion, and certificate of service. Ind. Appellate Rule 57(G). If the petition exceeds ten pages, it must also include a word count certificate that it contains no more than 4,200 words. Ind. Appellate Rule 44(D) & (E). After the cover page, the second page should include the "Question(s) Presented on Transfer" and nothing else. The third page will be the table of contents. No table of authorities is required, although the court may find one helpful if the petition cites a significant number of cases or other authorities. The rules allow requests for additional words, although you should only ask in unusual cases and make a compelling case. There is a motion on the IPDC website where the State Public Defender was granted additional words.

C. Decisions Reviewable on Transfer

Rule 57(B) is explicit about the types of decisions from which transfer may be sought. Transfer may be sought from published or unpublished decisions, including amendments or modifications of those decisions (i.e., opinions on rehearing), as well as orders dismissing an appeal. Transfer may *not* be sought from orders denying interlocutory appeals or orders denying permission to file a successive post-conviction relief petition. Transfer may *not* be sought from any other decision from the court of appeals, such as a ruling on a stay or appeal bond. However, the Indiana Supreme Court has signaled a slight degree of flexibility in its rules for exceptional cases:

> This Court can still consider a Petition to Transfer which does not fall within the categories established in [the predecessor rule.] However, consideration of such a petition should be a rare occurrence, and should be done only where a special need has been demonstrated. The grounds for transfer are relatively inclusive and permit consideration of most any important question which might arise. Parties seeking transfer should make a concerted effort to frame their arguments in terms of these established categories. If a party finds it impossible to urge its point within these categories, he should so state, explaining why it is impossible to do so and why the Supreme Court should still consider his Petition to Transfer.

Tyson v. State, 593 N.E.2d 175, 180 (Ind. 1992) (quoting Baker v. Fisher, 260 Ind. 513, 515, 296 N.E.2d 882, 883 (1973)). In Tyson, the court accepted the case for "the limited purpose of outlining the standards and procedures applicable to requests for bond pending completion of a criminal appeal." Id. at 176. More recently, however, the court has made it clear that transfer may not be sought in cases in which appeal bonds have been granted by the court of appeals. See, e.g., Laughner v. State, 82A01-0104-CR-141 (order dated May 7, 2001, dismissing the State's petition to transfer).

In A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 610 (Ind. 2018), the supreme court exercised its "broad discretion" to allow a party that had prevailed in the court of appeals to seek transfer.

> Our appellate rules authorize parties aggrieved by an "adverse decision" from the Court of Appeals to seek transfer to our Court. Ind. Appellate Rule 56(B). . . . Our rule of appellate standing from a trial court is clear. "A party cannot appeal from a judgment favorable to him."

> Of course, Appellate Rule 56(B) does not limit the Court's jurisdiction to entertain Eskenazi's petition. We have "broad constitutional authority to exercise appellate review and oversight," Tyson v. State, 593 N.E.2d 175, 180 (Ind. 1992), in discharging our inherent "duty to act as the final and ultimate authority" in pronouncing Indiana law. Transfer is merely the process by which the Court fulfills its law-giving function, and the Court may choose to exercise that function even in cases that do not comply strictly with the letter of the appellate rules for seeking transfer. See Tyson, 593 N.E.2d at 180. Compare Ind. Const. art. 7, § 4 ("The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules ...."), with App. R. 1 ("The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.").

Id. (internal citations omitted)

Counsel would be well-advised to seek transfer only in cases included in the rule, unless making an extraordinary showing for a deviation from the rule. Routine motions do not meet this showing.

III. Substantive and Practical Considerations

There are three important considerations when filing a petition to transfer: (A) crafting a petition likely to secure the court's review, (B) arguing claims that will be forfeited if not raised on direct appeal, and (C) preserving federal constitutional issues for federal habeas review.

A. Securing the Indiana Supreme Court's Review

Approximately fifteen to thirty petitions to transfer are read and discussed by the justices at the Indiana Supreme Court's weekly conference. Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4 (Spring 2007). In recent years, less than 10% have been granted. Therefore, it is essential that a petition include a "wow" factor, i.e., a compelling reason why the particular issue has a reach beyond the particular case. Id. Rule 57(H) list the six grounds that often help meet that standard. These include conflicts in decisions (between the Indiana Court of Appeals and Supreme Court or federal courts), undecided questions of law, precedent in need of reconsideration, or significant departures from law or practice.

In focusing on these considerations, the primary function of a petition to transfer is not to "cover again the same ground briefed to the Court of Appeals" but rather is to convince the Indiana Supreme Court why your case is worthy of the discretionary review afforded a small percentage of cases that come before the court. Frank Sullivan, Jr. Petitions to Transfer: New Rules, New Procedures, Res Gestae 8-9 (Feb. 1996). Justices have lamented that many transfer petitions merely regurgitate the arguments and pleas for error correction that were raised in the court of appeals rather than taking the broader view of why the issues presented are ones of wide impact worthy of the court's attention. Counsel should be mindful of their audience and purpose in drafting each of the sections of the petition.

1. Question(s) Presented on Transfer

The first page after the cover of a petition to transfer is a prominent place and should be used to your client's advantage. This "brief statement identifying the issue, question, or precedent warranting Transfer . . . must not be argumentative or repetitive." App. 57(G)(1). This does not mean that it should be bland. Rather, the question presented should "succinctly and persuasively convey the heart of the

case and highlight its 'wow' points, not merely state a general legal issue or parrot the language of Rule 57(H)." Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4, 5 (Spring 2007). The question should capture the reader's attention while stating the specific legal issue and the deleterious future impact on Indiana law if not addressed. For example, here are a few questions from successful petitions to transfer:

- In the wake of the 2005 amendments to Indiana's sentencing statutes, must trial courts continue the venerable requirement of a sentencing statement, including the articulation and weighing of aggravating and mitigating circumstances?

- May a police officer who believes a suspect has drugs in his mouth apply a chokehold to the suspect's throat when such a procedure poses significant health risks, safer alternatives are available to recover the evidence, and the officer has received no training on chokeholds?

