CHAPTER NINE

LIMITATIONS ON SENTENCES

I. DOUBLE JEOPARDY

When researching a possible double jeopardy violation, it is important to consider the possible violation under the United States Constitution, the Indiana Constitution, the Indiana Code, and Indiana common law. There is a different analysis to determine whether a violation exists under each possible basis. The United States Constitution includes the most restrictive analysis, while Indiana common law seems to provide the most relief. Courts may very well consider an issue waived if not raised under the proper constitution and/or law.

A. ANALYSIS

1. U.S. Constitution

No person "shall be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V. The Fifth Amendment Double Jeopardy Clause protection applies to both successive punishments and to successive prosecution for the same criminal offense. United States v. Dixon, 509 U.S. 688, 696 (1993) (citing North Carolina v. Pearce, 395 U.S. 711 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989)). The Fifth Amendment Double Jeopardy Clause is binding on states. Benton v. Maryland, 395 U.S. 784 (1969).

> H.M. v. State, 892 N.E.2d 679 (Ind. Ct. App. 2008) (double jeopardy principles attach where a juvenile faces multiple charges under a single delinquency adjudication). See also D.J. v. State, 88 N.E.3d 236 (Ind. Ct. App. 2017).

When determining whether multiple punishments violate the Fifth Amendment protection against double jeopardy, the "same elements" test is applied.

a. Same elements test: proof of additional element

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932).

A review of multiple punishments under the Double Jeopardy Clause of U.S. Constitution requires that the court look only to relevant statutes in applying the Blockburger same elements test and no further. Games v. State, 684 N.E.2d 466, 477 (Ind. 1996) (double jeopardy analysis does not allow court to look at charging information, jury instructions, or underlying proof needed to establish elements). See also Grinstead v. State, 684 N.E.2d 482 (Ind. 1997). Thus, when establishing a double jeopardy claim under the Fifth Amendment to the U.S. Constitution, the same conduct test [explained below] is not applied. United States v. Dixon, 509 U.S. 688 (1993) (overruling Grady v. Corbin, 495 U.S. 508 (1990), which held that if the Blockburger test is not met, the double jeopardy clause will still prevent the subsequent prosecution for a crime of which an essential element requires proof of conduct for which the defendant has already been convicted).

b. Indiana's interpretation of same elements test

Constrained by the Supremacy Clause, the Indiana Supreme Court recognizes that the same elements test requires that Indiana courts look only to the statutory elements of the offense, not to the charging information, the jury instructions outlining elements, or the underlying proof needed to establish the elements. Games v. State, 684 N.E.2d 466, 477 (Ind. 1997). First, the courts determine whether or not the legislature intended to impose separate punishments for multiple offenses arising in the course of a single act or transaction; but where legislative intent is uncertain, a comparison of the statutory elements is required. Potter v. State, 684 N.E.2d 1127, 1136 (Ind. 1997).

2. Indiana Constitution

"No person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Article I, Section 14 of the Indiana Constitution provides broader protections against double jeopardy than the Fifth Amendment of the United States Constitution. Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

a. Prior to October 1, 1999

Prior to October of 1999, when Richardson v. State, 717 N.E.2d 32 (Ind. 1999) was decided, it was unclear whether the Indiana constitutional prohibition against double jeopardy requires a different and more expansive analysis of double jeopardy claims than does the U.S. constitution.

Some courts held that the Indiana Constitution provided greater protection against double jeopardy than the Fifth Amendment of the U.S. Constitution. See Russell v. State, 711 N.E.2d 545 (Ind. Ct. App. 1999) and Roberts v. State, 712 N.E.2d 23 (Ind. Ct. App. 1999). Other courts held that the Indiana Constitution afforded the same protection as the U.S. Constitution. See Richardson v. State, 717 N.E.2d 32, 32 n. 36 (Ind. 1999) (providing list of cases incorrectly applying Indiana constitutional analysis).

However, Richardson is not available for retroactive application in post-conviction proceedings. Taylor v. State, 717 N.E.2d 90 (Ind. 1999). See also McCurry v. State, 718 N.E.2d 1201 (Ind. Ct. App. 1999).

Although the Richardson analysis of Indiana constitutional double jeopardy may not be applied retroactively, the court may decide on a case-by-case basis whether a violation of the Indiana Constitution's prohibition against double jeopardy was fundamental error. Taylor v. State, 717 N.E.2d 90, 95 n. 7 (Ind. 1999).

b. After October 1, 1999, to August 18, 2020 - Richardson

Article I, Section 14 of the Indiana Constitution provides broader protections against double jeopardy than the Fifth Amendment of the United States Constitution. Whereas federal double jeopardy analysis only consists of the same elements test, Indiana double jeopardy analysis consists of both the same elements test and the actual evidence test. Richardson v. State, 717 N.E.2d 32 (Ind. 1999); Atchley v. State, 730 N.E.2d 758 (Ind. Ct. App. 2000) (double jeopardy prohibition contained in State Constitution is not coterminous with its counterpart in Federal Constitution).

(1) Test

Two or more offenses are the same offense in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (Sullivan, J., concurring, setting forth five situations where double jeopardy violations occur; Boehm and Selby, J.J., concurring in result based on fact that evidence beyond elements of offenses must be considered; however, cases involving multiple punishment, such as instant case, should be resolved using common law and statutes, whereas successive prosecution cases should be resolved using constitutional double jeopardy analysis).

(a) Same elements test

The first step in determining whether two offenses violate double jeopardy under the Indiana Constitution is to apply the "same elements" test. After identifying the elements of each offense, the court must determine whether the elements of one offense could, hypothetically, be established by evidence that does not also establish the essential elements of the other charged offense. Each offense must contain at least one element which is separate and distinct from the other offense so that the same evidence is not necessary to convict for both offenses. Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

(b) Same conduct test: proof of additional fact

Even if consideration of the statutory elements test does not disclose a double jeopardy violation, the actual evidence test may. Under the actual evidence test, the defendant must demonstrate a reasonable possibility that evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish essential elements of a second challenged offense. Richardson v. State, 717 N.E.2d 32 (Ind. 1999). A reasonable possibility that the jury used the same facts to reach two convictions requires substantially more than a logical possibility, such as a particularly likely standard, but less may suffice. Lee v. State, 892 N.E.2d 1231 (Ind. 2009) (reasonable possibility turns on a practical assessment of whether the jury may have latched onto exactly the same facts for both convictions).

(c) Application of actual evidence test to acquittals and mistrials after hung juries

The actual evidence test applies to procedural double jeopardy. That is cases where the jury acquits a defendant of one charge but cannot reach a verdict on a second charge, and where the defendant is subsequently convicted of the second charge on retrial. Garrett v. State, 992 N.E.2d 710 (Ind. 2013). Thus, if the jury finds a defendant guilty or acquits on some counts but can't agree on others, prosecutors may not try defendant again on hung counts if they had a common element with those on which the jury acquitted or convicted. Yaeger v. United States, 129 S.Ct. 2360 (2009).

Harris v. State, 9 N.E.3d 679 (Ind. Ct. App. 2013) (double jeopardy did not bar retrial on Class C felony sexual misconduct with minor charge after jury hung on that charge and acquitted defendant on Class B felony rape charge notwithstanding the sexual intercourse common between the two charges; actual evidence test did not bar a retrial of the sexual misconduct charge, as victim's age was essential to that charge but irrelevant to the rape charge).

c. After August 18, 2020—Wadle and Powell tests for substantive double jeopardy claims

NOTE: In Wadle, the Indiana Supreme Court held that the Indiana Double Jeopardy Clause only protects against successive prosecutions for the same offense. Therefore, the Richardson actual evidence test is **not overruled** as it applies to **procedural double jeopardy** (i.e., successive prosecutions for the same offense). Wadle v. State, 151 N.E.3d 227, 244 n.15 (Ind. 2020). See Wisdom v. State, 162 N.E.3d 489, 496 (Ind. Ct. App. 2020) (analyzing challenge to prosecution for gang enhancement under Richardson - and not Wadle - because argument on appeal constituted claim of procedural double jeopardy), trans. denied. Additionally, the Court of Appeals has held Wadle **does not apply retroactively** in post-conviction proceedings. Johnston v. State, 164 N.E.3d 817, 828 (Ind. Ct. App. 2021), *trans. denied*.

(1) Wadle analysis- single criminal act or transaction violates multiple statutes with common elements and harms one or more victims

In Wadle v. State, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court expressly overruled the Constitutional tests formulated in Richardson v. State (above) as they apply to claims of substantive double jeopardy, noting that the standard had caused "more confusion than clarity." In its place, the court articulated a new analytical framework to resolve multiple punishment claims going forward:

When multiple convictions for a single criminal act or transaction implicate two or more statutes, a court first looks to the statutory language itself. If either statute clearly permits multiple punishments, either expressly or by unmistakable implication, there is no violation of substantive double jeopardy.

But if the statutory language is not clear, a court must then apply Indiana's included offense statutes to determine whether the charged offenses are the same. (See Ind. Code §§ 35-38-1-6 and 35-31.5-2-168, discussed below). If neither offense is included in the other (either inherently or as charged), there is no double jeopardy violation.

But if one offense is included in the other, then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. If, based on these facts, the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," then the prosecutor may charge the offenses as alternative sanctions only. If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy, even if one offense is, by statutory definition, "included" in the other.

Wadle, 151 N.E.3d at 249, 253.

The Court concluded that, under the new framework, Wadle's two OWI offenses based on BAC concentration and endangerment violate double jeopardy. The court also vacated Wadle's conviction for Level 5 felony leaving the scene of an accident, finding that it was one continuous transaction and included in his Level 3 felony conviction for leaving the scene of an accident.

(a) **Note:** Wadle calls its analysis a "two-part inquiry." Wadle, 151 N.E.3d at 235. But because the first part contains two inquiries, it is practically speaking a three-part test. See Koziski v. State, --- N.E.3d --- (Ind. Ct. App. June 2, 2021).

First step

The Court of Appeals has noted it would be a "highly unusual circumstance" for a statute to clearly permit multiple punishment under Wadle. Demby v. State, 20A-CR-1012 (Ind. Ct. App. Feb. 16, 2021), trans. denied.

Second step (a.k.a. part 2 of Step 1)

This requires applying Indiana's included-offense statutes:

Ind. Code § 35-38-1-6: "Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense."

Ind. Code § 35-31.5-2-168 defines "included offense" as an offense that: (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

(b) Cases applying Wadle analysis:

Diaz v. State, 158 N.E.3d 363 (Ind. Ct. App. 2020) (murder and Level 5 felony robbery convictions did not violate double jeopardy under old law (Richardson) or Wadle analysis because they were two distinct chargeable crimes and continuous crime doctrine did not apply). See also Jarrett v. State, 160 N.E.3d 526, 534 (Ind. Ct. App. 2020), *trans. denied*.

Thurman v. State, 158 N.E.3d 372 (Ind. Ct. App. 2020) (pointing a firearm and criminal recklessness convictions vacated as lesser included offenses of attempted murder).

Hendricks v. State, 162 N.E.3d 1123, 1139 (Ind. Ct. App. 2021) (conspiracy to commit robbery was included offense of felony murder as charged and acts were a single transaction not subject to multiple punishments), *trans. denied*.

Rowland v. State, 155 N.E.3d 637 (Ind. Ct. App. 2020) (possession of marijuana and possession of paraphernalia did not violate DJ because they were two distinct crimes and did not violate common law "very same act" rule)

Morales v. State, 165 N.E.3d 1002, 1009 (Ind. Ct. App. 2021) (arson is not a lesser included offense of burglary with intent to commit burglary, so no DJ violation).

Koziski v. State, --- N.E.3d --- (Ind. Ct. App. June 2, 2021) (because neither of two offenses under child molesting statute was included in the other, convictions did not violate DJ under Wadle)

Confinement and kidnapping convictions held to violate Wadle. Jones v. State, 159 N.E.3d 55 (Ind. Ct. App. 2020), *trans denied*; Madden v. State, 162 N.E.3d 549 (Ind. Ct. App. 2021); and Koziski v. State, --- N.E.3d --- (Ind. Ct. App. June 2, 2021).

Woodcock v. State, 163 N.E.3d 863 (Ind. Ct. App. 2021) (because one offense was not included in the other, either inherently or as charged, and facts showed two separate crimes, convictions for murder and battery for single act of shooting gun did not violate substantive double jeopardy), *trans. denied*.

Barrozo v. State, 156 N.E.3d 718, 725 (Ind. Ct. App. 2020) (no double jeopardy violation from convictions for reckless homicide, reckless driving, and leaving the scene of an accident because no offense was included in the others)

Brown v. State, 160 N.E.3d 205 (Ind. Ct. App. 2020) (convictions for reckless homicide and dangerous possession of a firearm did not violate DJ because different, unrelated facts used to support each charge).

(2) Powell analysis – single criminal act or transaction results in multiple convictions under a single statute

In a companion case handed down with Wadle, Powell v. State, 151 N.E.3d 256 (Ind. 2020), the Court established a test for situations where a single act or transaction violates a single statute but harms multiple victims.

The first step under Powell is to determine whether the statute indicates a "unit of prosecution." If the statute is "conduct-based" (i.e., if the focus of the statute is the defendant's actions rather than the consequences of those actions), only one conviction is permissible, regardless of the number of victims. If the statute is "result-based" (i.e., if the result is part of the definition of the crime), multiple convictions are permissible where there are multiple victims. If the statute is ambiguous, the court must continue to the second step. Id. at 264.

The second step under Powell incorporates the common-law continuous-crime doctrine. In this step, the court considers the facts as stated in the charging information or presented at trial to determine "whether the defendant's actions are 'so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." If so, only a single conviction may stand. "Any

doubt counsels against turning a single transaction into multiple offenses." Id. at 264-65.

The Supreme Court held that under this framework, the defendant's acts of rapidly firing multiple shots at two men seated in a car amounted to two separate chargeable acts of attempted murder. Despite the proximity in space and time of the defendant's actions, other evidence showed his dual purpose of intent to kill both victims.

(a) Note:

The Court of Appeals has held that when conduct violates separate provisions of same statute, it is akin to "multiple statutes" and should be analyzed under Wadle instead of Powell. Koziski v. State, --- N.E.3d --- (Ind. Ct. App., June 2, 2021).

(b) Cases applying Powell analysis:

Hill v. State, 157 N.E.3d 1225 (Ind. Ct. App. 2020) (two reckless homicide convictions arising from two fatalities did not violate double jeopardy under either old law or recently adopted Powell test, because reckless homicide is a "result-based" statute that creates a separate "unit of prosecution" for each death caused by a defendant's reckless act). See also Barrozo v. State, 156 N.E.3d 718, 726 (Ind. Ct. App. 2020).

Barrozo v. State, 156 N.E.3d 718, 728 (Ind. Ct. App. 2020) (unit of prosecution for reckless driving is act itself because crime occurs—and may be punished—only once; therefore, two reckless driving convictions violate DJ).

Morales v. State, 165 N.E.3d 1002, 1010 (Ind. Ct. App. 2021) (court sua sponte held that "facts of this case, as charged and as proven, establish that the two arson counts are a single offense" and violated DJ).

Madden v. State, 162 N.E.3d 549, 560 (Ind. Ct. App. 2021) ("Because the two batteries were separated by time, place, and purpose, they were not part of a single transaction"; but two convictions for kidnapping were single transaction and violated DJ).

Jones v. State, 159 N.E.3d 155 (Ind. Ct. App. 2020) ("The only things that distinguish the Level [5] conviction (injury) from the Level [2] conviction (ransom) is result and motive" and thus two kidnaping convictions violated DJ).

Koetter v. State, 158 N.E.3d 820 (Ind. Ct. App. 2020) (legislature intended to criminalize each possession of child pornography as a distinct violation, thus no DJ violation for multiple offenses).

3. Indiana common law

The Indiana Supreme Court has long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy but are not governed by the constitutional test. See Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).