- Does Indiana value the contributions that a loving, involved, sober, non-abusive Father makes to the life of his son? Or is it appropriate to terminate a Father's parental rights because of a few missed court appearances, services, or scheduled visits, even though the trial court made specific findings that the child loves his father, that the two share a bond, and that it "would be best for [the child] to be able to keep visiting his father," while living with his maternal grandmother?

2. Background and Prior Treatment of Issues on Transfer

The next section of the petition must briefly set forth "the procedural and substantive facts necessary for consideration of the Petition to Transfer," including how the issue was resolved by the trial court and court of appeals. App. R. 57(G)(3). Reference may be made to the appellate briefs. Id.

Do not assume the justices will read your briefs to the court of appeals; most will begin with the transfer petition and may never go back to look at the earlier briefing. Therefore, make sure the petition stands on its own—explaining the relevant facts in a persuasive way. Although you may copy and paste some parts of the brief from the court of appeals, keep in mind the limited goal and likely fewer/different issues on transfer in crafting this section.

Although the court is primarily concerned about the legal issue presented in your petition and its statewide impact, the particular facts of the case may make the case more appealing to the court. This section is your opportunity to present the relevant facts in a persuasive light. It is not an opportunity to be deceptive by misstating facts or leaving out relevant facts that bear negatively on your case. Finally, the section should end by telling the court how the issue(s) were resolved in the courts below. This entire section can usually be written in one or two pages, as shown in the sample petitions available on the IPDC website.

3. Argument

The argument section will be the most detailed one and must explain "the reasons why transfer should be granted." App. R. 57(G)(4). Although there may be a good deal of useful material in your brief to the court of appeals, resist the temptation to routinely copy large parts of it here. The purpose of a petition to transfer is different; your focus "should primarily be an argument as to why the Supreme Court should grant transfer," although it is appropriate to "cross-reference the analysis of the merits of

the underlying legal argument" from the briefs to the court of appeals. Lockridge v. State, 809 N.E.2d 843, 843 (Ind. 2004). A mere reference to arguments or authorities from the court of appeals' briefs is not sufficient without an explanation of the reasons why transfer should be granted. Id. Rather, "the most helpful transfer briefs combine argument as to why the court should . . . grant transfer and argument on the merits." Id.

In making this argument, it is important to remember your audience. The justices will be reviewing many petitions in a short period of time. A clear organization with effective point headings will make your argument more understandable. Including irrelevant information or making several claims that have little merit will be a distraction and reduce the possibility of transfer being granted. Moreover, no matter how wrong the court of appeals or State may have been, "hyperbolic contentions and snide, vitriolic comments simply annoy the Justices . . . ." Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4, 6 (Spring 2007).

Finally, write with the "generalist," and not the "specialist," in mind. Id. Some of the justices have limited experience with criminal law, and those who have been in or near the trenches may not have been there for several years. Although your petition should not speak down to them, it should seize the opportunity to persuade someone unfamiliar with your specific issue to want to read about it and want to write an opinion for all in the state to read. It is useful to have a lawyer without special knowledge of your issue read your petition to see if it assumes too much or is confusing. Id.

4. Conclusion

The conclusion should be simple and straightforward: a "short and plain statement of the relief requested." App. R. 57(G)(5). Rather than rehashing the argument section, it should simply "respectfully request" the court do something specific, such as "grant transfer and reverse the convictions" or "grant transfer and reduce the sentence to ten years."

B. Last Chance for Review on Direct Appeal

Petitions to Transfer should generally be limited to claims that were vetted in the trial court and in the briefs to the court of appeals. See, e.g., Wurster v. State, 715 N.E.2d 341, 348 (Ind. 1999) ("The new grounds advanced in the petition for transfer do not warrant reversal at this stage."). However, even if a claim was not squarely raised below, it may be appropriate to raise it in a petition to transfer. Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015), is an example of an issue that was not raised earlier in the proceedings, but the supreme court granted a belated petition to transfer because it could not "find any reason to treat" the defendant differently than her two co-defendants who prevailed on appeal. More recently, the majority granted transfer to address a different claim than the ones squarely raised, over a dissent justice's reference to the "Court's impulse to do justice in this case." Bedolla v. State, 123 N.E.3d 661, 670 (Ind. 2019).

If the United States Supreme Court or Indiana Supreme Court decide an important new case that might entitle your client to relief, it is imperative to raise that issue on direct appeal. A petition to

transfer or petition is the last viable stage of direct appeal.[1] Claims known and available on direct appeal may not be raised in a petition for post-conviction relief. See, e.g., Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006). Therefore, if the significant case was decided after you received an opinion from the court of appeals, you should raise the issue in a Petition for Rehearing. If that fails, it should be raised in a petition for transfer, as some defendants did successfully with claims under Blakely v. Washington, 542 U.S. 296 (2004). See, e.g., Smylie v. State, 823 N.E.2d 679, 690 (Ind. 2005) (observing that defendants must have "added a Blakely claim by amendment or on petition to transfer" to have preserved it from being barred by retroactivity rules).

C. Preserving Federal Constitutional Claims for Habeas Review

A final, but important, consideration in seeking transfer is the preservation of federal constitutional claims that might later be brought on federal habeas corpus review. Although appeals of state court convictions must be brought through the state appellate system, claims of federal constitutional error may later be brought in federal court through a writ of habeas corpus. Known as the "Great Writ" for centuries, more recently habeas procedures have become statutory. See 28 U.S.C. §§ 2241-2266. In the Habeas Act of 1867, Congress extended the writ to "cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States."

As explained in Section IV, it imperative to include the constitutional basis for any claim that is grounded in the constitution in your brief to the court of appeals. If one or more claim is grounded in a provision of the federal constitution, it may later be pursued in federal habeas proceedings as long as the state courts were given a "full and fair opportunity" to litigate the claim. Wright v. West, 505 U.S. 277 (1992). At a minimum this requires counsel to have cited the specific constitutional provision and made a cogent argument that included citation to relevant authority on the issue.

Defendants must also exhaust their state court remedies before pursuing relief in federal court. In O'Sullivan v. Boerckel, 526 U.S. 838 (1999), the Court held that exhaustion requires seeking discretionary review from the state's highest court. Thus, it is imperative to raise any federal claim that might later be pursued in a habeas proceeding in a timely petition to transfer. Failing to do so will foreclose your client's ability to pursue habeas relief.

D. Brief in Response to Transfer

If your client prevailed in the court of appeals, the Attorney General may seek transfer. You have an opportunity to respond in ten pages or 4,200 words. The response is due in twenty days; extensions will not be granted unless you make an extraordinary showing and cite Appellate Rule 1. The rules do not prescribe a format, App. R. 57(D), but you should include at least an argument section and conclusion, although a summary and questions presented section might also be useful. There is no

[1] A petition for certiorari to the United States Supreme Court may also be part of a direct appeal, but such petitions are rarely granted. Counsel should not expect an issue raised for the first time in a petition for certiorari to be granted relief by the Supreme Court. Odds are much better with the Indiana Supreme Court.

reason to repeat factual information argued in the State's petition to transfer. If something is incorrect or misleading, however, this would the opportunity to make that point.

Filing a response to transfer is almost always a good idea. It offers an opportunity to explain why the case does not present issues worthy of a grant of transfer. Indeed, at least one former justice chastised counsel (both from the State and for the defense) when not filing a response to transfer. The response should not merely contend that the court of appeals reached the correct result. If the opinion is published, the result is of limited importance if the court's reasoning conflicts with other precedent or is likely to cause problems in future cases. Your response must look beyond the result to the court's reasoning and its future impact.

Normally, a response will urge the court to deny transfer because the issues raised do not involve a conflict in decisions or present a significant issue. However, some cases do present significant conflicts or important new issues of statewide importance. In such cases, it may be effective strategy to acknowledge that transfer may be appropriate but then present a detailed argument explaining how the conflict or new issue should be resolved in a way favorable to your client. This will be your only opportunity to file a written response. Even if oral argument is granted, you will not be given another opportunity to file a written response.

E. Reply Brief in Support of Transfer

If the State files a response to your petition to transfer, you have the final opportunity to file a very short reply. The reply cannot exceed three pages or 1,000 words. It is due in only ten days, and the Rules prohibit requests for extensions.

The rules do not prescribe a format or require specific sections. Most replies will include only an argument section, although it may be effective to begin with a short summary or catchy introduction. This is your final opportunity to "wow" the justices into taking the case. This is best done by responding to points raised by the State instead of simply repeating points already made in your petition. Finally, if the State agrees that transfer is appropriate or possibly appropriate, this is the final opportunity to respond to the merits of the issues in writing.

MOTIONS TO PUBLISH

IV. The Rule

Rule 65. Opinions and Memorandum Decisions

A. Criteria for Publication. All Supreme Court opinions shall be published in the official reporter. A Court of Appeals opinion shall be published in the official reporter and be citable if the case:

(1) establishes, modifies, or clarifies a rule of law;

(2) criticizes existing law; or

(3) involves a legal or factual issue of unique interest or substantial public importance.

Other Court of Appeals cases shall be decided by memorandum decision that are not published in the official report and are not citable except as provided in (D). A judge who dissents from a

memorandum decision may designate the dissent for publication in the official reporter if one (1) of the criteria above is met.

B. Time to File Motion to Publish. Within fifteen (15) days of the entry of the decision, a party may move the Court to publish in the official reporter any memorandum decision which meets the criteria for publication in the official reporter.

C. Official Reporter. West's Northeastern Reporter shall be the official reporter of the Supreme Court and the Court of Appeals.

D. Precedential Value of Memorandum Decision. Unless later designated for publication in the official reporter, a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.

V. Technical Requirements a Motion to Publish

The Rule provides little guidance about the form of motions to publish. The motion must adhere to the general requirements explained in Appellate Rule 34 and Section III(A) of this manual.

A. Length

Motions cannot exceed ten (10) pages or 4,200 words. Ideally, a motion to publish will not exceed two or three pages, as shown in the samples posted on the IPDC website.

B. Content

The motion should expressly inform the court which of the three criteria for publication apply. The two most common are "(1) the decision establishes, modifies, or clarifies a rule of law" or "(3) the decision involves an issue of unique interest or substantial public importance." Many decisions in some way clarify or modify existing case law. Issues that arise frequently in criminal cases, such as the contours of an appropriate traffic stop, are arguably issues of substantial public importance when clear law on the specific point does not exist. It is imperative in the motion to publish that counsel argue precisely and specifically how the new case changes or clarifies the existing law in a significant way that warrants the case being published.

C. Deadline

Rule 65(B) requires filing the motion to publish within fifteen days after the not-for-publication decision was issued. This deadline changed effective January 1, 2015; the deadline was previously thirty days. Motions are presented to the same three judges who decided the case and are usually ruled upon within a couple of weeks. Although there is no deadline for a ruling, the judges usually rule well in advance of the deadline for a petition to transfer. As explained below, transfer is granted far more often in published opinions than in unpublished ones.

VI. Practical Considerations

All decisions of the Indiana Supreme Court are published in the Northeastern Reporter and become binding precedent for all courts in the state. Approximately one-quarter of the decisions of the

Indiana Court of Appeals are published. The remaining are designated "not-for-publication" memorandum decisions. The unpublished decisions cannot be relied upon as precedent, an only those issued on or after January 1, 2023 may be cited for persuasive value.

As explained in an article by the Indiana Supreme Court administrator that was reprinted in the November 2005 issue of the Indiana Defender, there is a much higher likelihood that transfer will be granted when the court of appeals' opinion is published than with unpublished decisions. More recent statistics show that transfer is sometimes thirty times more likely in published decisions compared to memorandum/unpublished ones. The Defender article suggests that lawyers who win in the court of appeals in an unpublished decision should "think twice" about seeking publication of the decision because it may "snatch defeat from the jaws of victory." This is certainly sound advice—to an extent.

A. Criteria for Publication Must Be Met

Ideally, decisions that meet any of the three grounds for publication will be ordered published by the court of appeals when the opinion is issued. The criteria, however, are fairly broad, and reasonable minds may differ. Before filing a motion to publish, counsel should be sure to have a respectable argument that at least one of the three grounds exists.