It is unclear whether these common law rules have been superseded by the Wadle-Powell analyses. Compare Rowland v. State, 155 N.E.3d 637 (Ind. Ct. App. 2020) (finding no violation of common law "very same act test" but finding Wadle "appears to have left [common law double jeopardy] "undisturbed") with Diaz v. State, 158 N.E.3d 363 (Ind. Ct. App. 2020) (finding that Wadle *overruled* all common-law rules like the continuous-crime doctrine).

Cases finding common law double jeopardy jurisprudence still intact:	**Cases finding common law double jeopardy overruled:**
Rowland v. State, 155 N.E.3d 637 (Ind. Ct. App. 2020) (finding no violation of common law "very same act test" but finding Wadle "appears to have left [common law double jeopardy] "undisturbed") Shepherd v. State, 155 N.E.3d 1227 (Ind. Ct. App. 2020) (*citing* Guyton and signaling that all five categories from the concurring opinion in Richardson remain viable after Wadle), *trans. denied*.	Diaz v. State, 158 N.E.3d 363 (Ind. Ct. App. 2020) (finding that Wadle *overruled* all common-law rules like the continuous-crime doctrine), *trans.* not sought. Woodcock v. State, 163 N.E.3d 863, 871–72 (Ind. Ct. App. 2021) ("the common law rules are incorporated into the Wadle analysis and no longer exist independently"); Jones v. State, 159 N.E.3d 55, 61 (Ind. Ct. App. 2020) (Wadle "swallowed statutory and common law to create one unified framework for substantive double jeopardy claims"), trans. *denied*; Hill v. State, 157 N.E.3d 1225, 1229 (Ind. Ct. App. 2020) ("The only common-law rule that survived Wadle and Powell is the continuous-crime doctrine, though only as part of the new tests, not as a separately enforceable double-jeopardy standard."). Morales v. State, 165 N.E.3d 1002 (Ind. Ct. App. 2021) (concurring with reasons in Jones).

These common-law doctrines have often provided more relief than the Indiana constitutional analysis. See Henderson v. State, 769 N.E.2d 172 (Ind. 2002); Pierce v. State, 761 N.E.2d 826 (Ind. 2002); Montgomery v. State, 804 N.E.2d 1217 (Ind. Ct. App. 2004) (ignoring Spivey's constitutional analysis and applying common law to overturn dual arson convictions against single victim).

a. The five articulated categories

There are at least five categories of common law double jeopardy recognized in Indiana. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002) (*citing* Justice Sullivan's concurrence in Richardson). See also Shepherd v. State, 155 N.E.3d 1227 (Ind. Ct. App.

2020) (*citing* Guyton and signaling that all five categories from the concurring opinion in Richardson remain viable after Wadle), *trans. denied*.

The categories in which two convictions may not coexist are: (1) lesser included offenses; (2) two crimes consist of the very same act; (3) one crime consists of the very same act as an element of the other; (4) enhancement of one crime imposed for very same behavior or harm as another crime; and (5) conspiracy where overt act is the very same act as another crime. Id.

(1) Lesser included offenses

Conviction and punishment for a crime which is a lesser-included offense of another crime for which the defendant has been convicted and punished is a double jeopardy violation. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002). Further, IC 35-38-1-6 prohibits convictions and sentences on lesser included offenses. For a detailed discussion of lesser included offenses, see Section I.A.4, *Double Jeopardy, Analysis, Indiana Code*, *supra,* this chapter.

(2) Enhancement and crime based on same behavior

The following section discusses: (1) multiple enhancements based on the same fact; and (2) an enhancement and an element of another offense based on the same fact. For a detailed discussion on the preclusion of using an element of an offense as an aggravator, see Chapter 4, Subsection II. C., *Sentencing Decision; Aggravating Circumstances; Improper Enhancement of Sentence*.

To the extent that a defendant's conviction for engaging in particular additional behavior or causing particular additional harm, that behavior or harm cannot also be used as an enhancement of a separate crime except where separate victims are involved or the behavior or harm that is the basis of the enhancement is distinct and separate. Walker v. State, 758 N.E.2d 563, 565-66 (Ind. Ct. App. 2001) (quoting Justice Sullivan's concurrence in Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999)). Example: enhancement for robbery based on a death for which the defendant is also being punished. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002); Gross v. State, 769 N.E.2d 1136, 1139 (Ind. 2002).

(a) Bodily Injury

Double Jeopardy can be violated due to bodily injury-related enhancements: (1) where multiple charges are enhanced based upon the same injurious consequences to the same person; or (2) where a sentence is enhanced, and an element of another charge is proven by the same injurious consequences or death to the same person.

However, when there is more than one non-superficial injury, one injury can be used to enhance a sentence for one crime and the other injury can be used to support proof of another crime. Jackson v. State, 625 N.E.2d 1219 (Ind. 1993) (sentencing defendant for both murder and robbery resulting in serious bodily injury did not violate double jeopardy where there were many injuries inflicted on victim before she died). See also Wethington v. State, 655 N.E.2d 91, 96-97

(Ind. Ct. App. 1995) (same result where injuries occurred over a half-hour period); Baltimore v. State, 878 N.E.2d 253 (Ind. Ct. App. 2007).

Mitchell v. State, 541 N.E.2d 265 (Ind. 1989) (convictions for class B robbery based on serious bodily injury and murder were not permissible based on single gunshot wound to head; other injuries caused by victim falling on gravel after being shot were superficial and did not constitute serious bodily injury to justify enhancement).

(i) Multiple charges enhanced based upon same injurious consequences to same person

Pierce v. State, 761 N.E.2d 826 (Ind. 2002) (enhancement of burglary conviction based on same bodily injury that formed the basis of Class B felony robbery conviction violated Indiana common law double jeopardy, but not Indiana constitutional double jeopardy); See also Street v. State, 30 N.E.3d 41 (Ind. Ct. App. 2015).

Flowers v. State, 481 N.E.2d 100 (Ind. 1985) (there was error where burglary, attempted rape, and attempted robbery were all enhanced based on same injury to victim caused by stabbing and striking of victim; remanded with instructions to vacate convictions and sentences for class A felonies and to enter convictions and appropriate sentences for class B and C felonies). See also Campbell v. State, 622 N.E.2d 495 (Ind. 1993) and Odom v. State, 647 N.E.2d 377 (Ind. Ct. App. 1995).

Holloway v. State, 773 N.E.2d 315 (Ind. Ct. App. 2002) (although offense occurred prior to adoption of Richardson analysis, under common law double jeopardy, enhancements of criminal deviate conduct and rape based on same bodily injury to victim violated double jeopardy).

(ii) Sentence enhancement and element of separate charge proven by same injurious consequences or death to same person

A person cannot be convicted of both a homicide-related offense and another crime enhanced due to death or injury to the same person. Gross v. State, 769 N.E.2d 1136 (Ind. 2002) (murder and enhanced robbery conviction as Class A felony both based on single act of shooting victim cannot stand under Spivey or common law; however, robbery conviction was only reduced to Class B rather than Class C felony because of distinct deadly weapon enhancement to charge); see also Spears v. State, 735 N.E.2d 1161 (Ind. 2000); Hampton v. State, 719 N.E.2d 803 (Ind. 1999); Kingery v. State, 659 N.E.2d 490 (Ind. 1995).

Nor can the same injury or death be used to enhance two different offenses due to death or injury to same victim. Deloney v. State, 938 N.E.2d 724 (Ind. Ct. App. 2010) (same bodily injury, death, was used to enhance defendant's conviction of both burglary and attempted robbery to class A felony. Court remanded for reduction of conviction to Class C felony attempted robbery).

Henderson v. State, 769 N.E.2d 172 (Ind. 2002) (although not violation of Richardson-Spivey test, enhancement of conspiracy to commit robbery conviction based on same bodily injury, death, as murder conviction violated Indiana common law).

Francis v. State, 758 N.E.2d 528 (Ind. 2001) (where defendant was convicted of murder and three counts of robbery, all elevated to Class A felonies based on death of same person, double jeopardy required robbery convictions to be reduced to Class C felonies; although defendant could be guilty of Class B felony robbery based on use of deadly weapon, information alleging only death of victim and not use of deadly weapon prohibited Class B felony robbery convictions). See also Williams v. State, 757 N.E.2d 1048 (Ind. Ct. App. 2001); McBride v. State, 837 N.E.2d 182 (Ind. Ct. App. 2005); and Owens v. State, 897 N.E.2d 537 (Ind. Ct. App. 2009).

Wieland v. State, 736 N.E.2d 1198 (Ind. 2000) (enhancements of convictions for conspiracy to commit robbery and attempted robbery due to death of victim violated Indiana double jeopardy principles because defendant also was convicted of felony murder based on same death; both conspiracy to commit robbery and attempted robbery were reduced to Class B felonies). See also Boyce v. State, 736 N.E.2d 1206 (Ind. 2000).

Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000) (where murder was charged as striking victim, and victim's death was serious bodily injury used to enhance neglect, double jeopardy prohibited conviction of neglect as Class B felony and murder); see also Strong v. State, 870 N.E.2d 442 (Ind. 2007).

(iii) Injurious acts close in time/manner used to enhance multiple offenses

Bevill v. State, 472 N.E.2d 1247 (Ind. 1985) (sentences for class B burglary elevated to class A felony due to serious bodily injury and attempted murder violated double jeopardy where both were based on quick and confined multiple stabbing). See also Davis v. State, 770 N.E.2d 319 (Ind. 2002); Johnson v. State, 749 N.E.2d 1103 (Ind. 2001); King v. State, 517 N.E.2d 383 (Ind. 1988), *overruled on other grounds*, 642 N.E.2d 511; Mallot v. State, 485 N.E.2d 879 (Ind. 1985).

Curry v. State, 740 N.E.2d 162 (Ind. Ct. App. 2000) (where beating that supported force element of criminal deviate conduct, attempted rape, burglary and battery was one single episode of brutality, there was double jeopardy violation; burglary and criminal deviate conduct convictions were reduced to Class B felonies).

Russell v. State, 711 N.E.2d 545 (Ind. Ct. App. 1999) (because two convictions were imposed for same injurious consequences to same victim during single confrontation, defendant's convictions and sentences for Class A felony arson and reckless homicide violated Indiana Constitutional double jeopardy prohibition; court vacated reckless homicide conviction). See also

McIntire v. State, 717 N.E.2d 96 (Ind. 1999); Weemes v. State, 637 N.E.2d 832 (Ind. Ct. App. 1994).

Channell v. State, 658 N.E.2d 925 (Ind. Ct. App. 1995) (choking victim with forearm and cane, striking him in face, hitting his head with a flat iron, and stabbing him in the head with a fork were all part of one continuous assault, and therefore conviction on attempted murder and enhanced robbery constituted double jeopardy).

(b) Deadly weapon used during separate offenses

Use of a single deadly weapon during the commission of two or more separate offenses may enhance the level of each offense. Miller v. State, 790 N.E.2d 437 (Ind. 2003). The Supreme Court's recognition in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), of the common law rule establishing that enhancements cannot be imposed for "the very same behavior" could not have included the use of a single deadly weapon during the commission of separate offenses. Sistrunk v. State, 36 N.E.3d 1051 (Ind. 2015). Because a defendant chooses to use the weapon in each of his crimes, repeated use of the weapon justifies multiple enhancements to the crimes committed. Leggs v. State, 966 N.E.2d 204 (Ind. Ct. App. 2012).

Stokes v. State, 947 N.E.2d 1033 (Ind. Ct. App. 2011) (three different weapons supported conviction for unlawful possession of a firearm by a serious violent felon and separate enhancements for robbery and criminal recklessness convictions).

Marshall v. State, 832 N.E.2d 615 (Ind. Ct. App. 2005) (court affirmed multiple enhancements on three counts of child molesting even though defendant held knife to victim's throat only once).

Peterson v. State, 650 N.E.2d 339 (Ind. Ct. App. 1995) (no double jeopardy violation by enhancing both rape and robbery convictions as a result of using same weapon on same victim; court declined to use same conduct test applied in Bevill and Flowers in weapon case).

Lingler v. State, 635 N.E.2d 1102 (Ind. Ct. App. 1994), *vacated in part on other grounds*, 644 N.E.2d 131 (Ind. 1994) (defendant confined victim in car, performed deviate sexual acts upon her at her residence and then raped her twice, all while armed with deadly weapon; all felonies properly elevated on basis that defendant was armed with deadly weapon while committing separate and distinct felonies).

But see:

Cross v. State, 15 N.E.3d 569 (Ind. 2014) (5-year firearm sentence enhancement vacated because it was based on the same behavior as carrying handgun without a license conviction).

Walker v. State, 758 N.E.2d 563 (Ind. Ct. App. 2001) (it was violation of double jeopardy to enhance defendant's conviction for voluntary

manslaughter due to use of deadly weapon and enhance his conviction for robbery by use of deadly weapon; where defendant took item from victim after he was shot, harm caused by use of deadly weapon ceased prior to robbery).

(c) Bodily injury/deadly weapon

Where the bodily injury is used to enhance one offense and the use of the deadly weapon is used to form the basis of the conviction for another offense, double jeopardy may not be violated.

Wethington v. State, 655 N.E.2d 91 (Ind. Ct. App. 1995) (same use of deadly weapon formed basis for both attempted murder and robbery charges; held, robbery charge properly elevated based on bodily injury rather than use of deadly weapon).

Lyles v. State, 576 N.E.2d 1344 (Ind. Ct. App. 1991) (convictions for battery enhanced to C felony based on use of deadly weapon and for burglary enhanced to A felony based on bodily injury did not violate double jeopardy).

But see:

Noble v. State, 734 N.E.2d 1119 (Ind. Ct. App. 2000) (battery resulting in serious bodily injury and battery with deadly weapon was state constitutional double jeopardy violation because both were based on same stabbing of victim).

(d) Miscellaneous enhancements

Generally, multiple egregious results do not increase the number of crimes. But a defendant may be convicted of multiple crimes/enhancements where the legislature explicitly allows for multiple convictions where multiple injuries or deaths have occurred. Scuro v. State, 849 N.E.2d 682, 687 (Ind. Ct. App. 2006) (overruling Kelly v. State, 527 N.E.2d 1148, 1155 (Ind. Ct. App. 1988), which held that multiple egregious results of operating vehicle while intoxicated do not increase number of crimes, only the penalty; after Kelly, the legislature amended the statute to allow for multiple convictions of OVWI based on multiple victims' deaths or injuries).

Clark v. State, 732 N.E.2d 1225 (Ind. Ct. App. 2000) (although defendant's conduct of offering to pay money for someone to burn his house so that he could collect insurance proceeds constituted both attempted arson for hire and attempted arson with intent to defraud insurance company, defendant could only be convicted of one enhancement under Indiana Constitution).

Porter v. State, 935 N.E.2d 1228 (Ind. Ct. App. 2010) (enhancement of defendant's two nonsupport offenses to Class C felony status based on the same $20,000 arrearage violated Indiana's common law double jeopardy tradition that prohibits multiple enhancements based upon a single act).

(e) Habitual offender enhancements

For a detailed discussion on this issue, see Chapter 8, *Habitual Offender Enhancement*, Subsection VI.B, *Constitutional Issues; Double Jeopardy*.

(3) Very same act is the basis of two crimes

Conviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished is a double jeopardy violation. One example would be a battery conviction vacated because the information showed that the identical touching was the basis of a second battery conviction. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002); see Rowland v. State, 155 N.E.3d 637, 640 (Ind. Ct. App. 2020) (finding common law categories, including very same act rule, left undisturbed by Wadle).

Jones v. State, 976 N.E.2d 1271 (Ind. Ct. App. 2012) (although there were multiple instances where defendant battered a victim during an altercation, two of defendant's three convictions for battery had to be vacated because there was a reasonable possibility the jury based the convictions on the same acts as a result of the State's use of the same general language in each battery and its attempt during closing to differentiate the batteries was legally incorrect).

Smith v. State, 983 N.E.2d 226 (Ind. Ct. App. 2013) (where two criminal deviate conduct charges were charged in the alternative to the two intercourse charges, not as separate offenses, convictions on all four charges violated Indiana's double jeopardy prohibition).