B. Publication of Wins and Partial Wins

If a court of appeals' decision breaks new legal ground, publication can serve an important purpose for the criminal defense bar. If the decision is unpublished, it cannot be relied upon by anyone, anywhere in the future. Moreover, if it is an issue that is likely to arise in the future, such as a mistake that the same judge makes repeatedly, publication also serves an important purpose.

These reasons to file a motion must be balanced against the increased risk of the case becoming a transfer target. You know the case better than anyone, and if the court of appeals did a good job of addressing the claims in an opinion that is consistent with precedent and policy-related concerns, the Indiana Supreme Court is unlikely to grant transfer—regardless of whether the court of appeals' opinion is published. See generally Ind. Appellate Rule 57(H) (grounds for transfer) & Part V.B. of this manual. If the opinion is flawed in one or more of these ways—or involves a new or controversial issue likely to be of interest to some members of the court—you may serve your client best by ***not*** filing a motion to publish. If the State seeks transfer, your response can accurately inform the court that the issue presented is not of much state-wide significance because the court of appeals' opinion is in no way binding.

C. Publication of Losses

In light of the increased likelihood of transfer being granted of a published decision, lawyers who lose in the court of appeals should consider the possibility of moving to publish a decision. As explained above, the Indiana Supreme Court is much more likely to grant transfer of a published decision. An unpublished decision is not precedent, and there is little reason for the court to be concerned about it having the sort of significant, state-wide impact that underlies the considerations for transfer.

A fundamental question in making this decision is: Just how bad is the court of appeals' decision? If it is especially poorly reasoned or inconsistent with the precedent, the Indiana Supreme

Court will probably not want it to stand as precedent for trial courts around the state to rely upon in the future. Although the denial of transfer does not technically enhance the pedigree of a court of appeals' opinion, Ind. Appellate Rule 58(B), at least some of the justices have spoken proudly in public about how seriously they take their review on transfer.

C. PETITIONS FOR WRIT OF CERTIORARI (TO THE UNITED STATES SUPREME COURT)

The United States Supreme Court has discretionary jurisdiction to review issues of federal constitutional law from state courts. The Court receives more than 8,000 petitions for writs of certiorari each year, and it issues formal written opinions in about eighty or ninety cases. The chances of the Court taking any given case are about one percent.

A. Grounds for Certiorari

The first question you should ask yourself before pursuing a petition for certiorari is whether you have an issue likely to get the Court's very limited attention. Your issue must be one of significant nationwide impact. According to Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

B. Secure Admission

Before filing any documents in the Supreme Court, an attorney must be admitted to practice before the Court. This requires an attorney to have been admitted to a state bar for at least three years and be sponsored for admission by two members of the Supreme Court bar. The application and instructions are available on the Court's website: https://www.supremecourt.gov/filingandrules/supremecourtbar.aspx.

C. Deadline for Petition for Certiorari

A petition for writ of certiorari must be filed within ninety days of the final Indiana appellate opinion. Supreme Court Rule 13(1). Counsel may request an extension of no more than sixty days. Supreme Court Rule 13(5).

D. Read the Rules

Counsel should carefully consult the Court's rules and other helpful information on the Court's website: http://www.supremecourtus.gov/ Beyond the website, Stern and Gressman's Supreme Court Practice, now in its ninth edition, is widely regarded as the bible in the field.

E. Review Successful Petitions

In preparing a petition for certiorari, it is often helpful to review petitions from similar cases. Ideally, counsel will review a successful petition, but any petition written by an experienced advocate will be helpful. Petitions are available through Westlaw and Lexis, and some may be accessed for free through Findlaw or by searching legal blogs.

F. Talk to an Experienced SCOTUS Practitioner

If you have a strong issue, you should consider enlisting the help of an experienced Supreme Court practitioner. The staff attorneys at the Indiana Public Defender Council may be able to help locate someone to assist you.

Some Indiana appellate defenders have also enlisted the help of prominent law professors or Supreme Court advocates through law school Supreme Court Clinics, who have then served as lead counsel in cases from Indiana.

Section VI
Oral Argument
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Section VI

Oral Argument

I. The Rules

Rule 52. Setting and Acknowledging Oral Argument

A. Court's Discretion. The Court may, in its discretion, set oral argument on its own or a party's motion. If the Court sets oral argument in a Criminal Appeal, the Clerk shall send the order setting oral argument to the parties and to the prosecuting attorney whose office represented the state at trial.

B. Time for Filing Motion for Oral Argument. A party's motion for oral argument shall be filed no later than seven days after: (1) any reply brief would be due under Rule 45(B), or (2) any reply brief would be due under Rule 57(E) if petitioning to transfer, or (3) any reply brief would be due under Rule 63(E), if petitioning for review.

C. Acknowledgment of Order Setting Oral Argument. Counsel of record and unrepresented parties shall file with the Clerk an acknowledgment of the order setting oral argument no later than fifteen (15) days after service of the order.

Rule 53. Procedures for Oral Argument

A. Time Allowed. Each side shall have the amount of time for argument set by court order. A party may, for good cause, request more or less time in its motion for oral argument or by separate motion filed no later than fifteen (15) days after the order setting oral argument. A party is not required to use all of the time allowed, and the Court may terminate any argument if in its judgment further argument is unnecessary. A side may not exceed its allotted time without leave of the Court.

B. Order and Content of Argument. Unless the Court's order provides otherwise, the appellant shall open the argument and may reserve time for rebuttal. The appellant shall inform the Court at the beginning of the argument how much time is to be reserved for rebuttal. Failure to argue a particular point shall not constitute a waiver. Counsel shall not read at length from briefs, the Record on Appeal, or authorities.

C. Multiple Counsel and Parties. Unless the Court otherwise provides, multiple appellants or appellees shall decide how to divide the oral argument time allotted to their side. If more than one attorney on a side will participate in oral argument, the first attorney shall inform the Court at the beginning of the argument of the intended allocation of time, but the Court will not separately time each attorney.

D. Cross-Appeals. Unless the Court directs otherwise, if both parties file a Notice of Appeal, the plaintiff in the action below shall be deemed the appellant for purposes of this Rule. Otherwise, the party filing a Notice of Appeal shall be deemed the appellant.

E. ***Amicus Curiae*.** An *amicus curiae* may participate in oral argument without leave of the court to the extent that all parties with whom the *amicus curiae* is substantively aligned consent. Otherwise, the Court shall grant leave for an *amicus curiae* to participate in oral argument only in extraordinary circumstances upon motion by the *amicus curiae.*

F. Use of Physical Exhibits at Argument; Removal. If physical objects or visual displays other than handouts are to be used at the argument, counsel shall arrange to have them placed in the court room before the Court convenes for the argument. Counsel shall provide any equipment needed. After the argument, counsel presenting the exhibits shall be responsible for removal of the exhibits from the court room and, if necessary, for return to the trial court clerk.

G. Non-Appearance at Argument. If one or more parties fail to appear at oral argument, the Court may hear argument from the parties who have appeared, decide the appeal without oral argument, or reschedule the oral argument. The Court may sanction non-appearing parties.

H. Appeals Involving Records Excluded From Public Access. In any appeal in which Court Records are excluded from Public Access, the parties and counsel at any oral argument and in any public hearing conducted in the appeal, shall refer to the case and parties only as identified in the appellate Chronological Case Summary and shall not disclose any matter excluded from Public Access in accordance with the requirements of Access to Court Records Rule 5.

The focus of Appellate Rule 52 is primarily technical and procedural. It tells us the deadline for filing a motion for oral argument and that an acknowledgment must be filed when argument is set. Part A notes that oral argument is discretionary, but the rule provides no guidance about which cases are appropriate for oral argument.

Similarly, Rule 53 is fairly technical and not particularly specific about what should be done at an oral argument. The court will specify a length for the argument, the appellant will go first and last, counsel should not read at length from notes, physical exhibits may be used under certain conditions, and, not surprisingly, it is important for counsel to show up.

II. Motion for Oral Argument

A. Deadline

Motions for oral argument in the court of appeals must be filed no later than seven days after the reply brief would be due. App. R. 52(B). Reply briefs are due fifteen days after the appellee's brief is filed. Although oral argument could be requested when filing the Appellant's brief, an effective strategy is to wait until reading the State's brief to decide whether argument would be helpful for the reasons explained in (C)(1) below.

B. Content of Motion

The appellate rules do not provide specific guidance about the content of a motion for oral argument. The general requirements for motions are discussed in Section III. Judges of the court of appeals who have spoken at CLE programs have urged counsel to include specific information about

how oral argument will materially assist the court in deciding the case. For example, does your case raise an issue of first impression or implicate a new statute or court rule? The motion should not be used as a way to supplement your reply brief; make all the important and necessary points in the briefs.

C. Practical Considerations in Filing in Motion for Oral Argument

The Indiana Supreme Court and Court of Appeals may set argument in any case for any reason. That said, a motion likely enhances the chances of argument being set in the court of appeals. In 2016 and 2017, oral arguments were held in 23 and 18 criminal appeals—a little less than 2% of the roughly 1,100 criminal appeals decided by the Court of Appeals each year. The Indiana Supreme Court holds argument in most cases in which it grants transfer and in some cases in which it is considering whether to grant transfer. For example, in the 2021-22 fiscal year, of the 519 transfer petitions, the Court heard oral argument in ten cases before granting transfer and twenty-five cases after transfer was granted. In another five cases, the Court issued an opinion without hearing oral argument; these tend to be cases that raise an issue already argued in another case or cases in which the Court issues a narrow, per curiam opinion, such as sentence revision under Appellate Rule 7(B).

Counsel should make a strategic decision about when to ask for oral argument. As explained in the Introduction, the court of appeals decides cases in three-judge panels with one judge (and his or her law clerks) doing most of the work. Therefore, in the absence of oral argument, two of the judges will likely spend relatively little time on cases in which they are panel members. As you brief a case and consider the possibility of oral argument, ask yourself: Is a fresh-out-of-law-school clerk who has read all the briefs and reviewed the record likely to draft an opinion in my client's favor? If you think oral argument is likely to help the clerk, judges, and client, ask for it.

1. When Not to Request Oral Argument

As hard as we may try, sometimes an appeal does not present any strong arguments. If the case seems hopeless and you have nothing to add, do not ask for oral argument.

On the flip side, some cases look like sure-fire winners on paper. The law is solidly on your client's side and the facts are favorable—or at least do not present a problem. If the State's brief is not strong, do not ask for oral argument. It will only give the State a chance to make more arguments and give the court reasons why perhaps you should not win.

2. When to Request Oral Argument

Oral argument is most helpful in cases in which it is important to engage all three panel members. Your issue may be novel or especially complicated with a lot of moving parts. Oral argument will provide you an opportunity to help the court sort through the issue and provide a path to victory for your client. In addition, oral argument may be helpful in cases that raise questions of broader impact or public policy concerns. As explained below, judges often ask questions about policy implications or the practical consequences of a decision at oral argument. If your case raises serious questions about important constitutional or statutory rights, oral argument may be an opportunity for that point to become much clearer than it will in a brief.

Finally, oral argument may be appropriate when the State's position seems plausible at first blush but quickly unravels under scrutiny. Judges may not delve into the nuances of an issue on paper;

oral argument forces them to do so. Although judges often ask tough questions of appellate defenders, they ask them of the State as well. Oral argument can be useful to force the State to defend its position in the heat of twenty minutes of questioning from engaged and interested judges.

Some successful motions for oral argument are posted on the IPDC website. Considering the large number of arguments, the Court of Appeals holds "on the road" each year, counsel may want to note when a case might be particularly appropriate for a high school or college audience.

3. Indiana Supreme Court Practice

Motions for oral argument are not necessary or useful with petitions to transfer to the Indiana Supreme Court. The justices generally meet weekly to discuss transfer petitions. Justices and staff attorneys have told CLE audiences that the Court will generally schedule oral argument in cases in which transfer is granted or cases in which the court is contemplating transfer but seeks further dialogue. The reason(s) to grant transfer are generally the same as the reason(s) to hold oral argument. A request for oral argument is not likely to increase the possibility of either.