Other examples include:

- Criminal confinement and murder convictions based on the single act of restraining the victim while suffocating her. Lowrimore v. State, 728 N.E.2d 860, 868 (Ind. 2000). See also Newgent v. State, 897 N.E.2d 520 (Ind. Ct. App. 2008).
- Voluntary manslaughter and involuntary manslaughter. Dixon v. State, 777 N.E.2d 110 (Ind. Ct. App. 2002).
- Reckless homicide and involuntary manslaughter. Phillips v. State, 25 N.E.3d 1284 (Ind. Ct. App. 2015).
- Aggravated battery and battery. Oeth v. State, 775 N.E.2d 696 (Ind. Ct. App. 2002).

(4) Same act is element of another crime

Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished is a double jeopardy violation. An example being a confinement conviction vacated because it was coextensive with the behavior necessary to establish an element of a robbery conviction. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002). For a detailed discussion on the double jeopardy implications for specific offenses, see this chapter, *Limitations on Sentences*, Section I.B., *Double Jeopardy, Specific Offenses.*

(5) Conspiracy: overt act is another crime

Conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished is a double jeopardy violation. An example being conspiracy in which the overt act is no more than the crime itself. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002); Griffen v. State, 717 N.E.2d 73, 89 (Ind. 1999).

PRACTICE POINTER: Although double jeopardy implications based on conspiracy convictions have often been analyzed under the Indiana constitution, they should also be raised as common law double jeopardy violation, as outlined in Guyton. Further, conspiracy to commit a crime and the underlying crime each have elements that the other does not. Thus, under a "same elements" test, double jeopardy does not always prohibit sentences for both convictions. See Buie v. State, 633 N.E.2d 250 (Ind. 1994) (murder and conspiracy to commit murder) and State v. Moore, 666 N.E.2d 109 (Ind. Ct. App. 1996) (robbery and conspiracy to commit robbery).

(a) Conspiracy and overt act

If the same evidentiary facts used to establish the essential elements of the underlying offense may have also been used to establish the essential elements of the conspiracy to commit the underlying offense, there is a double jeopardy violation.

Lundberg v. State, 728 N.E.2d 852 (Ind. 2000) (although State presented evidence of many overt acts that could have supported conspiracy conviction, jury instruction only mentioned murder, which established reasonable possibility that jury used same facts to convict defendant of conspiracy to commit murder and murder).

Marcum v. State, 725 N.E.2d 852 (Ind. 2000) (conspiracy to commit burglary and auto theft violated Indiana Constitution because auto theft was overt act used to support conspiracy).

Turnley v. State, 725 N.E.2d 87 (Ind. 2000) (where overt act supporting conspiracy to commit murder was defendant holding victim while co-defendant strangled victim and murder was charged as manual strangulation, conspiracy and murder conviction violated Indiana double jeopardy clause).

Chavez v. State, 722 N.E.2d 885 (Ind. 2000) (dealing marijuana and conspiracy to deal marijuana was double jeopardy under Indiana Constitution because possession of marijuana with intent to deliver was charged as overt act in furtherance of conspiracy). See also Derado v. State, 622 N.E.2d 181 (Ind. 1993); and Lamagna v. State, 776 N.E.2d 955 (Ind. Ct. App. 2002).

Buie v. State, 633 N.E.2d 250 (Ind. 1994) (where State alleged intentional killing as overt act for conspiracy conviction and charged defendant with murder, double jeopardy precluded convictions for conspiracy to commit murder and murder for same killing). See also Neal v. State, 659 N.E.2d 122 (Ind. 1995).

However, where the State proves an overt act in furtherance of the conspiracy other than the underlying felony itself, there is no double jeopardy violation.

Henderson v. State, 769 N.E.2d 172 (Ind. 2002) (under Richardson-Spivey test, felony murder conviction based on completed robbery and conspiracy to commit robbery in which overt act was placing gun at side of victim were both established by proof of fact not used to establish other offense).

Jack v. State, 870 N.E.2d 444 (Ind. Ct. App. 2007) (separate convictions for murder and conspiracy to commit murder did not violate Double Jeopardy Clause of Indiana Constitution; in view of jury instructions and evidence presented, there was no substantial likelihood that evidentiary facts used by jury to establish essential elements of aiding, inducing, or causing murder may have also been used to establish essential elements of conspiracy to commit murder). See also Chiesi v. State, 644 N.E.2d 104 (Ind. 1994); Ziebell v. State, 788 N.E.2d 902 (Ind. Ct. App. 2003); Smith v. State, 655 N.E.2d 532 (Ind. Ct. App. 1995).

Parker v. State, 660 N.E.2d 1025 (Ind. Ct. App. 1995) (double jeopardy did not preclude convictions for both criminal confinement and conspiracy to commit criminal confinement, where defendant performed acts independent of actual confinement). See also Griffin v. State, 717 N.E.2d 73 (Ind. Ct. App. 1999).

James v. State, 953 N.E.2d 1191 (Ind. Ct. App. 2011) (where the charging information, evidence adduced at trial, and prosecutor's argument all support a conclusion that the jury did not use the same evidence to convict defendant of both conspiracy to commit robbery and aiding in the commission of robbery; no Double Jeopardy violation as each was based on separate events).

Firestone v. State, 774 N.E.2d 109 (Ind. Ct. App. 2002) (where fact that defendant confined victim in car supported kidnapping conviction and fact that defendant confined victim to bed supported overt act of conspiracy to commit murder conviction, there was no common law double jeopardy violation).

(b) Multiple conspiracies

A single agreement to commit several unlawful acts cannot be punished by multiple convictions under the general conspiracy statute.

Perkins v. State, 483 N.E.2d 1379, 1386 (Ind. 1985) (where both conspiracy convictions were centered on same act, delivery of drugs, participants were same, double jeopardy prohibited convictions for conspiracy to sell and conspiracy to deal drugs in prison).

(c) Guilty plea to conspiracy

A guilty plea to conspiracy to commit an underlying felony can preclude a subsequent prosecution for the underlying felony.

Thomas v. State, 764 N.E.2d 306 (Ind. Ct. App. 2002) (after a guilty plea for conspiracy to deliver cocaine based on the overt act of arranging to provide and effecting the transfer of cocaine, further prosecution of the act of dealing in cocaine violated Indiana Double Jeopardy Clause).

b. Historical categories: Close proximity/continuous act or continuing crime doctrine

Although not specifically listed by the Indiana Supreme Court within the categories of common law double jeopardy violations, there are other types of common law double jeopardy violations that have been recognized by Indiana courts throughout the years. Thus, under Pierce v. State, 761 N.E.2d 826 (Ind. 2002), the courts should continue recognizing these common law doctrines; but see Diaz v. State, 158 N.E.3d 363, 368 (Ind. Ct. App. 2020) ("Wadle did away with the 'old law' on claims of substantive double jeopardy, including the Richardson constitutional tests and all common-law rules like the continuous-crime doctrine.").

Actions that are sufficient in themselves to constitute separate criminal offenses may be so compressed in terms of time, place, singleness of purpose and continuity of actions as to constitute a single transaction. Nunn v. State, 695 N.E.2d 124, 125 (Ind. Ct. App. 1998) (*citing* Eddy v. State, 496 N.E.2d 24, 28 (Ind. 1986)).

Nunn v. State, 695 N.E.2d 124 (Ind. Ct. App. 1998) (double jeopardy precluded five convictions and separate sentences for five shots fired at a single victim in the space of a few seconds).

Haggard v. State, 445 N.E.2d 969 (Ind. 1983) (because victim was confined in same car without any interruption, defendant could be convicted of only one count of confinement although victim was confined in more than one county). See also Curry v. State, (Ind. Ct. App. 1994) (kidnapping and confinement); Gomez v. State, 56 N.E.3d 697 (Ind. Ct. App. 2016) (three battery convictions).

Saucerman v. State, 555 N.E.2d 1351 (Ind. Ct. App. 1990) (trial court erred in entering multiple convictions of receiving stolen property where on one occasion defendant received property which had been stolen from multiple sources).

Leggs v. State, 966 N.E.2d 204 (Ind. Ct. App. 2012) (defendant's two confinement convictions violated continuing crime doctrine where victim testified, she never felt free to leave).

Chavez v. State, 988 N.E.2d 1226 (Ind. Ct. App. 2013) (where defendant was charged with touching alleged victim in two places while kissing her, and then touching her while kissing her a second time, continuing crime doctrine prohibits convictions for each kiss or touch).

Kocielko v. State, 943 N.E.2d 1282 (Ind. Ct. App. 2011) (defendant's convictions on two counts of sexual misconduct with a minor which involved a single victim during a single encounter violated double jeopardy); but see Vermillion v. State, 978 N.E.2d 459 (Ind. Ct. App. 2012).

But see:

Johnston v. State, 578 N.E.2d 656 (Ind. 1991) (defendants were properly convicted of separate attempts to murder and of murder of same victim; defendants beat victim in attempt to kill him; when they came back to bury victim, they found him still alive, beat him again then threw him off a bridge but missed water; they then went down to the victim and killed him by drowning).

Firestone v. State, 838 N.E.2d 468 (Ind. Ct. App. 2005) (because rape was separate in time from criminal deviate conduct, court could not conclude that defendant's actions fell within continuing crime doctrine); see also Anthony v. State, 56 N.E.3d 705 (Ind. Ct. App. 2016); and Pugh v. State, 52 N.E.3d 945 (Ind. Ct. App. 2016).

Curtis v. State, 42 N.E.3d 529 (Ind. Ct. App. 2015) (robbery of drugs from pharmacist and of car keys from pharmacy technician seconds later constituted two separate and distinct robberies); see also Dupree v. State, 51 N.E.3d 1251 (Ind. Ct. App. 2016).

Johnson v. State, 774 N.E.2d 1012 (Ind. Ct. App. 2002) (defendant was properly convicted of two counts of resisting law enforcement when he successfully fled from one officer, drove around for two to three hours, then fled again from a second officer before being arrested).

Taylor v. State, 644 N.E.2d 612 (Ind. Ct. App. 1994) (acts of placing child's face in scalding water and subsequently failing to seek medical treatment were separate and distinct and supported two convictions for neglect of dependent; neither of acts underlying convictions was means by which other act was accomplished); see also Smith v. State, 718 N.E.2d 794 (Ind. Ct. App. 1999).

Wright v. State, 590 N.E.2d 650 (Ind. Ct. App. 1992) (each offense arose from separate confrontation where one confrontation occurred when child was forced to put lips on defendant's penis, another occurred when defendant performed fellatio on child, and yet another occurred when defendant forced child to lay on his sister; because each conviction was proximate result of different criminal encounters, multiple convictions for child molest and vicarious sexual gratification did not violate double jeopardy). See also Starks v. State, 565 N.E.2d 1142 (Ind. Ct. App. 1991).

Baugh v. State, 926 N.E.2d 497 (Ind. Ct. App. 2010) (defendant's two convictions for Class B felony sexual misconduct with a minor did not violate continuing crime doctrine because the several acts of intercourse occurred over a four-month period in two different residences and thus were not "so compressed in time, place, and singleness of purpose and continuity as to constitute a single transaction").

PRACTICE POINTER: It is important to raise the continuous act doctrine as a separate analysis than the actual evidence test because some convictions may violate the continuous act doctrine but do not violate the actual evidence test. See, e.g., Graham v. State, 889 N.E.2d 1283 (Ind. Ct. App. 2008), *sum aff'd*, 903 N.E.2d 963 (where defendant fired three shots at victim's truck – two of which hit the truck and caused property damage and one of which did not – it was not reasonably possible that the jury used the same facts to sustain the defendant convictions for criminal recklessness and criminal mischief). However, these convictions may have violated double jeopardy under the continuous act analysis. Regardless of whether double jeopardy bars multiple sentences for same injurious consequences arising from "single incident" or "single confrontation," sentences must reflect the episodic nature of the crimes committed. See Kocielko v. State, 943 N.E.2d 1282 (Ind. Ct. App. 2011). This "single incident analysis" for sentencing purposes has been embraced in other contexts. See Beno v. State, 581 N.E.2d 922 (Ind. 1991) (improper to impose consecutive sentences for multiple drug dealing convictions based on nearly identical State-sponsored sales as part of an ongoing operation). Thus, courts should consider the episodic nature of multiple violent crimes when committed against a single victim in a single confrontation. In Kocielko, the court of appeals held that the imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of the crimes committed by the defendant. But see Vermillion v. State, 978 N.E.2d 459 (Ind. Ct. App. 2012) (disagreeing with Kocielko and finding no error in imposing consecutive sentences for two acts of sexual misconduct with a minor that were part of a "single confrontation").

(1) Multiple confinement

The determinative factor as to whether multiple convictions can stand for confinement is whether confinement may be divided into two separate parts. A confinement ends when the victim both feels and is free from detention, and separate confinement begins if and when the detention of the victim is re-established. Boyd v. State, 766 N.E.2d 396 (Ind. Ct. App. 2002).

Penrod v. State, 810 N.E.2d 345 (Ind. 2004) (Court vacated two confinement convictions and affirmed defendant's kidnapping conviction where evidence established only one continuous confinement).

Idle v. State, 587 N.E.2d 712 (Ind. Ct. App. 1992) (defendant's violation of both subsections of confinement statute by nonconsensual restraint of victim in one place and by removing victim from one place to another was one continuous episode of confinement; double jeopardy barred defendant's two convictions for confinement). See also Bartlett v. State, 711 N.E.2d 497 (Ind. 1999).

Taylor v. State, 879 N.E.2d 1198 (Ind. Ct. App. 2008) (one continuous confinement may result in only one conviction, even if the defendant both confines and removes a person; thus, defendant's convictions for confinement by removal and kidnapping by hijacking violated double jeopardy).

(2) Multiple taking: One offense

When several articles of property are taken at the same time, from the same place, belonging to the same person, there is but a single larceny. Dellenbach v. State, 508 N.E.2d 1309, 1314 (Ind. Ct. App. 1987).

Raines v. State, 514 N.E.2d 298 (Ind. 1987) (where defendant exerted unauthorized control over several items of personal property, including

automobile, all of which were taken at same time from victim's home, there was only one offense in violation of single statute).

Beaty v. State, 856 N.E.2d 1264 (Ind. Ct. App. 2006) (if a person retains items of stolen property, knowing the property to be stolen at one time and one place, that person has committed but one criminal act of retention regardless of whether the items he received belong to several owners or were subject of more than one theft).

Keller v. State, 987 N.E.2d 1099 *aff'd on reh'g*, 989 N.E.2d 1283 (Ind. Ct. App. 2013) (single larceny rule required Court to vacate one of defendant's two convictions of theft for taking from a victim a social security check and several separate checks); see also Hill v. State, 25 N.E.3d 1280 (Ind. Ct. App. 2013).

Stout v. State, 479 N.E.2d 563 (Ind. 1985) (defendant could not be convicted of two counts of theft where evidence showed he broke into house and stole some items, then broke into garage and stole automobile; court considered garage part of home).

But see:

J.R. v. State, 982 N.E.2d 1037 (Ind. Ct.App. 2013) (distinguishing Stout (above), which involved multiple violations of the same theft statute, Court held that theft and auto theft findings are distinct offenses and violations of different statutes, thus no violation of the single larceny rule); see also Brown v. State, 52 N.E.3d 945 (Ind. Ct. App. 2016).

Dupree v. State, 51 N.E.3d 1251 (Ind. Ct. App. 2016) (single larceny rule did not apply among three carjacking charges and to defendant's convictions of robbing victim of various personal property and then stealing her car).

Bivins v. State, 642 N.E.2d 928 (Ind. 1994) (two theft convictions upheld where defendant took money and credit card from victim's motel room and then took victim's automobile from motel parking lot; Court declined to deem parking lot and motel room to be part of a single place).

(3) Multiple victims

Multiple convictions resulting from one transaction may be sustained pursuant to a result-oriented criminal statute if the defendant's conduct involved multiple victims. However, a defendant may only be convicted once for a violation of a conduct-oriented statute even if his actions affect multiple victims, because the harm to the victims is not included in the statutory definition of the crime. Geiger v. State, 866 N.E.2d 830 (Ind. Ct. App. 2007). For example, an act of arson that is a Class B felony and also results in actual bodily injury to multiple people constitutes a single Class A felony arson. Mathews v. State, 849 N.E.2d 578 (Ind. 2006) ((*interpreting arson statute prior to 2014 amendment*) if a consequence of a crime serves primarily to enhance the penalty for a crime that is committed without the consequence, multiple consequences do not establish multiple crimes).

Thompson v. State, 82 N.E.3d 376 (Ind. Ct. App. 2017) (double jeopardy violation under "actual evidence test" for two battery convictions relying on a single push resulting in injuries to two people).

Edmonds v. State, 100 N.E.3d 258 (Ind. 2018) (I.C. 35-44.1-3-1 allows only one conviction for each act of resisting law enforcement, regardless of how many people are harmed); see also Paquette v. State, 101 N.E.3d 234 (Ind. 2018).

Brown v. State, 790 N.E.2d 1061 (Ind. Ct. App. 2003) (just waving a gun at three people is sufficient to support multiple convictions of pointing a firearm, because each person is put at risk of injury from a discharge of the firearm). See also Armstrong v. State, 742 N.E.2d 972, 976 (Ind. Ct. App. 2001).

Sanjari v. State, 961 N.E.2d 1005 (Ind. 2012) (statute permits a separate class D felony conviction for nonsupport of each dependent child, but only one such offense may be enhanced to a class C felony where the unpaid support for one or more of such children is $15,000 or more).

But see:

Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002) (convictions of felony murder for death of three people and Class A felony arson based on injury to a fourth person, all arising out of one act of arson, was not double jeopardy).

Parks v. State, 489 N.E.2d 515 (Ind. 1986) (no double jeopardy violation for two confinement convictions where defendant confined two people in car, wounded one and took car keys). See also Randall v. State, 455 N.E.2d 916 (Ind. 1983) and Johnson v. State, 455 N.E.2d 932 (Ind. 1983).

Walker v. State, 923 N.E.2d 733 (Ind. Ct. App. 2010) (offenses of burglary, robbery of one victim, and criminal confinement of another victim did not violate continuing crime doctrine, as each offense was a distinct, chargeable crime).

Patton v. State, 837 N.E.2d 576 (Ind. Ct. App. 2005) (criminal recklessness against two different victims).

Lockhart v. State, 632 N.E.2d 374 (Ind. Ct. App. 1994) (reckless homicide and OWI causing death from single accident but based on different victims).

Geans v. State, 623 N.E.2d 435 (Ind. Ct. App. 1993) (separate counts of non-support for multiple children).

Borum v. State, 951 N.E.2d 619 (Ind. Ct. App. 2011) (where defendant accosted one victim in car during attempted carjacking and then confronted her two friends outside of the car during the attempted robbery, there was not a single incident even though the victim in the car was alleged as a victim in both the attempted robbery and attempted carjacking).

Frazier v. State, 988 N.E.2d 1257 (Ind. Ct. App. 2013) (double jeopardy does not bar convictions for both sexual battery and official misconduct based on same incident, because victim of official misconduct is the public; because the two

crimes have separate victims, double jeopardy does not prohibit convictions for both).

(a) Exception: single intent

The appellate courts are split over whether double jeopardy prohibits multiple convictions for multiple victims of crimes which require a single intent regardless of how many victims are present. Interpreting the arson statute (before 2014 amendment), the Supreme Court held that the number of arsons of which a person can be convicted is based on the number of properties damaged, not number of people injured. Mathews v. State, 849 N.E.2d 578 (Ind. 2006). Previously, in Bald v. State, 766 N.E.2d 1170 (Ind. 2002), the court held that a single act of arson that harms several victims and results in multiple convictions does not violate the Richardson-Spivey double jeopardy test. The Court made no reference to statutory construction or the common law single intent exception but decided the case only under a constitutional analysis. Id.

Examples:

- Under pre-2014 statute, a defendant could not be convicted of more than one arson, regardless of the number of victims. Mathews v. State, 849 N.E.2d 578 (Ind. 2006). See also Belser v. State, 727 N.E.2d 457 (Ind. Ct. App. 2000); and Atchley v. State, 730 N.E.2d 758 (Ind. Ct. App. 2000); but see Land v. State, 802 N.E.2d 45 (Ind. Ct. App. 2004) (convictions of Class B felony arson for damaging one victim's residence and Class D felony arson for damaging second victim's property inside the house, even though both charges arose from single act of arson, was not double jeopardy under Richardson-Spivey actual evidence test).
- Defendant could not be convicted of three counts of dissemination of matter harmful to minors based on one occurrence, even though there was more than one victim. Scuro v. State, 849 N.E.2d 682 (Ind. Ct. App. 2006). See also Issac v. State, 439 N.E.2d 1193 (Ind. Ct. App. 1982).
- A defendant may not be convicted of more than one count of impersonating a public servant based on same occurrence, even if there are multiple victims. Geiger v. State, 866 N.E.2d 830 (Ind. Ct. App. 2007).
- Convictions of felony murder for death of three people and Class A felony arson based on injury to a fourth person, all arising out of one act of arson, was not double jeopardy. Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002).
- Convictions for three counts of child exploitation and five counts of possession of child pornography did not violate double jeopardy. Brown v. State, 912 N.E.2d 881 (Ind. Ct. App. 2009); see also Pontius v. State, 930 N.E.2d 1212 (Ind. Ct. App. 2010) (while two of defendant's convictions were based upon possession of a single identical digital video file, he downloaded that file at two separate times, onto two separate computers and hard drives located at two separate residences; thus there was no double jeopardy violation).

- Defendant properly sentenced for six counts of reckless homicide based on single accident that killed six passengers Marshall v. State, 563 N.E.2d 1341 (Ind. Ct. App. 1990).

(b) Exception: robbery of single entity

An individual who robs a business, taking that business' money from multiple employees, can be convicted of only one count of robbery. Williams v. State, 395 N.E.2d 239, 248-49 (Ind. 1979). See also Randall v. State, 455 N.E.2d 916 (Ind. 1983) and Cain v. State, 594 N.E.2d 835 (Ind. Ct. App. 1992).

However, when property taken in one occurrence belongs to two separate entities, double jeopardy does not preclude two convictions. Lash v. State, 433 N.E.2d 764 (Ind. 1982) (convicting defendant of separate counts of robbery for robbing pizzeria employee of cash register receipts and money from her purse was not double jeopardy). See also McKinley v. State, 272 Ind. 689, 400 N.E.2d 1378 (1980) and Young v. State, 274 Ind. 107, 409 N.E.2d 579, 583 (1980).

(c) Resisting law enforcement

A single affray with multiple officers supports only one conviction for resisting law enforcement because resisting is an offense against public administration, not against an individual. Armstead v. State, 549 N.E.2d 400 (Ind. Ct. App. 1990). Resisting by fleeing in a vehicle is not a different "species" than fleeing on foot. Arthur v. State, 824 N.E.2d 383 (Ind. Ct. App. 2005). See also Lewis v. State, 43 N.E.3d 689 (Ind. Ct. App. 2015).

> Touchstone v. State, 618 N.E.2d 48 (Ind. Ct. App. 1993) (where defendant resisted arrest when getting in police car and at police station, there was only one incident).

In order to charge defendant with two counts of resisting law enforcement based on separate and distinct acts within a short period of time, the State is required to specifically identify the particular officers from whom defendant fled in its separate informations. Bonner v. State, 789 N.E.2d 491 (Ind. Ct. App. 2003).

> Johnson v. State, 774 N.E.2d 1012 (Ind. Ct. App. 2002) (defendant's flight from two officers were sufficiently separated in time and distance as to constitute two distinct, separate offenses). See also Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006).
>
> Williams v. State, 755 N.E.2d 1183 (Ind. Ct. App. 2001) (defendant could be convicted of resisting by fleeing and resisting with force because defendant committed two crimes by running from officers and then fighting with officers once caught).

Where a defendant commits another crime, such as battery during his resisting, there is no double jeopardy violation as long as the second crime has an element that resisting law enforcement does not.

Pettit v. State, 439 N.E.2d 1175 (Ind. 1982) (where defendant resisted officer with rifle and later fled by car, double jeopardy did not preclude two convictions for resisting arrest). See also Parks v. State, 513 N.E.2d 170 (Ind. 1987).

Scott v. State, 859 N.E.2d 749 (Ind. Ct. App. 2007) (conviction for resisting law enforcement was based on struggle with police and attempted battery was based on defendant's release of dogs on police; thus, no violation of actual evidence test under Indiana Constitution); see also Armstead v. State, 549 N.E.2d 400 (Ind. Ct. App. 1990).

Nevel v. State, 818 N.E.2d 1 (Ind. Ct. App. 2004) (upholding separate convictions for auto theft and use of same vehicle to resist law enforcement).

(4) Non-support

A defendant cannot be charged with additional counts of non-support based on failure to support same child during different periods of time. The length of time and the amount of the arrearage go to the severity of the crime and the length of the sentence and not to the number of crimes committed. Boss v. State, 702 N.E.2d 782, 785 (Ind. Ct. App. 1998).

Sanjari v. State, 942 N.E.2d 134 (Ind. Ct. App. 2011) *summarily aff'd*, 961 N.E.2d 1005 (Ind. 2012) (where actual evidence is used to convict the defendant of two class C felony counts was one "in gross" support order, conviction on both counts amounted to multiple punishments for the same offense, violating double jeopardy).

(5) Drug offenses

(a) Possession: drugs found in multiple locations

Although police may find narcotics in several locations within the defendant's control, the original possession is simultaneous, and he can be convicted of but one possession. Young v. State, 564 N.E.2d 968, 972 (Ind. Ct. App. 1991).

Donnegan v. State, 809 N.E.2d 966 (Ind. Ct. App. 2004) (despite fact that cocaine was found at different times and places, defendant simultaneously possessed cocaine on his person and inside safe in his residence), superseded by statute on other grounds.

Storey v. State, 875 N.E.2d 243 (Ind. Ct. App. 2007) (because State used finished methamphetamine to prove possession with intent to deliver and and unfinished methamphetamine to prove manufacturing, there was no double jeopardy violation).

Campbell v. State, 734 N.E.2d 248 (Ind. Ct. App. 2000) (where defendant possessed cocaine on his person and at his residence simultaneously, there could only be one conviction of possession).

Stephens v. State, 588 N.E.2d 564 (Ind. Ct. App. 1992) (where defendant dropped cocaine as he fled from officers coming to search his home for drugs, convictions for both cocaine found at his home and that dropped outside were precluded by double jeopardy).

Young v. State, 564 N.E.2d 968 (Ind. Ct. App. 1991) (where police found one gram of cocaine on defendant's person and, subsequently, eight grams in a spray can in his car, defendant could only be convicted on one count of possession).

(b) Dealing: different types of drugs

A single sale of drugs "between the same principals at the same time and place which violates a single statutory provision does not justify conviction of and sentence for separate crimes even though more than one controlled substance is involved." Young v. State, 564 N.E.2d 968, 971-72 (Ind. Ct. App. 1991) (quoting Duncan v. State, 274 Ind. 457, 412 N.E.2d 770, 776 (1980)).

For a more detailed discussion of double jeopardy and drug offenses, see this chapter, Section I.B., *Specific Offenses.*

4. Indiana Code

A court need not address whether sentences for two offenses violate double jeopardy under the Indiana Constitution and the U.S. Constitution when the sentences violate the Indiana Code. See Emery v. State, 717 N.E.2d 111 (Ind. 1999); Harvey v. State, 719 N.E.2d 406 (Ind. Ct. App. 1999); Byrd v. State, 707 N.E.2d 308 (Ind. Ct. App. 1999); and Burton v. State, 665 N.E.2d 924 (Ind. Ct. App. 1996).

Specifically, IC 35-38-1-6 prohibits a court from entering a judgment and a sentence against a defendant for both an offense and an included offense in separate counts, even if found guilty of both. For purposes of IC 35-38-1-6, an "included offense" means one that: (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability is required to establish its commission. Ind. Code § 35-31.5-2-168.

Sering v. State, 488 N.E.2d 369 n.10 (Ind. Ct. App. 1986) (Indiana legislature has expanded the definition of a lesser included offense under IC 35-41-1-16 (now IC 35-31.5-2-168)).

Also, a defendant may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime nor may a defendant be convicted of both a crime and an attempt to commit the same crime. Ind. Code § 35-41-5-3.

Statutory double jeopardy has survived Wadle. Demby v. State, --- N.E.3d --- (finding double jeopardy violation under lesser included offense statute post-Wadle) (Ind. Ct. App. Feb. 16, 2021), *trans. denied*

a. Lesser included offense: Ind. Code § 35-31.5-2-168

Whenever a defendant is charged with both an offense and an included offense in separate counts, and the defendant is found guilty of both counts, judgment and sentence may not be entered for the included offense. Ind. Code § 35-31.5-2-168.

There are two categories of lesser included offenses: (1) inherently lesser included offense; and (2) those included as charged (Factually Included). Meriweather v. State, 659 N.E.2d 133, 138 (Ind. Ct. App. 1995), abrogated in part on other grounds by Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

When determining whether an offense is a lesser included offense, the trial court first compares the statute defining the crime charged with the statute defining the lesser included offense to determine whether the lesser offense is inherently included in the crime charged; if not, the court then compares the statute defining the alleged lesser included offense with the charging instrument to determine whether lesser offense is factually included in the crime charged. Wright v. State, 690 N.E.2d 1098, 1108 (Ind. 1997).

Pursuant to Ind. Code § 35-31.5-2-168, an "included offense" means an offense that: (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability is required to establish its commission.

(1) Inherently included

An inherently lesser included offense is necessarily included within the greater so that it is impossible to commit the greater without first having committed the lesser. See Zachary v. State, 469 N.E.2d 744, 749 (Ind. 1984); Gregory v. State, 412 N.E.2d 744, 748 (Ind. 1980); and Watford v. State, 143 N.E.2d 405, 407 (Ind. 1957).

For example:

- One cannot commit robbery without committing theft, thus theft is an inherently lesser included offense and defendant cannot be convicted of both crimes. Tingle v. State, 632 N.E.2d 345 (Ind. 1994).
- It is possible to attempt murder without touching the victim; thus, battery is not an inherently lesser included offense of attempted murder. Leon v. State, 525 N.E.2d 331 (Ind. 1988).
- Residential entry is a lesser included offense of burglary when the property burglarized is a residential dwelling. Hayden v. State, 19 N.E.3d 831 (Ind. Ct. App. 2014).

(2) Factually included ("as charged")

(a) Whether included in statutory analysis

It is unclear whether the definition of lesser included offense set forth in IC 35-31.5-2-168 includes factually included offenses. However, Indiana courts have analyzed the statutory definition of "factually included offenses." See Bush v. State, 772 N.E.2d 1020 (Ind. Ct. App. 2002); Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002). The Court of Appeals has held that, "whether an offense is included in another within the meaning of IC 35-38-1-6 (now IC 35-31.5-2-168) requires careful examination of the facts and circumstances of each particular case." Scott v. State, 803 N.E.2d 1231 (Ind. Ct. App. 2004).

In Emery v. State, 717 N.E.2d 111 (Ind. 1999), the court held that sexual battery with a deadly weapon is not an included offense of attempted rape with a deadly weapon under IC 35-41-1-16(1) (now IC 35-31.5-2-168(1)) because each offense requires proof of an element that the other offense does not. In addition, sexual battery is not an included offense under IC 35-41-1-16(3) (now IC 35-31.5-2-168(3)) because two offenses not only differed with respect to severity of harm or risk of harm, they also differed because sexual battery requires touching and attempted rape does not. Id.