III. Preparing for Oral Argument

The court will usually allow you at least one month (and sometimes considerably longer) to prepare for an oral argument. The Indiana Supreme Court will send a form email setting the date, subject to revision only for extraordinary cause. The court of appeals will simply issue an order setting the date.

A. Review the Order and File an Acknowledgement

Appellate Rule 52(C) requires counsel to file a written acknowledgement of oral argument within fifteen days of the order setting it. This acknowledgement need only be a sentence or two, informing the court that you have received its order for oral argument on [day] at [time] in [location] and that you will appear and present argument. If you are truly unable to attend the argument for an extraordinary reason, such a longstanding prepaid vacation, surgery, or perhaps a longstanding lengthy trial commitment, you should promptly file a motion to reschedule the argument. The motion should state the specific reason you cannot attend and offer alternative dates for rescheduling. Plans or court proceedings that can be easily rescheduled should not be cited as the reason.

If another lawyer in your office is able to present oral argument, the court may want him or her to do so. But if a specific attorney has done all the preparation and is best person to argue the case, explain to the court why it is important for that attorney to present the argument.

B. Do Not Divide Your Time; In Extraordinary Cases, Ask for More Time

Although the rules do not address it, judges and justices regularly and consistently tell lawyers at CLEs and other presentation not to split oral argument time. If more than one lawyer wrote the brief, the lawyer most familiar with the case and most comfortable doing an oral argument (and willing to put in the necessary preparation time) should do the entire oral argument. If two cases are consolidated for oral argument and involve the same issue, one lawyer will be more effective than trying to divide (or create) issues. If you decide to disregard this advice and divide your argument time, counsel must be prepared to address questions even if better addressed as part of co-counsel's argument. Judges do not

want to hear, "Sorry, that is my co-counsel's issue." Finally, if the first lawyer goes over his or her allotted time, the court is unlikely to say anything. Indeed, Rule 53(C) specifically says "the Court will not separately time each attorney." Rather, the first lawyer can and sometimes does burn into the second lawyer's time. To prevent this, the second lawyer should rise and stand behind the first lawyer at the podium at the appropriate time. This will let the court (and co-counsel) know that it is time to move on.

With the exception of death penalty cases, oral arguments are almost always scheduled for a total of forty minutes or twenty minutes per side. Appellate Rule 53(A) permits counsel to request additional time by filing a written motion demonstrating "good cause" no later than fifteen (15) days after the order setting oral argument. Counsel should only invoke this rule in an extraordinary case, such as ones involving multiple arguing parties or perhaps a case with significant time allocated to amicus counsel. See, e.g., Gunderson v. State, Case No. 46A03-1508-PL-01116 (order on August 11, 2016); Brewington v. State, Case No. 15A01-1110-CR-00550 (order on July 15, 2013).

C. Review the Case, Develop a Theme, and Make an Outline

Early in the preparation process, you should review the briefs, relevant cases, and refresh your memory of the record. If your brief argues five or more issues, you will not have time to address all of those in twenty or thirty minutes. You should generally choose the one or two issues mostly likely to lead to relief for your client. If the law is unsettled in a particular area, you should prepare to discuss that issue regardless of how important it is to your client. The court will be interested in it.

Below is a helpful checklist for oral argument, which includes a section on developing an appellate theory of your case:

1. Write a paragraph of one to three sentences that summarizes each of the issues and will help an appellate judge understand why what happened was improper, unfair, unjust, or will leave them with a feeling of uncertainty or discomfort about the propriety of the outcome at trial or sentencing.

2. Your appellate theory of the case should usually:

a. explain the factual context of the issue;
b. explain the actions of the people involved, i.e., witness, judge, prosecutor, defense lawyer;
c. contains the legal issue;
d. be able to be stated simply and concisely; and
e. produce a fair and just result.

3. Your appellate theory should consider that appellate judges:

a. do not make decisions based solely on their conscience, but they rarely make decisions contrary to their conscience; and
b. like jurors, they want to be able to go home after writing an opinion and be able to explain what they did to their spouse, significant other, children, relatives, neighbors, and friends, and feel good about it.

Sometimes the court will specify the issues it wants to discuss in its order setting argument. If this happens, focus on those issues—regardless of how meritorious you might think the other ones are.

You will only alienate the court if you go in with your own agenda and use the court's time to advance it. That said, you might briefly find a way to address a key issue the court has not identified after addressing the court's questions and concerns.

The court of appeals and supreme court often post summaries of upcoming arguments online. These might give you a hint of the issue(s) of interest to the court. If you are still baffled about why the court set the case for oral argument, ask other lawyers to read the briefs and offer their opinion.

D. Begin to Anticipate the Judges' Questions

Judges may and often do ask questions on a wide array of different topics at oral argument. It is impossible to anticipate every question, but it is possible to anticipate and prepare to address many of them. At a minimum, be prepared to discuss the following:

- Any factual questions about the record.

- The holdings of all key cases, statutes, and other authorities. Adverse authority is most likely to be the source of questions. Be prepared to address it. Adverse authority can usually be distinguished; other times you have no choice but to argue that it should be overruled.

- The practical effect and policy reasons that support your argument. If your client wins, will the floodgates swing open for other defendants? Are there retroactivity issues? Judges routinely ask questions to test the limits of your argument. Be prepared to address these and make reasonable concessions to make your argument as reasonable as possible.

- The precise relief you are seeking. If the case is reversed, what happens? Is the conviction vacated or can the State retry the case? If you are challenging the sentence, do you want a new sentencing hearing or reduction to a specific term of years?

- Finally, the types of questions posed at an Indiana Supreme Court argument may differ from those posted by the Court of Appeals. As explained in Part V, the Indiana Supreme Court generally focuses on broad issues of state-wide significance in deciding whether to grant transfer. Thus, especially when the Court has not yet granted transfer, be prepared to address why the issue in your case in your case is one that affects other cases. Justices will sometimes ask how other states or federal courts have addressed your issue. Highlighting the potential effect on other defendants is fine, but often an adverse Court of Appeals' decision may also raise concerns for others. Highlighting concerns of judicial efficiency, the need for clarity for trial courts and prosecutors, or the effect on public confidence and understanding of the judicial system are sometimes effective themes and strategies on transfer.

E. Set up One or More "Moots"

Before delivering your oral argument, you should have practiced ("mooted") it with a group of lawyers on more than one occasion. You should initially meet to "brainstorm" the issues and then twice or more to practice the argument while being interrupted with questions. Regardless of your location in

the state, lawyers are available to help you prepare—either in person or via telephone or skype conference.

The attorneys at the Indiana Public Defender Council have many years of appellate experience and offer a free mooting program for public defender cases (and the same service for private lawyers at a modest cost.) CLE credit is available for mooting an oral argument with the Indiana Public Defender Council. For a non-criminal defense perspective, the Appellate Institute at the Indianapolis Bar Association has numerous experienced appellate lawyers and former clerks available for free moots for first-time advocates or those representing public defender clients.

No matter how well you know the case, mooting will better prepare you for an argument. Judges and justices often comment that they can tell which lawyers have mooted their case and which ones have not. Those who have are better prepared to address the wide variety of questions from the bench and will be prepared for problem areas or tough questions that can leave an unprepared advocate speechless.

F. File Additional Authority, if Helpful

If you come across significant new cases or other authorities as you prepare for oral argument, consider filing a Notice of Additional Authority. As explained in Section IV, such notices may be filed at any time while an appeal is pending and cannot include more than a one-sentence description of the authority and its importance to your case. Although there is no official deadline for such notices to be filed, counsel should strive to file a single notice—not multiple ones—at least a week before the argument. This will give the judges enough time to read and consider the cases cited. A notice filed on the day before the argument may not be well-received by the judges.

G. Be Cautious About Using Visual Aids, Except Perhaps a Short Handout

Although Rule 52(F) mentions the possibility of using "physical objects or visual displays" during oral argument, seldom will this be a good idea. Unless the exhibit is very large, the judges or justices will have a difficult time seeing it and a difficult time hearing you if you are turned trying to explain something about it. If you want the judges or justices to follow along with a key exhibit or statutory excerpt, consider preparing a short handout for their use during the argument. You may want to file something like a "Notice Regarding Use of Handout" at least a few days before argument to apprise the court and opposing counsel of the handout, which could be attached.

On rare occasion, use of an exhibit may be appropriate and helpful. For example, counsel showed part of a troubling interrogation by police at a Court of Appeals' argument in a case that was ultimately reversed by the Indiana Supreme Court. Bond v. State, 9 N.E.3d 134 (Ind. 2014). In a civil case, the Indiana Supreme Court reconsidered and allowed a large bucket from a utility truck at the argument, which counsel argued was "absolutely critical" to resolving the legal claims in the case. See Cause No. 29S05-1209-CT-557 (order on Jan. 2, 2013). If an exhibit is critical or very helpful in your case, alert the court and opposing counsel of your plans early in the process. Counsel is responsible under Rule 53(F) to provide any equipment needed and remove the exhibit promptly.

H. Watch an Argument Online

If you have never had an oral argument or have not had one for several years, you will feel much more comfortable by watching one or more recent arguments. All Indiana Supreme Court arguments since 2001 are available for viewing on the court's website; several years of Court of Appeals arguments are also archived: https://mycourts.in.gov/arguments/default.aspx?court=sup. You may search for an argument on an issue similar to yours by entering keywords or can watch a specific lawyer's argument by entering his or her name. Although an argument on a similar issue may be helpful, watching newer Indiana Supreme Court arguments may be especially helpful considering the change in membership in recent years.

I. Know Your Panel

If you are arguing at the Indiana Supreme Court, all five justices will attend and ask questions. If one or more cases are crucial to your argument, you should be aware of which justice wrote that opinion (or a dissent to that opinion) in preparing for the argument. That justice may have a special interest in asking questions about the case. Moreover, it is useful to know a little about the justices' backgrounds, which can be easily researched by reading their biography on the court's website. Justices who have practiced criminal law or been a trial judge may have a different perspective from those who have not.

If you are arguing at the Indiana Court of Appeals, only three judges will attend and ask questions at your argument. The court's order setting oral argument will usually include the names of the three panel members. If it does not, you may call the court administrator's office and ask. Again, a judge who wrote a particular opinion will likely have a special interest in it. Moreover, there are occasional splits among different panel of the court of appeals on some issues. You will want to know which judge(s) have decided previous cases in a way favorable or adverse to the position you are arguing. This does not mean you should give up on a judge who has written an adverse decision, but you should be aware of their prior decision. Most judges are open to reconsidering prior decisions, especially when asked to do so in a thoughtful, well-reasoned, and respectful way.

J. Review the Court's Website

Both the Indiana Supreme Court and Indiana Court of Appeals have posted detailed information about oral arguments on their websites. Be sure to review the website in the course of preparing for your argument.

IV. Delivering the Oral Argument

The best oral arguments are conversations with the court. They are not a prepared speech but rather an opportunity to make your key points while responding to the court's questions. Consider taking a two-page outline that lies flat to the podium with you. You may take additional materials but strive to avoid shuffling a lot of paper during the argument.

The following points are worth considering in delivering a high-quality oral argument.

A. Relax

Sure, you may have gone into appellate work because you dread public speaking. This may not be a pleasant experience for you but relax. You know more about the case and issues than the judges do. You have read the record and cases and written a brief; they have probably just read your brief. This is your chance to share your knowledge. Relax and take advantage of it. Being overwhelmed by fear or nervousness will not help your client—and it really is not warranted.

B. Get Started and Reserve Time for Rebuttal

Perhaps your last oral argument was in law school during a moot court competition. That is not a bad start, but a real argument is a little different. The presiding judge or Chief Justice will probably introduce the lawyers, so there is no need for you to tell the court again who you are. Simply walk to the podium and say, "May it please the court," and proceed to your argument. You will probably be asked by a clerk or bailiff ahead of time about rebuttal time, and five minutes seems to be the norm. The Supreme Court staff will likely tell you it is important to begin your argument by stating, "I have reserved X minutes for rebuttal."