However, Justice Boehm concurred on the basis that IC 35-41-1-16(1)) (now IC 35-31.5-2-168(1))'s definition of "included offense" includes not only inherently included offenses but also factually included offense as determined by analysis set forth in Wright v. State, 658 N.E.2d 563 (Ind. 1995) (considering evidence beyond statutory elements, defendant committed two crimes)). Emery v. State, 717 N.E.2d 111 (Ind. 1999). Also, Justice Sullivan concurred on the basis that the Indiana Code is not implicated when facts support convictions based on two separate acts. Id.

Thus, because Emery was affirmed by an equally divided court in two separate opinions, it does not represent precedent which the Court of Appeals must follow. Harvey v. State, 719 N.E.2d 406 (Ind. Ct. App. 1999) (court chose to follow earlier Indiana Supreme Court cases that held that IC 35-38-1-6 does not just protect against convictions for greater and inherently lesser included offenses, but also against convictions for greater and factually included lesser offenses. See Wright v. State, 658 N.E.2d 563 (Ind. 1995). See also Merriweather v. State, 778 N.E.2d 449 (Ind. Ct. App. 2002) (following Harvey court interpretation).

(b) Definition

While a particular lesser offense may not be inherent in the greater offense, it may have been committed by reason of manner in which the greater offense was committed, for purposes of determining whether the judgment of conviction and sentence on included offense has occurred. Collins v. State, 645 N.E.2d 1089, 1093 (Ind. Ct. App. 1995), *aff'd in part, vacated in part*, 659 N.E.2d 509. Factually included offenses occur when the charging instrument alleges the means used to commit the charged crime charged include all the elements of an alleged lesser included offense which is not an inherently included offense.

Harvey v. State, 719 N.E.2d 406, 411 (Ind. Ct. App. 1999); Sering v. State, 488 N.E.2d 369, 375 (Ind. Ct. App. 1986).

Ingram v. State, 718 N.E.2d 379 (Ind. 1999) (criminal confinement conviction, in addition to criminal deviate conduct and sexual battery convictions, did not violate IC 35-38-1-6 because defendant used force beyond that necessary to effectuate criminal deviate conduct and sexual battery). See also Gates v. State, 759 N.E.2d 631 (Ind. 2001).

A conviction for possessing precursors with intent to manufacture methamphetamine is a lesser included offense of manufacturing methamphetamine if the defendant had completed the manufacturing process; however, when manufacturing is completed, and precursors are present for further manufacturing, both convictions can stand. Bush v. State, 772 N.E.2d 1020 (Ind. Ct. App. 2002). See also Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002); Robertson v. State, 877 N.E.2d 507 (Ind. Ct. App. 2007); and Harrison v. State, 32 N.E.3d 240 (Ind. Ct. App. 2015).

Goffinet v. State, 775 N.E.2d 1227 (Ind. Ct. App. 2002) (no reasonable possibility that jury relied on same evidentiary facts to establish essential elements of both manufacturing methamphetamine and possession of precursors). See also Scott v. State, 803 N.E.2d 1231 (Ind. Ct. App. 2004).1

Moore v. State, 869 N.E.2d 489 (Ind. Ct. App. 2007) (convictions for possession of anhydrous ammonia and possession of reagents or precursors are necessarily included offenses of dealing in methamphetamine under IC 35-38-1-6 and thus violate double jeopardy).

Hardister v. State, 849 N.E.2d 563 (Ind. 2006) (possession of cocaine and firearm is included offense of class A felony dealing in cocaine based on defendant's possession of cocaine with intent to deal; enhancement of cocaine possession charge because of simultaneous possession of gun or proximity to school is irrelevant to lesser-included offense analysis).

b. Conspiracy/Attempt

A person may not be convicted of both a conspiracy and an attempt with respect to the same underlying crime. Ind. Code § 35-41-5-3(a). See also Williams v. State, 690 N.E.2d 162, 171 (Ind. 1997) and Borton v. State, 759 N.E.2d 641 (Ind. Ct. App. 2001).

Also, under the Richardson test, a conspiracy conviction and an attempt conviction may violate the Indiana Constitution. Guffey v. State, 717 N.E.2d 103 (Ind. 1999) (because there was a reasonable possibility that jury used same evidentiary facts - that defendant provided handgun to principal and waited for principal to commit robbery - to prove essential elements of conspiracy to commit armed robbery and essential elements of aiding armed robbery, conspiracy conviction must be vacated).

c. Substantive offense/attempt

A person may not be convicted of both a crime and an attempt to commit the same crime. Ind. Code § 35-41-5-3(b). However, if an attempt and the underlying offense occur at different times and were separate and distinct acts, double jeopardy is not violated.

> Dellenbach v. State, 508 N.E.2d 1309 (Ind. Ct. App. 1987) (defendant's convictions for attempted theft and theft were not barred by prohibition against conviction for both crime and attempt to commit same crime, where attempted theft involved a different taking at a different time than theft).

Separate convictions for both murder and attempted murder of the same victim will be upheld if the time sequence shows each murder attempt and murder were separate and distinct acts.

> Johnston v. State, 578 N.E.2d 656 (Ind. 1991) (where defendant made two attempts to murder victim at distinct points in evening, then succeeded in murdering him on third attempt at a different time and place, convictions on two attempted murder counts and one murder count were proper).

d. Right to fair notice

The fact that an offense is a lesser included offense of the crime charged doesn't always give the defendant fair notice. In Young v. State, 30 N.E.3d 719 (Ind. 2015), the Supreme Court reversed a Class B felony aggravated battery conviction because the charging information for murder did not give adequate notice. The information alleged that the defendant shot the victim as an accomplice, but in finding the defendant guilty of aggravated battery, the trial court found that he "pounded on" and "beat on" the victim. The defendants were denied their due process right to fair notice about the crime for which they were ultimately convicted.

> Ocelotl-Toxqui v. State, 793 N.E.2d 271 (Ind. Ct. App. 2003) (attempt crime is inherently included offense of completed crime, thus defendant charged with child molesting had fair notice to defend against attempted child molesting).

B. SPECIFIC OFFENSES

Although the following cases apply various double jeopardy analyses (U.S. constitutional, Indiana constitutional, Indiana common law, and Indiana statutory analysis), it is important to raise a double jeopardy violation under the appropriate analysis, as explained in Section I.A, *Double Jeopardy, Analysis*, of this Chapter. Because the case law concerning double jeopardy has been conflicting and changing for many years, when uncertain about the most beneficial analysis in your specific case, allege a double jeopardy violation under the Indiana Constitution (Wadle or Powell analysis), common law *and* the Indiana Code. Moreover, although the following cases may not find a double jeopardy violation under one analysis (such as the United States constitutional analysis or Indiana constitutional analysis) there still may be a double jeopardy violation under a different analysis (such as Indiana common law or statutory analysis).

1. Offenses against the person

a. Murder/Felony murder

A defendant may not stand convicted of both murder and felony murder when both convictions arise out of a single homicide. Whalen v. United States, 445 U.S. 684 (1980). See also Fletcher v. State, 442 N.E.2d 990, 993 (Ind. 1982).

However, when a person intentionally murders a human being while committing another felony, punishment for both the killing and the other felony does not violate double jeopardy principles. Henson v. State, 707 N.E.2d 792, 794 (Ind. 1999). Thus, when a defendant stands convicted of murder, felony murder, and an additional felony, the felony murder should be vacated, and the murder conviction should remain. Id. To hold otherwise would permit a person who commits an intentional murder while committing another felony to use the felony murder rule to escape punishment for the underlying felony. Fuller v. State, 639 N.E.2d 344, 347-48 (Ind. Ct. App. 1994). See also Moore v. State, 652 N.E.2d 53 (Ind. 1995).

Hobson v. State, 675 N.E.2d 1090 (Ind. 1996) (trial court erred in permitting jury to return guilty verdict on murder without specifying whether conviction was based on murder or felony-murder theory and in sentencing defendant, who had been charged only with murder, consecutively on both murder and on two potential underlying felonies; if defendant was convicted of felony murder, at least one felony would have to merge, and if defendant was convicted of murder, felony-murder would have to be vacated).

Moore v. State, 652 N.E.2d 53 (Ind. 1995) (convictions for murder and robbery of same victim did not violate double jeopardy where jury found defendant knowingly and intentionally murdered victim while in commission of robbery).

Shields v. State, 493 N.E.2d 460 (Ind. 1986) (where defendant committed only one homicide but was convicted of felony murder and murder, court rejected State's contention that because only one life sentence was imposed, defendant was not punished twice; judgment of conviction alone, without imprisonment, constituted punishment).

b. Felony murder/Underlying felony

Convictions for felony murder and underlying felony violate both the U.S. and the Indiana constitutional prohibition against double jeopardy. Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912 (1977). Sentences may not be imposed separately for felony murder and the underlying offense giving rise to the felony murder. Id.

Kennedy v. State, 674 N.E.2d 966 (Ind. 1996) (conviction and sentence for both felony murder and accompanying felony violated double jeopardy because conviction for murder while in commission of felony could not occur without proof of accompanying felony). See also Wieland v. State, 736 N.E.2d 1198 (Ind. 2000); Sanchez v. State, 794 N.E.2d 488 (Ind. Ct. App. 2003); and Jordan v. State, 676 N.E.2d 352 (Ind. Ct. App. 1997).

However, if the felony murder is based on the death of a different victim that is alleged in the felony charge, then there is no double jeopardy violation under either the U.S. or Indiana Constitution.

Bald v. State, 766 N.E.2d 1170 (Ind. 2002) (because evidence of first victim's death was required to prove felony murder, and evidence of second victim's injury resulting from arson was used to prove arson as Class A felony, convictions for arson and felony murder based on same fire did not violate double jeopardy under Richardson).

Reaves v. State, 586 N.E.2d 847 (Ind. 1992) (no error to sentence for both felony murder and robbery because robbery conviction was for robbery of victim who did not die, and robbery of dead victim was predicate for felony murder).

c. Murder/ Battery

Owens v. State, 659 N.E.2d 466 (Ind. 1995) (convictions and sentences for battery and murder violated double jeopardy where it was apparent from instructions and information that State was not required to prove any fact in addition to those it proved to convict defendant of murder).

Woodcock v. State, 163 N.E.3d 863, 875 (Ind. Ct. App. 2021) (convictions for murder and battery did not violate DJ where murder was not alleged to have been performed by a touching and more critically, the two crimes were alleged to have been committed on different victims), *trans. denied*.

d. Murder/ Unlicensed handgun

Mickens v. State, 742 N.E.2d 927 (Ind. 2001) (convictions for murder and carrying unlicensed handgun did not violate Indiana Double Jeopardy clause because murder was based on firing handgun two times at victim and carrying was based on defendant carrying handgun as defendant approached).

e. Murder/Reckless homicide

Wright v. State, 658 N.E.2d 563 (Ind. 1995) (based on IC 35-41-1-16(3) (now IC 35-31.5-2-168)), which defined lesser included offense as one distinguished only by lesser required intent, reckless homicide is inherently included offense of murder).

f. Neglect of dependent/Other felonies

Convictions for neglect of a dependent and for another felony based on the injuries or death resulting from neglect are precluded by double jeopardy unless the neglect is based on a pattern of conduct prior to the acts resulting in the felony.

Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000) (evidence offered to prove serious bodily injury was same evidence offered to prove knowing killing; double jeopardy violation; Class B felony neglect reduced to Class D felony neglect). See also Rody v. State, 742 N.E.2d 505 (Ind. 2001) (class B felony neglect vacated).

Strong v. State, 870 N.E.2d 442 (Ind. 2007) (reduction of Class A felony neglect to Class B or C felony failed to cure double jeopardy violation, because injuries urged to support serious bodily injury necessary for Class B neglect are same injuries that resulted in child's death and are basis of murder charge); see also Montgomery v. State, 21 N.E.3d 846 (Ind. Ct. App. 2014).

Hall v. State, 493 N.E.2d 433 (Ind. 1986) (where failure to provide medical treatment was basis on neglect and reckless homicide conviction, double jeopardy precluded convictions on both).

Howard v. State, 481 N.E.2d 1315, 1318 (Ind. 1985) (court could not impose separate sentences for convictions of neglect of dependent and battery because only difference between two offenses was required intent).

Sanders v. State, 734 N.E.2d 646 (Ind. Ct. App. 2000) (convictions for involuntary manslaughter and neglect of dependent resulting in death violated Indiana's Double Jeopardy Clause because both were based on death to same child). See also Shipley v. State, 620 N.E.2d 710 (Ind. Ct. App. 1993); Smith v. State, 408 N.E.2d 614 (Ind. Ct. App. 1980); and Montgomery v. State, 21 N.E.3d 846 (Ind. Ct. App. 2014).

Gasaway v. State, 547 N.E.2d 898 (Ind. Ct. App. 1989) (where neglect charge was based on pattern of abuse prior to acts resulting in death of child, and manslaughter conviction was based on injuries caused in last two days of child's life, double jeopardy did not preclude sentences for convictions of both offenses).

Vandergriff v. State, 812 N.E.2d 1084 (Ind. Ct. App. 2004) (considering statutes, charging instruments, evidence and arguments of counsel, convictions for battery of defendant's infant son and neglect of dependent did not violate double jeopardy; facts supporting these two crimes were separate and distinct).

PRACTICE POINTER: The time that elapsed between the actions which constituted neglect and the actions which constituted the other felony affects whether convictions for both offenses violate double jeopardy. If both actions occur on the same day, the defendant is less likely to be sentenced for both offenses.

g. Murder/Feticide

A conviction for both feticide and murder does not violate double jeopardy when the murder is based on the killing of the female and the feticide is based on the termination of the pregnancy that resulted from the killing of the female. Baird v. State, 604 N.E.2d 1170 (Ind. 1992) (feticide was not factually included offense of murder because termination of pregnancy, which was element of feticide, was different than basis of murder, which was strangulation of pregnant woman).

h. Murder/Robbery

Minnick v. State, 965 N.E.2d 124 (Ind. Ct. App. 2012) (where stab to victim's back was cause of death and also cited as serious bodily injury element for class A felony robbery, convictions for murder and class A felony robbery violated double jeopardy. Case was remanded with instructions to reduce robbery conviction to a class B felony).

i. Murder/OWI

Orta v. State, 940 N.E.2d 370 (Ind. Ct. App. 2011) (trial court alleviated any potential double jeopardy problem by reducing defendant's conviction for class B felony operating with a controlled substance in the blood causing death to a class A misdemeanor, instead of vacating defendant's murder conviction).

j. Reckless Homicide or Manslaughter/Firearm Enhancement

Nicoson v. State, 938 N.E.2d 660 (Ind. 2010) (5-year enhancement of reckless homicide sentence pursuant to the firearm enhancement statute did not violate Indiana's Double Jeopardy principles, even though the evidence that defendant killed the victim with a gun was used to support both the reckless homicide conviction and the five-year firearm enhancement); see also Cooper v. State, 940 N.E.2d 1210 (Ind. Ct. App. 2011).

Howell v. State, 97 N.E.3d 253 (Ind. Ct. App. 2018) (voluntary manslaughter conviction properly enhanced for using a firearm in commission of offense).

k. Attempted Murder/Feticide

Kendrick v. State, 947 N.E.2d 509 (Ind. Ct. App. 2011) (defendant's convictions for attempted murder and two counts of feticide violated Double Jeopardy clause of Indiana Constitution where the evidentiary facts used to establish the feticide convictions established all of the elements of the attempted murder convictions).

l. Attempted murder/Battery

Battery may be a lesser included offense to an attempted murder charge if the information alleges a factual physical transgression against the victim so as to satisfy the "touching" element of battery. Meriweather v. State, 659 N.E.2d 133, 138 (Ind. Ct. App. 1995) (because only difference between two offenses is required intent, attempted aggravated battery is inherently lesser included offense of attempted murder).

Hughett v. State, 557 N.E.2d 1015 (Ind. 1990) (defendant who had been charged both with attempted murder by means of infliction of wound and with lesser-included offense of battery could not, as matter of double jeopardy, be convicted and sentenced on both offenses).

Ellerman v. State, 786 N.E.2d 788 (Ind. Ct. App. 2003) (because defendant fired only one shot, it is clear that conviction for attempted battery arose from same evidence that also gave rise to attempted murder conviction).