C. Offer a Short Preview or Roadmap of your Key Points

Most judges will give counsel a minute or so to introduce their case and key points before asking questions. This is your prime—and possibly only—opportunity to offer your theme and the key points that you want to make. A clear roadmap lets the judges know where the argument is likely to go. Take advantage of it; it will allow the judges to better follow your argument and ask questions at the appropriate time.

D. Keep the Facts to a Minimum in Most Cases

With rare exception, judges will have read the briefs and be familiar with the facts of your case. There is no reason to begin your argument with a lengthy summary of the facts. However, if you have a roadshow argument at a high school or college, the court will appreciate you providing some basic factual information for the benefit of the audience.

E. Answer the Judges Questions

Oral argument is an opportunity to convince the judges to rule in your favor. This requires you to answer their questions and concerns rather than simply making a speech or the points you believe are important. At the top of your agenda should be answering the judges' questions. When a judge starts to speak, you should stop. Listen carefully to the question, pause briefly to consider the answer if necessary, and provide a specific answer. "Yes, your honor" or "No, your honor," then explain the specific reason(s) for your answer. After answering the question, return as seamlessly as possible to your outline.

F. Be Respectful and Deferential

Judges do not like to be interrupted, ignored, or insulted. Regardless of how silly or irrelevant you might find a question, answer it respectfully without a grimace or annoyed tone in your voice.

There is a difference between deference ("yes, your honor") and sucking up ("that is an excellent question, your honor"). Show deference and respect; do not suck up.

G. Use Your Time Wisely

There should be a timing device at the podium. Do not obsess about it, but do not ignore it either. The judges have considerable control over what you discuss at oral argument through their questions. You certainly want to be responsive to those questions. However, you also want to make your key points. This is best accomplished by finding a subtle way to weave back into your theme and key points after responding to questions. If you have not hit on a key point and have only a few minutes remaining, you should try to find a way to get to it.

H. Remember Confidentiality Concerns and Rules on Access to Court Records

Oral arguments are webcast live and archived. Appellate Rule 53(H) makes special note of the importance of maintaining confidentiality of certain information at oral argument; specifically, counsel must be sure to refer to "parties only as identified in the appellate Chronological Case Summary" and not otherwise "disclose any matter excluded from Public Access in accordance with the requirements of Rules on Access to Court Records Rule 5. Thus, in TPR/CHINS, civil commitment, protective order, and juvenile cases, be sure to use initials instead of names. In criminal cases, the names of child victims of sex crimes are protected, although the court often avoids use of names more broadly. Thus, the safest approach would be to avoid using the name of any child or the adult victim of a sex offense or domestic violence.

I. Listen Carefully to the State's Argument; Take Notes

If you are the Appellant, you will get to go first and last. During the State's argument, listen carefully and take notes. Pay attention to the judge's questions and concerns. These will be your best points on rebuttal. If the State misstates the record or a holding of a case, be prepared to bring it up in a tactful way during your rebuttal.

J. Offer an Effective Rebuttal

Most lawyers will reserve five minutes for rebuttal. Rebuttal is not an opportunity to make new points or to repeat the same points you made in your initial argument. It is your chance to respond to the State's argument—and especially the concerns of the judges raised during the State's argument. This is best done by careful listening and note-taking. Near the end of the State's argument, compile a short list of the most important points you need to make. If a helpful case or statute has not yet been mentioned, you should bring it up during your rebuttal as well.

H. Supreme Court Specifics

The suggestions outlined above apply for the most part to oral arguments at the Indiana Court of Appeals and the Indiana Supreme Court. Because the supreme court is more interested in the statewide impact of your case, however, the court is less likely to be interested in the particular facts of your case. Therefore, you should approach the argument expecting the court to "probe the outer

limits" of your position and its statewide impact. If the justices embrace your argument, what else may happen?[2]

V. After the Oral Argument

If the court of appeals, Indiana Supreme Court, or United States Supreme Court decides an important new case, counsel should promptly file a Notice of Additional Authority to bring that case to the attention of the court and briefly explain its significance to the pending appeal. Although such a notice may be filed at any time while an appeal is pending, counsel should be cautious in filing additional authority after oral argument is held. The court may strike a Notice of Additional Authority if it is merely "an attempt to file a surrebuttal to the arguments raised during the oral argument, as the case law cited . . . could have been cited in the . . . brief." Heather Smith, Indiana Appellate Rule 48 – Additional Authorities, No Second Chances!, The Appellate Advocate 3 (Spring 2007).

Indiana used to allow advocates to file "Notes on Oral Argument" for the limited purpose of answering questions from oral argument. Kent Zepick, Notes on Oral Argument (citing Wiltrout, Indiana Practice, Sec. 2738 (1967)). In 2012, the Indiana Supreme Court made clear such a filing "without leave of court" is no longer allowed. Reed v. Reid, 969 N.E.2d 589 (Ind. 2012). More recently, after lengthy filings under a number of different captions, the Indiana Supreme Court issued an order to "amplify *Reed*'s admonition: After transfer briefing is closed, further arguments on the merits—by any name—may be filed only by leave of this Court or in the limited form Rule 48 authorizes for notices of additional authority." Care Grp. Heart Hosp., LLC v. Sawyer, 93 N.E.3d 743, 745 (Ind. 2018).

In a rare case where a truly unexpected or significant issue arises during oral argument, counsel may request permission of the court to file a post-argument submission. If the court appears amenable during the oral argument, counsel should promptly file a Motion for Leave to File Post-Argument Submission and tender the proposed submission with the request for leave. Examples from Purvi Patel v. State, 71A04-1504-CR-166 are available on the IPDC website.

[2] This is advice is based on comments offered by Chief Justice Shepard after an oral argument held at the Indiana University School of Law at Bloomington on January 30, 2007. The argument was *Richard Brown v. State* and may be accessed on the court's website.