Spry v. State, 720 N.E.2d 1167 (Ind. Ct. App. 1999) (aggravated battery and attempted murder both based on defendant reaching into ex-girlfriend's car in attempt to stab her violated Indiana Double Jeopardy clause).

m. Attempted murder/Possession of explosive

Wilson v. State, 611 N.E.2d 160 (Ind. Ct. App. 1993) (although possession of explosive is not inherently lesser included offense of attempted murder, it was element of attempted

murder because defendant was charged with attempt to commit murder by attaching bomb to car).

n. Attempted Murder or Murder/Armed robbery

Duncan v. State, 735 N.E.2d 211 (Ind. 2000) (where defendant's act of striking victim repeatedly on head with hammer was separate and distinct from subsequent decision of defendant and co-defendant to steal victim's truck, robbery and murder convictions did not violate Indiana double jeopardy).

Carter v. State, 686 N.E.2d 834 (Ind. 1997) (following same elements test, trial court did not err in sentencing defendant to separate terms for both attempted murder and armed robbery of same person because attempted murder requires substantial step towards killing and robbery requires property to be taken).

Smith v. State, 475 N.E.2d 27 (Ind. 1985) (there was no error in sentencing for attempted murder and armed robbery because shooting did not occur during robbery; defendant was not convicted of felony murder). See also Anderson v. State, 448 N.E.2d 1180 (Ind. 1983).

Watkins v. State, 766 N.E.2d 18 (Ind. Ct. App. 2002) (no reasonable possibility the jury used same evidence that defendant possessed knife to establish intentional element of murder and possession of deadly weapon element of Class B felony robbery).

o. Attempted murder/Criminal recklessness

Mihay v. State, 515 N.E.2d 498 (Ind. 1987) (where defendant fired several shots at one time, and no shot hit victim, defendant could not have been convicted and sentenced for both criminal recklessness and attempted murder). See also Thurman v. State, 158 N.E.3d 372 (Ind. Ct. App. 2020) (affirming defendant's attempted murder convictions but vacating the pointing a firearm and criminal recklessness convictions, applying the included offense analysis under Wadle).

p. Attempted Murder/Resisting Law Enforcement

Zieman v. State, 990 N.E.2d 53 (Ind. Ct. App. 2013) (there was a reasonable possibility that jury used the evidence of defendant crashing his vehicle into police officer's vehicle and injuring him to establish both the substantial step element of attempted murder and the resulting serious bodily injury element of the class C felony resisting law enforcement, resulting in common law double jeopardy violation).

q. Sex Offenses

(1) Rape/Sexual battery

Sexual battery is not a lesser-included offense of rape. Thompson v. State, 761 N.E.2d 467 (Ind. Ct. App. 2002). However, sexual battery is a lesser included offense of attempted rape and thus, convictions and sentences for both cannot stand regardless of whether they are prohibited by Indiana and U.S. Constitution' double jeopardy protection. Byrd v. State, 707 N.E.2d 308 (Ind. Ct. App. 1999). See also Emery v. State, 717 N.E.2d 111 (Ind. 1999) (under Indiana Code, sexual battery

while armed with a deadly weapon and attempted rape while armed with a deadly weapon are two separate crimes (Sullivan, Boehm, and Selby concur with two different interpretations of code)).

(2) Rape/Child molesting

Proof of force for rape and proof of age for child molesting do not constitute proof of additional and separate "facts" defeating a conclusion of sameness for purposes of double jeopardy. Kizer v. State, 488 N.E.2d 704, 708 (Ind. 1986). Regardless of whether rape and child molest are attempted or actually completed, where both offenses are based on same conduct toward sexual intercourse, result in the same harm to the victim, are committed within the same short span of time, double jeopardy prohibits convictions and sentences on both offenses. Stwalley v. State, 534 N.E.2d 229 (Ind. 1989).

Roberts v. State, 712 N.E.2d 23 (Ind. Ct. App. 1999) (because defendant's rape and child molesting convictions arose from one act of sexual intercourse, double jeopardy was violated under Indiana Constitution).

Davies v. State, 730 N.E.2d 726 (Ind. Ct. App. 2000) (where defendant committed one act of putting finger in diaper and in vagina, there was reasonable possibility the same facts were used to prove that defendant molested victim by fondling and by criminal deviate conduct, class A felony and class C felony child molest convictions violated Indiana double jeopardy).

(3) Rape/Criminal deviate conduct

Criminal deviate conduct is not an inherently included offense of attempted rape; it is not necessarily committed when one attempts rape.

McGill v. State, 465 N.E.2d 211 (Ind. Ct. App. 1984) (where information did not mention penetration with finger as means of attempted rape, criminal deviate conduct was not factually included offense of attempted rape).

Collins v. State, 717 N.E.2d 108 (Ind. 1999) (because separate evidentiary facts were clearly used to establish compelled oral sex and compelled anal sex, defendant's two convictions for criminal deviate conduct did not violate Indiana's Double Jeopardy Clause).

(4) Rape/Intimidation

Potter v. State, 684 N.E.2d 1127 (Ind. 1997) (convictions for rape and intimidation based on defendant's same threats to victim did not violate double jeopardy under Blockburger test because rape requires proof of sexual intercourse and intimidation requires proof of communicated threat to another).

(5) Attempted rape/Battery

Ott v. State, 648 N.E.2d 671 (Ind. Ct. App. 1995) (battery conviction vacated on double jeopardy grounds where same conduct, repeated striking and choking of victim, was used to support battery and attempted rape).

(6) Intercourse/Fondling child

Hawk v. State, 506 N.E.2d 71 (Ind. Ct. App. 1987) (sexual intercourse with child less than twelve and touching or fondling child less than twelve with intent to arouse or satisfy sexual desires have different elements, and thus, neither crime is included in other).

(7) Possession of child pornography/Exploitation

Brown v. State, 912 N.E.2d 881 (Ind. Ct. App. 2009) (multiple convictions for possession of child pornography and child exploitation did not violate double jeopardy; legislature intended to criminalize as distinct occurrence the dissemination of each book or picture; moreover, State established each challenged offense by separate and distinct image of child pornography).

(8) Child Molesting/Incest

Acuna v. State, 581 N.E.2d 961 (Ind. Ct. App. 1991) (where single act of intercourse underlay convictions for both child molesting/sexual intercourse and incest, double jeopardy considerations prohibit multiple convictions).

Williams v. State, 997 N.E.2d 1154 (Ind. Ct. App. 2013) (convictions for eight counts of child molesting and one count of incest do not violate actual evidence test where evidence showed defendant had intercourse with the child many times over a two- year period).

(9) Multiple acts

Where each sex offense is a separate and distinct act, multiple convictions do not violate double jeopardy.

Koziski v. State, --- N.E.3d --- (Ind. Ct. App. June 2, 2021) (multiple convictions for child molesting did not violate DJ under Wadle analysis).

Collins v. State, 717 N.E.2d 108 (Ind. 1999) (because separate evidentiary facts were used to establish compelled oral sex and anal sex, defendant's two convictions for criminal deviate conduct did not violate Indiana Double Jeopardy).

Ward v. State, 736 N.E.2d 265 (Ind. Ct. App. 2000) (where evidence showed that defendant fondled victim's penis prior to attempted criminal deviate conduct, both convictions for child molesting did not violate Indiana constitutional protection against double jeopardy).

Wright v. State, 590 N.E.2d 650 (Ind. Ct. App. 1992) (where defendant forced victim to commit oral sex, did same on victim, and forced victim to lie on top of sister, all in the course of one day, each occurrence was a distinct offense and three separate convictions of child molesting and vicarious sexual gratification was not double jeopardy). See also Minton v. State, 802 N.E.2d 929 (Ind. Ct. App. 2004) and Heinzman v. State, 970 N.E.2d 214 (Ind. Ct. App. 2012), *summarily aff'd*, 979 N.E.2d 143 (Ind. 2012).

(10) Miscellaneous

Trowbridge v. State, 717 N.E.2d 138 (Ind.1999) (defendant's convictions for rape and abuse of corpse, both based on defendant's single act of intercourse with murder victim, violated double jeopardy; because State did not offer evidence that victim was alive during sex, rape conviction was vacated).

Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005) (convictions for two counts of attempted deviate conduct and two counts of sexual battery violated double jeopardy).

r. Intimidation/Harassment

Haynes v. State, 656 N.E.2d 505 (Ind. Ct. App. 1995) (under "same elements" test, convictions for intimidation and harassment do not violate double jeopardy because intimidation requires proof of additional fact which harassment does not, i.e., perpetrator entertains intent that other person be placed in fear of retaliation for prior lawful act, and harassment requires proof of additional fact which intimidation does not, i.e., perpetrator entertains intent to harass, annoy, or alarm other person).

s. Voluntary manslaughter/Battery

Diekhoff v. State, 555 N.E.2d 477 (Ind. 1990) (it was violation of IC 35-38-1-16 (now IC 35-31.5-2-168) to sentence defendant for both attempted voluntary manslaughter and for battery against same person).

t. Confinement/Other forcible felonies

Where criminal confinement is charged along with another crime, the commission of which inherently involves a restraint on the victim's liberty, and where the language of the charging instruments makes no distinction between the factual basis for the confinement charge and the facts necessary to the proof of an element of the other crime, convictions for both are precluded by double jeopardy. Wethington v. State, 560 N.E.2d 496, 508 (Ind. 1990). See also Tingle v. State, 632 N.E.2d 345 (Ind. 1994); Fuller v. State, 639 N.E.2d 344 (Ind. Ct. App. 1994); and Carrington v. State, 619 N.E.2d 309 (Ind. Ct. App. 1993).

However, any other confinement of the victim beyond that inherent in the force used to effectuate the crime constitutes a violation of the confinement statute apart from the violation inherent in the other crime. Gates v. State, 759 N.E.2d 631 (Ind. 2001).

(1) Confinement/Sex crimes

Where the confinement of the victim is a "substantial step" in the attempted sexual assault, or related offense, confinement is an included offense of the attempted sexual offense. Moore v. State, 698 N.E.2d 1203 (Ind. Ct. App. 1998). However, where the confinement is beyond that which is necessary to commit the offense, double jeopardy may not be violated.

Williams v. State, 889 N.E.2d 1274 (Ind. Ct. App. 2008) (criminal confinement conviction barred by double jeopardy provision of Indiana Constitution, where

reasonable possibility exists that jury used same evidentiary facts to establish essential elements of attempted rape and battery).

Wells v. State, 568 N.E.2d 558 (Ind. Ct. App. 1991) (where defendant pointed gun at victim in order to attempt to rape her and take her money, defendant's conviction for confinement in addition to attempted rape and armed robbery was precluded by double jeopardy; nothing prior to or after attempt to rape and rob victim constituted confinement). See also Griffin v. State, 583 N.E.2d 191 (Ind. Ct. App. 1991).

Gates v. State, 759 N.E.2d 631 (Ind. 2001) (tying of victim's hands during several acts of sexual assault was sufficient to support separate conviction of confinement because tying of hands was not necessary part of the rape and criminal deviate conduct).

(2) Confinement/ Robbery

The test is whether the defendant's confinement was greater than that necessary to accomplish the robbery. If the defendant confines a victim longer than necessary, or after the commission of the robbery, double jeopardy may not preclude convictions for both offenses.

Polk v. State, 783 N.E.2d 1253 (Ind. Ct. App. 2003) (State failed to prove that defendant's confinement was any greater than that necessary to accomplish robbery).

VanZandt v. State, 731 N.E.2d 450 (Ind. Ct. App. 2000) (where evidence at trial showed that defendant ordered victims to lie on ground while he robbed store, there was reasonable likelihood that jury relied on fact that defendant used gun to order victim on ground to convict defendant of both robbery and confinement). See also Wethington v. State, 560 N.E.2d 496 (Ind. 1990); and D.J. v. State, 88 N.E.3d 236 (Ind. Ct. App. 2017).

Merriweather v. State, 778 N.E.2d 449 (Ind. Ct. App. 2002) (no double jeopardy violation where defendant's confinement of manager and employee was more extensive than that necessary to effect robbery). See also Smith v. State, 717 N.E.2d 1277 (Ind. Ct. App. 1999); Harris v. State, 716 N.E.2d 406 (Ind. 1999); Stidham v. State, 637 N.E.2d 140 (Ind. 1994); and Ho v. State, 725 N.E.2d 988 (Ind. Ct. App. 2000).

Polk v. State, 578 N.E.2d 687 (Ind. Ct. App. 1991) (where defendant confined victim by making him wait in alley after robbery, double jeopardy did not preclude convictions for confinement and robbery).

(3) Confinement/Carjacking

Wright v. State, 665 N.E.2d 2 (Ind. Ct. App. 1996) (convictions for confinement and attempted carjacking violated double jeopardy given that twisting victim's arm behind her back and placing knife at her back served both as act of confinement and force needed to prove attempted carjacking). See also Taylor v. State, 879 N.E.2d 1198 (Ind. Ct. App. 2008).

(4) Confinement/ Battery

An inference of confinement does not arise from evidence of injury to the victim; if so, every battery would also constitute confinement. Cunningham v. State, 870 N.E.2d 552 (Ind. Ct. App. 2007). Where there is no independent evidence to prove confinement beyond that used to establish a battery, both convictions cannot stand.

Bradley v. State, 867 N.E.2d 1282 (Ind. 2007) (Class B felony criminal confinement and aggravated battery violated Indiana double jeopardy because there is a reasonable possibility that facts used by jury to establish essential elements of confinement were also used to establish essential elements of aggravated battery).

McFadden v. State, 25 N.E.3d 1271 (Ind. Ct. App. 2015) (because there was no independent evidence to establish confinement beyond the evidence used to establish that defendant committed battery, evidence was insufficient to support defendant's criminal confinement conviction); see also Kelley v. State, 2 N.E.3d 777 (Ind. Ct. App. 2014); Hines v. State, 30 N.E.3d 1216 (Ind. 2015).

Ransom v. State, 850 N.E.2d 491 (Ind. Ct. App. 2006) (double jeopardy violation where there was no confinement separate and apart from battery, sequence of events was unclear and events occurred within short period of time; court found reasonable possibility that jury found defendant guilty of confinement for victim's having been confined against her will when co-defendant was striking her with handgun, and that jury also relied on that same evidence–including use of handgun–to find her guilty of Class C felony battery).

Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000) (criminal confinement and battery with deadly weapon violated Indiana double jeopardy because both were based on defendant's placement of rope around victim's neck).

Ely v. State, 655 N.E.2d 372 (Ind. Ct. App. 1995) (convictions for confinement with deadly weapon and battery with deadly weapon violated double jeopardy where putting victim in headlock and placing knife at her chest constituted basis for both charges although neither offense was inherently included in other).

Allen v. State, 725 N.E.2d 472 (Ind. Ct. App. 2000), *aff'd in part, vacated in part,* 737 N.E.2d 741 (apart from acts constituted battery, defendant pulled telephone cord from wall to prevent victim from using phone, locked door to apartment, and choked victim to unconsciousness in order to prevent her leaving; no double jeopardy violation for convictions of confinement and battery).

May v. State, 578 N.E.2d 716 (Ind. Ct. App. 1991) (battery and confinement convictions did not violate double jeopardy where defendant overpowered police officer who was driving him back to detention, took officer's sidearm, used officer's key to release himself from handcuffs, and at gunpoint forced officer to drive him to Anderson).

Williams v. State, 889 N.E.2d 1274 (Ind. Ct. App. 2008) (no reasonable possibility jury used same evidentiary facts to establish essential elements of both

confinement and misdemeanor battery against victim, where confinement was more extensive than necessary to commit battery).

(5) Confinement/Kidnapping

Criminal Confinement is always a lesser included offense of kidnapping, and unless evidence establishes more than one confinement, confinement conviction must be vacated. Curry v. State, 643 N.E.2d 963 (Ind. Ct. App. 1994). See also Koch v. State, 952 N.E.2d 359 (Ind. Ct. App. 2011).

Jones v. State, 159 N.E.3d 55 (Ind. Ct. App. 2020) (under Wadle analysis, given defendant's Level 2 felony kidnapping conviction, his Level 5 felony kidnapping and Level 2 felony criminal confinement convictions involving same victim must fall; two battery convictions upheld); see also Madden v. State, 162 N.E.3d 549 (Ind. Ct. App. 2021); Koziski v. State, --- N.E.3d --- (Ind. Ct. App. June 2, 2021).

Hopper v. State, 475 N.E.2d 20 (Ind. 1985) (because confinement is lesser included offense of kidnapping, conspiracy to commit confinement merges into conviction for conspiracy to commit kidnapping).

(6) Confinement/Intimidation

Stafford v. State, 736 N.E.2d 326 (Ind. Ct. App. 2000) (conviction of criminal confinement based on placing rope around victim's neck and conviction of intimidation based on threatening to place rope around victim's neck did not violate Indiana double jeopardy).

(7) Confinement/Murder

Russell v. State, 743 N.E.2d 269 (Ind. 2001) (where defendant abducted, confined, raped, stored and disposed of body, and court instructed jury that any one of these acts could be overt act of conspiracy to commit murder, there was no reasonable possibility that jury found overt act based on confinement; confinement and conspiracy convictions did not violate Indiana DJ clause). See also Redman v. State, 743 N.E.2d 263 (Ind. 2001).

Lowrimore v. State, 728 N.E.2d 860 (Ind. 2000) (Indiana double jeopardy precluded conviction of confinement resulting in serious bodily injury and murder when confinement was charged as defendant placing pillow on victim's face and chocked her with cord resulting in broken neck and murder was charged as defendant knowingly killing victim by asphyxiation).

Newgent v. State, 897 N.E.2d 520 (Ind. Ct. App. 2008) (where prosecutor charged and argued that defendant aided in murder by confining victim and by providing boyfriend the murder weapon, there was reasonable possibility that jury used the confinement and the providing of murder weapon to support both convictions despite other evidence being introduced).

(8) Confinement/Pointing firearm

Burnett v. State, 736 N.E.2d 259 (Ind. 2000) (where both convictions of pointing firearm and confinement were based on defendant's act of pointing firearm at four-year-old daughter, conviction for pointing firearm was vacated), *overruled on other grounds by* Ludy v. State, 784 N.E.2d 459 (Ind. 2003).

(9) Confinement/Human trafficking

Singh v. State, 40 N.E.3d 981 (Ind. Ct. App. 2015) (convictions for attempted promotion of human trafficking and criminal confinement did not violate actual evidence test because there was no reasonable possibility that the same evidence was used to establish the essential elements of both offenses).

u. Criminal recklessness/Battery

Adams v. State, 754 N.E.2d 1033 (Ind. Ct. App. 2001) (because State chose to charge domestic battery, battery causing serious bodily injury and criminal recklessness all based on same injury, two counts had to be vacated under Indiana double jeopardy principles, regardless of fact that victim actually suffered more than one injury).

Henson v. State, 86 N.E.3d 432 (Ind. Ct. App. 2017) (convictions of two counts of battery against one victim and battery and criminal recklessness against another victim based on single act of driving car into gas pumps violated double jeopardy under Indiana Constitution; held, one battery count and one criminal reckless count ordered vacated).

Rodriguez v. State, 714 N.E.2d 667 (Ind. Ct. App. 1999) (there was no double jeopardy violation because battery required proof of rude, insolent, or angry touching, which criminal recklessness did not require, and criminal recklessness required proof of act that creates substantial risk of bodily injury, which battery did not require; concurring judge held that lesser included offense analysis, rather than same elements analysis, should have been applied).

v. Criminal Recklessness/Resisting Arrest

Jones v. State, 938 N.E.2d 1248 (Ind. Ct. App. 2010) (enhancement of both resisting arrest and criminal recklessness by the same act—defendant's attempt to flee the scene with his vehicle—violated double jeopardy under Indiana Constitution).

w. Battery/Attempted robbery

Owens v. State, 742 N.E.2d 538 (Ind. Ct. App. 2001) (convictions for attempted robbery and battery resulting in bodily injury to law enforcement officer violated Indiana double jeopardy because there was reasonable possibility that the fact that defendant struck officer in head was used to support essential elements of both offenses). See also Burnett v. State, 736 N.E.2d 259 (Ind. 2000), *overruled on other grounds by* Ludy v. State, 784 N.E.2d 459 (Ind. 2003).

x. Battery/Resisting law enforcement

James v. State, 755 N.E.2d 226 (Ind. Ct. App. 2001) (where State charged defendant with Class D felony resisting law enforcement causing bodily injury and aggravated battery based on same bodily injury, resisting law enforcement charge was vacated).

y. Stalking

An individual may be convicted of separate counts of stalking the same victim if the respective series of incidents upon which charges are based can be divided into distinct and separate series. Peckinpaugh v. State, 743 N.E.2d 1238 (Ind. Ct. App. 2001). See also Johnston v. State, 164 N.E.3d 817, 826 (Ind. Ct. App. 2021) (issuance of protective order divided separate instances of stalking, so trial counsel not ineffective for not challenging entry of multiple stalking convictions), *trans. denied*.

2. Offenses against property

a. Multiple thefts

Benberry v. State, 742 N.E.2d 532 (Ind. Ct. App. 2001) (where defendant purchased stolen credit cards at same time and from same place, there was only one theft offense). See I.A.3.b(2), *Multiple taking: one offense*, above.

b. Burglary/ Theft

Vestal v. State, 773 N.E.2d 805 (Ind. 2002) (breaking into liquor store was distinct and separate act from taking liquor and cash, and thus, burglary and theft convictions did not violate Indiana double jeopardy principles). See also Swaynie v. State, 762 N.E.2d 112 (Ind. 2002).

Moffatt v. State, 542 N.E.2d 971 (Ind. 1989) (double jeopardy does not prohibit sentencing for both burglary, charged as breaking and entering with intent to commit theft inside, and theft actually committed inside because to obtain conviction for burglary, it is not necessary to prove theft, only intent to commit theft, and to obtain theft conviction, proof of breaking and entering is not required).

c. Robbery/ Theft

Because all elements of theft are included in robbery, theft is an inherently included offense and must merge into robbery. Tingle v. State, 632 N.E.2d 345, 350 (Ind. 1994). See also Mitchell v. State, 690 N.E.2d 1200 (Ind. Ct. App. 1998).

However, when multiple victims or different items are involved, even if part of one transaction, robbery and theft convictions do not violate double jeopady. Ho v. State, 725 N.E.2d 988 (Ind. Ct. App. 2000).

d. Robbery/Carjacking

Where the property element of robbery consists of a motor vehicle, carjacking is an included offense of robbery, and conviction on both counts violates double jeopardy.

Goudy v. State, 689 N.E.2d 686, 698 (Ind. 1997). See also Jenkins v. State, 695 N.E.2d 158 (Ind. Ct. App. 1998).

But see Borum v. State, 951 N.E.2d 619 (Ind. Ct. App. 2011) (in light of the fact that the information and jury instructions alleged different substantial steps on the attempted robbery and attempted carjacking charges, there was not a reasonable possibility that the jury relied upon exactly the same facts in rendering convictions on each charge).

e. Robbery/Criminal Confinement

Wright v. State, 950 N.E.2d 365 (Ind. Ct. App. 2011) (based on the evidence presented and the State's argument to the jury, there was a reasonable possibility that the jury could have used the same evidence to convict defendant for Class A felony robbery and class D felony criminal confinement; held, criminal confinement conviction reversed).

f. Fraud/Theft

Trotter v. State, 733 N.E.2d 527 (Ind. Ct. App. 2000) (where information alleged that substantial step in attempted fraud was defendant's act of presenting store credit card for payment of merchandise without cardholder's consent, and jury was also instructed that it could find defendant guilty of theft if it found he exerted control over cardholder's credit card without his consent, there was reasonable possibility that both attempted fraud and theft were based on same evidence).

g. Theft/Receiving Stolen Property

White v. State, 944 N.E.2d 532 (Ind. Ct. App. 2011) (theft and receiving stolen property convictions violate Indiana Constitution's Double Jeopardy provision where defendant drove the getaway car after accomplice stole cash register and cash from restaurant and both men later divvied up the cash).

h. Carjacking/Kidnapping

Burton v. State, 706 N.E.2d 568 (Ind. Ct. App. 1999) (there was no violation of Fifth Amendment Double Jeopardy Clause where defendant was convicted and sentenced for both carjacking and kidnapping because kidnapping occurred when defendant left with victim in car and carjacking occurred when defendant forced victim out of car, so he could take car).

i. Class A or B felony arson

Lahrman v. State, 465 N.E.2d 1162 (Ind. Ct. App. 1984) (sentences for Class B felony and Class A felony arson are in violation of double jeopardy because Class B felony arson is based on endangering others and includes all elements of Class A felony arson, which is based on bodily injury of others).

3. Handgun offenses

Where the defendant's offense in which he used the handgun can be separated from the defendant's carrying of the handgun, Indiana double jeopardy principles have not been

violated. Carrying a handgun on the street is one offense while using the handgun is another. Mickens v. State, 742 N.E.2d 927 (Ind. 2000).

a. Criminal recklessness/Pointing firearm

Bracksieck v. State, 691 N.E.2d 1273 (Ind. Ct. App. 1998) (because there is no situation in which pointing loaded firearm at another person does not also create substantial risk of bodily injury to that person, defendant's convictions and sentences for both pointing firearm and criminal recklessness violated prohibition against double jeopardy under Games' "same elements" analysis).

b. Criminal recklessness/Possession of handgun without license

Collier v. State, 715 N.E.2d 940 (Ind. Ct. App. 1999) (defendant's convictions for carrying handgun without license and criminal recklessness with deadly weapon, based on single incident, violated federal double jeopardy because lack of license is not an element, but rather a defense).

Skaggs v. State, 751 N.E.2d 318 (Ind. Ct. App. 2001) (because there was evidence that defendant carried gun to home and then shot towards victim, defendant failed to demonstrate that there was reasonable possibility that defendant's conviction of carrying unlicensed handgun and criminal recklessness violated Indiana double jeopardy).

But see:

Fields v. State, 676 N.E.2d 27 (Ind. Ct. App. 1997) (although it is defendant's burden to prove license for handgun, lack of valid license is element of possession of handgun without license for purposes of double jeopardy; thus, possession of handgun without license contained element that criminal recklessness did not, and criminal recklessness contained element of substantial risk, which possession without license did not; no double jeopardy violation). See also Woods v. State, 768 N.E.2d 1024 (Ind. Ct. App. 2002) (rejecting Collier analysis, infra) and Burk v. State, 716 N.E.2d 39 (Ind. Ct. App. 1999).

c. Possession of handgun/Pointing firearm

Armstrong v. State, 742 N.E.2d 972 (Ind. Ct. App. 2001) (possession of unlicensed handgun and pointing firearm were based on different evidence under Indiana constitutional analysis).

d. Firearm Enhancement

(1) Possession of handgun/enhancement

Cross v. State, 15 N.E.3d 569 (Ind. 2014) (5-year firearm sentence enhancement vacated because it was based on same behavior as carrying handgun without a license conviction; defendant continuously possessed but did not use a handgun from the time he drove to hotel room to sell drugs until he was taken into custody by police officers).

(2) Confinement/enhancement

Nicoson v. State, 919 N.E.2d 1203 (Ind. Ct. App. 2010) (defendant's five-year sentence enhancement for use of firearm following his conviction for criminal confinement with a deadly weapon did not violate double jeopardy, where at sentencing trial court implicitly recognized distinction between defendant's mere possession of the gun and his actual use of it).

(3) Battery with deadly weapon/pointing firearm/enhancement

Duncan v. State, 23 N.E.3d 805 (Ind. Ct. App. 2015) (because prosecutor in opening and closing statements invited jury to rely on defendant's firing of gun while fleeing to support convictions for attempted battery with deadly weapon, pointing a firearm and enhancement to resisting law enforcement by drawing or using a gun, there was reasonable possibility that jury relied on same evidence for all three convictions; pointing firearm and enhancement of resisting law enforcement vacated).

e. Armed robbery/Unlicensed handgun

Ho v. State, 725 N.E.2d 988 (Ind. Ct. App. 2000) (convictions for robbery and carrying unlicensed handgun did not violate Indiana double jeopardy principles because robbery required proof that defendant committed robbery while armed with handgun and unlicensed handgun required lack of evidentiary facts, that defendant did not have license). But see Collier v. State, 715 N.E.2d 940 (Ind. Ct. App. 1999) (lack of license is not an element of offense of carrying unlicensed handgun, and therefore merges with other handgun-related charge).

f. Aggravated battery/Unlicensed handgun

Newman v. State, 751 N.E.2d 265 (Ind. Ct. App. 2001) (no reasonable possibility that jury used same evidence to convict defendant of aggravated battery and carrying a handgun without a license, because defendant was clearly carrying gun prior to battery, and therefore illegal carrying was completed before the battery occurred).

g. Unlicensed handgun/Serious violent felon

Where both offenses were based on possession of a handgun, rather than a separate use of the handgun, there may be a double jeopardy violation.

Hatchett v. State, 740 N.E.2d 920 (Ind. Ct. App. 2000) (possession of firearm by serious violent felon and carrying handgun without license violated Indiana double jeopardy principles under actual evidence test), *overruled in part on other grounds by* Robinson v. State, 805 N.E.2d 783 (Ind. 2004); see also Alexander v. State, 772 N.E.2d 476 (Ind. Ct. App. 2002).

Calvert v. State, 930 N.E.2d 633 (Ind. Ct. App. 2010) (convictions for possession of sawed-off shotgun and possession of firearm by serious violent felon based on possession of the same gun violated common law double jeopardy).

But see:

Walton v. State, 81 N.E.3d 679 (Ind. Ct. App. 2017) (upholding two convictions for unlawful possession of firearm by SVF based on defendant's simultaneous possession of two different firearms in his home).

Taylor v. State, 929 N.E.2d 912 (Ind. Ct. App. 2010) (General Assembly's use of singular phrase "possesses a firearm" means that a SVF who possesses more than one firearm has committed more than one offense).

Carpenter v. State, 15 N.E.3d 1075 (Ind. Ct. App. 2014) (no double jeopardy violation for convictions for possession of firearm by SVF and possession of handgun with altered identifying marks because not all of the elements of both offenses were established by the gun that was entered into evidence).

4. Drug offenses

a. Possession/Manufacturing

Because one cannot manufacture a drug without possessing the drug, possession is an inherently included offense of manufacturing. Mudd v. State, 483 N.E.2d 782, 784 (Ind. Ct. App. 1985).

However, even though one also cannot manufacture a drug without possessing the necessary precursors, convictions for possession of precursors and manufacturing of a drug have been upheld under a strict Richardson double jeopardy analysis if there is evidence of both the finished product and precursors, based on the theory that the defendant has previously manufactured the drug and the presence of precursors is a separate crime indicating an intent to manufacture again in the future (see subsection (e), infra). Goffinet v. State, 775 N.E.2d 1227 (Ind. Ct. App. 2002). See also Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002).

Weddle v. State, 997 N.E.2d 45 (Ind. Ct. App. 2013) (possession and manufacturing methamphetamine convictions did not violate double jeopardy because jury could have reasonably concluded that defendant was in possession of methamphetamine and was in the process of manufacturing an additional amount of the drug).

b. Manufacturing/Dealing

Bigler v. State, 602 N.E.2d 509 (Ind. Ct. App. 1992) (because defendant harbored two distinct criminal intents: to knowingly manufacture, and then to deliver manufactured substance, defendant was manufacturer and dealer).

c. Dealing/Possession

Possession of a narcotic is an inherently included lesser offense of dealing that narcotic. Collins v. State, 520 N.E.2d 1258, 1261 (Ind. 1988); Quick v. State, 660 N.E.2d 598, 601 (Ind. Ct. App. 1996). Under the Indiana Constitution, an individual may not be convicted of possession and dealing of the same drugs. Mack v. State, 736 N.E.2d 801 (Ind. Ct. App. 2000).

Phillips v. State, ___N.E.3d___ (Ind. Ct. App. 2021) (as charged and tried, defendant's Level 3 felony possession of methamphetamine conviction was a

factually included offense of his dealing conviction and his offenses constituted a single transaction under Wadle, *supra*)).

However, separate convictions for dealing in and possession of drugs, arising out of the same incident, are sustainable over a double jeopardy objection when the defendant deals a portion of a drug and retains the rest, if the State makes clear that only the quantity sold forms the basis of the dealing charge and only the quantity retained after the sale forms the basis of the possession charge. Johnson v. State, 659 N.E.2d 242, 246-47 (Ind. Ct. App. 1995) (information did not distinguish between quantity sold and quantity retained nor did record show that State intended to make distinction). See also Collins v. State, 520 N.E.2d 1258 (Ind. 1988); Bennett v. State, 5 N.E.3d 498 (Ind. Ct. App. 2013); and Abron v. State, 591 N.E.2d 634 (Ind. Ct. App. 1992).

Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000) (Indiana constitutional double jeopardy violation when State chose to charge dealing and possession offenses broadly and its closing argument was no more specific).

Quick v. State, 660 N.E.2d 598 (Ind. Ct. App. 1996) (where defendant sold LSD to undercover officer and threw remainder of LSD into pond, defendant could not be convicted of both dealing and possession because information did not distinguish between drugs defendant was accused of dealing and drugs he was accused of possessing); see also Leitch v. State, 736 N.E.2d 1284 (Ind. Ct. App. 2000).

d. Dealing/ Possession with intent to deliver

Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000) (possession of cocaine with intent to deliver is not an inherently lesser included offense of dealing, because the former charge requires possession of at least three grams and the latter charge requires delivery; however, dual convictions may violate the Indiana constitution under the actual evidence test).

Bigler v. State, 602 N.E.2d 509 (Ind. Ct. App. 1992) (defendant harbored two distinct criminal intents: to knowingly or purposefully manufacture methamphetamine, and then possession with intent to deliver; therefore, two convictions of dealing based on manufacturing and possession with intent to deliver is not double jeopardy violation).

Mudd v. State, 483 N.E.2d 782, 784 (Ind. Ct. App. 1985) (possession of marijuana with intent to deliver represents an included offense of delivery of marijuana).

e. Manufacturing/Possession of precursors

Where manufacturing is proved by evidence of completed methamphetamine and precursors are present for further manufacturing, separate convictions for possession of precursors and dealing in methamphetamine by manufacturing does not violate double jeopardy. Iddings v. State, 772 N.E.2d 1006 (Ind. Ct. App. 2002).

However, where there is no direct evidence that the defendant has completed the manufacture of methamphetamine from precursors, conviction for possessing precursors with intent to manufacture is a lesser included offense of manufacturing. Bush v. State, 772 N.E.2d 1020 (Ind. Ct. App. 2002).

Moore v. State, 869 N.E.2d 489 (Ind. Ct. App. 2007) (convictions for possession of anhydrous ammonia and possession of reagents or precursors are necessarily included offenses of dealing in methamphetamine and thus violate double jeopardy).

Speer v. State, 995 N.E.2d 1 (Ind. Ct. App. 2013) (prosecutor in final argument mentioned ammonium mixture containing two precursors to support both class B felony manufacturing methamphetamine and D felony possession of two or more precursors; this created reasonable possibility that jurors used those same pieces of evidence to establish essential elements of both crimes).

Goffinet v. State, 775 N.E.2d 1227 (Ind. Ct. App. 2002) (no reasonable possibility that jury relied on same evidentiary facts to establish essential elements of both manufacturing methamphetamine and possession of precursors). See also Scott v. State, 803 N.E.2d 1231 (Ind. Ct. App. 2004).

f. Possession without valid license/Fraud in obtaining substance

Loman v. State, 640 N.E.2d 745 (Ind. Ct. App. 1994) (convictions for possession of controlled substance without valid prescription and obtaining controlled substance by fraud or deceit violated double jeopardy because one could not obtain possession of narcotic by fraud by use of invalid prescription without also possessing it without valid prescription).

g. Payment of Controlled Substance Excise Tax ("CSET")/Dealing

Dealing is inherently lesser included offense of failure to pay Controlled Substance Excise Tax ("CSET") on the dealt substance so that conviction and sentence for both crimes will violate double jeopardy. Collins v. State, 659 N.E.2d 509 (Ind. 1995). For discussion on subsequent prosecution, see Bryant v. State, 660 N.E.2d 290 (Ind. 1995) and Chu v. State, 991 N.E.2d 142 (Ind. Ct. App. 2013).

h. Payment of CSET/Possession with 1000 feet of school

Possession within 1000 feet of school property is not a lesser included offense of failure to pay CSET, as each offense requires proof of at least one element which other does not. Charley v. State, 651 N.E.2d 300 (Ind. Ct. App. 1995).

i. Multiple possessions

Under both the actual evidence test and decisions pre-dating Richardson, an individual can be convicted of only one count of possession of a narcotic where possessions charged and proven were simultaneous. Campbell v. State, 734 N.E.2d 248 (Ind. Ct. App. 2000) (where defendant possessed cocaine on his person and at his residence simultaneously, there could only be one conviction of possession). See also Stephens v. State, 588 N.E.2d 564 (Ind. Ct. App. 1992); Young v. State, 564 N.E.2d 968 (Ind. Ct. App. 1991); and Donnegan v. State, 809 N.E.2d 966 (Ind. Ct. App. 2004).

Williams v. State, 930 N.E.2d 602 (Ind. Ct. App. 2010) (defendant's two Class C felony convictions for possessing two different brand names of pills, both including the same schedule III-controlled substance violated double jeopardy).

j. Possession of drug/possession of paraphernalia

Rowland v. State, 155 N.E.3d 637, 641 (Ind. Ct. App. 2020) (based on the record, court concluded defendant's behavior of possessing marijuana was separate and distinct from his behavior of possessing paraphernalia and therefore upheld both convictions).

5. OWI and driving-related offenses

a. OWI/BAC of .10%

Operating a vehicle with a .15% BAC as a Class A misdemeanor is not a lesser included offense of operating a vehicle while intoxicated as a Class C misdemeanor, given the 2000 and 2001 amendments to the applicable statutes which show legislative intent that Class A misdemeanor constitutes a greater risk than the C misdemeanor OWI. Stutz v. State, 970 N.E.2d 263 (Ind. Ct. App. 2012) (remanded to vacate the Class C misdemeanor offense because it should have been merged into the Class A offense).

Rouse v. State, 525 N.E.2d 1278 (Ind. Ct. App. 1988) (operating vehicle with blood alcohol content of .10% or more resulting in death of another person is not lesser-included offense of operating motor vehicle while intoxicated resulting in death of another under Blockburger analysis nor under IC 35-41-1-16(3) (now IC 35-31.5-2-168) because both offenses are C felonies).

The statutory analysis under Ind. Code § 35-31.5-2-168 provides protection against being convicted of and sentenced for two offenses based on the same facts.

b. OWI/Public intoxication

Convictions for both OWI and Public Intoxication may violate Indiana Double Jeopardy where both are based on the defendant's driving on a public road while intoxicated. Smith v. State, 725 N.E.2d 160 (Ind. Ct. App. 2000).

PRACTICE POINTER: Although an issue of first impression in Indiana, the Indiana common law double jeopardy clause may prohibit convictions on both Operating While Intoxicated and Driving While Suspended and/or Driving While a Habitual Traffic Violator. By analogy, see Hatchett v. State, 740 N.E.2d 920 (Ind. Ct. App. 2000), *overruled on other grounds by* Robinson v. State, 805 N.E.2d 783 (Ind. 2004) (possession of firearm by serious violent felon and carrying handgun without license violated Indiana double jeopardy principles).

(1) OWI prior/OWI injury

In 1996, the Legislature amended IC 9-30-5-4 and -5 to allow a conviction for OWI causing serious bodily injury or death to be enhanced by a prior conviction, overruling Mehidal v. State, 623 N.E.2d 428 (Ind. Ct. App. 1993).

(2) OWI causing SBI or death/Failure to stop after accident involving SBI or death of same victim

McElroy v. State, 864 N.E.2d 392 (Ind. Ct. App. 2007) (no double jeopardy violation for convictions and sentences for OWI causing death and failure to stop at accident

resulting in death based on one death; defendant was only punished once for causing the death because the death was a circumstance of failure to stop, and causation was not an element).

Wadle v. State, 151 N.E.3d 227, 255 (Ind. 2020) (convictions for Level 5 felony OWI-SBI and Level 3 felony leaving the scene of an accident violated double jeopardy where OWI offense was included in leaving the scene offense and there was no temporal distinction between the two in either the charging instrument or the jury instructions).

(3) OWI injury/ OWI death of different victims

In 1994, the legislature amended IC 9-30-5-4 (OWI causing serious bodily injury) and IC 9-30-5-5 (OWI causing death) to allow separate convictions and sentences for each person whose serious bodily injury or death is caused by the single OWI violation. Under prior law, a defendant whose driving while intoxicated seriously injured or killed more than one person could not be convicted and sentenced for multiple OWIs causing serious bodily injury or OWIs causing death. Kelly v. State, 527 N.E.2d 1148 (Ind. Ct. App. 1988) (allowing only one enhancement for one OWI, even if there was more than one victim).

Stafford v. State, 83 N.E.3d 721 (Ind. Ct. App. 2017) (one act of reckless driving in a highway work zone cannot sustain two Class C felony convictions, even though it resulted in two deaths; as written, IC 9-21-8-56 is a conduct-based, not result-based statute, thus, in light of Indiana Supreme Court's holding in Kelly (above), Court was "compelled to conclude that [D] committed one crime here, albeit one crime with multiple, horrific results").

c. OWI/Neglect of a dependent

Kellogg v. State, 636 N.E.2d 1262 (Ind. Ct. App. 1994) (where both charges predicated on defendant's driving drunk, convictions for OWI and neglect of dependent were precluded by double jeopardy because OWI was factually included offense of neglect).

d. OWI/Operating vehicle with controlled substance in blood

Kremer v. State, 643 N.E.2d 357 (Ind. Ct. App. 1994) (court violated double jeopardy by accepting convictions of operating helicopter while intoxicated and operating vehicle with controlled substance in blood), superseded by statute on other grounds.

e. Reckless driving/leaving scene of an accident

Barrozo v. State, 156 N.E.3d 718 (Ind. Ct. App. 2020) (included offenses were not implicated because reckless driving requires operating a vehicle in a reckless manner, thereby endangering others and causing the bodily injury, but leaving the scene of an accident merely requires that the defendant's vehicle was involved in an accident (he need not have caused the accident or the bodily injury) and that the defendant then left the scene of the accident without providing his identifying information, among other things).

f. Reckless driving/criminal recklessness

Shepherd v. State, 155 N.E.3d 1227 (Ind. Ct. App. 2020) (largely avoiding Wadle and relying on "common law double jeopardy jurisprudence," Court accepted the State's concession that a defendant could not be convicted both of Class A misdemeanor reckless driving for passing a school bus when its arm signal device was extended causing bodily injury and Level 6 felony criminal recklessness arising from the same act with the same victim.

6. Leaving the scene of an accident

Convictions for two counts of leaving the scene of an accident will violate double jeopardy if the convictions stem from a single accident. Nield v. State, 677 N.E.2d 79 (Ind. Ct. App. 1997). See also Wood v. State, 999 N.E.2d 1054 (Ind. Ct. App. 2013).

However, convictions for failure to stop at an accident resulting in injury and failing to stop at an accident causing property damage do not violate double jeopardy, even if resulting from a single accident, because each offense requires proof of an additional fact that the other does not (i.e. separate and distinct injury) and offenses are listed under two separate statutes. Robinson v. State, 835 N.E.2d 518 (Ind. Ct. App. 2005).

7. Miscellaneous offenses

a. Promoting animal fighting/Using animal in animal fight

Fuller v. State, 674 N.E.2d 576 (Ind. Ct. App. 1996) (convictions for promoting or staging animal fighting contest and using animal in animal fighting contest did not subject defendant to double jeopardy because they were based on different conduct).

b. Criminal contempt/Escape

Ellis v. State, 634 N.E.2d 771 (Ind. Ct. App. 1994) (it was not error to convict defendant on both criminal contempt and escape based on same conduct, defendant running from court, under U.S. constitutional analysis).

c. Forgery/Theft; Obstruction of justice

Multiple instances of forgery, theft or obstruction of justice all done for a single purpose may implicate double jeopardy.

Blythe v. State, 14 N.E.3d 823 (Ind. Ct. App. 2014) (even though defendant falsified nine separate signatures on election ballot, he committed only one forgery because he had but one purpose and falsified signatures during relatively short period of time).

Lahr v. State, 731 N.E.2d 479 (Ind. Ct. App. 2000) (evidence that defendant had provided his attorney with two forged letters for purposes of bolstering self-defense argument could not support two counts of forgery and two counts of obstruction of justice under Indiana Constitution).

Williams v. State, 892 N.E.2d 666 (Ind. Ct. App. 2008) (there was more than a reasonable possibility that State used same evidentiary facts to convict defendant of both forgery and attempted theft).

Winn v. State, 722 N.E.2d 345 (Ind. Ct. App. 1999) (convictions on seven separate counts of bribery violated double jeopardy where defendant made seven payments to prosecutor for single purpose of persuading prosecutor not to prosecute him for illegal gambling).

Williams v. State, 892 N.E.2d 666 (Ind. Ct. App. 2008) (there was more than a reasonable possibility that State used same evidentiary facts to convict defendant of both forgery and attempted theft).

d. Exhibition of obscene matter/Distribution of obscene matter

Adams v. State, 804 N.E.2d 1169 (Ind. Ct. App. 2004) (no double jeopardy violation to convict defendant of exhibition of obscene matter for having shown tapes to undercover officer on his home computer and of distribution of obscene matter for selling tapes to same officer; even though both acts were part of one transaction, the evidentiary facts used to establish the elements of each offense were distinct).

e. Resisting Arrest/Disorderly Conduct

Glenn v. State, 999 N.E.2d 859 (Ind. Ct. App. 2013) (no double jeopardy violation to convict defendant of both resisting law enforcement and disorderly conduct where State presented evidence that defendant tried several times to push away from the arresting officer to show that she resisted law enforcement and swung her handcuffs at the officer to show disorderly conduct).

C. WHICH CONVICTION TO REDUCE OR VACATE

Although a sentencing court's merger of a lesser included offense into a greater offense will cure a double jeopardy violation, the proper appellate remedy for a double jeopardy violation is to either reduce the level of a conviction or vacate a conviction. Clark v. State, 752 N.E.2d 209 (Ind. Ct. App. 2001). See also Leitch v. State, 736 N.E.2d 1284 (Ind. Ct. App. 2000). Thus, appellate courts will not remand cases to vacate conviction when sentence was never entered on that conviction due to double jeopardy. Carter v. State, 750 N.E.2d 778 (Ind. 2001).

Green v. State, 856 N.E.2d 703 (Ind. 2006) (there is no need to remand on appeal to vacate lesser offense when trial court merges the lesser offense into greater offense without imposing judgment); see also Bass v. State, 75 N.E.3d 1100 (Ind. Ct. App. 2017).

Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App. 2005) (unlike facts and circumstances in Laux v. State, 821 N.E.2d 816 (Ind. 2005), trial court entered judgment of conviction upon each of jury verdicts and then "merged" convictions for sentencing purposes; merger after judgments of convictions have been entered does not cure double jeopardy violation).

Reinstatement of a lesser included offense after vacating a finding for the greater offense does not violate double jeopardy.

R.W. v. State, 975 N.E.2d 407 (Ind. Ct. App. 2012) (reinstating lesser included offense of criminal mischief after Court vacated true finding for greater offense of attempted burglary did not violate double jeopardy).

1. Reduce if possible

When two convictions are found to contravene double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious offense if doing so will eliminate the violation; however, the court cannot engage in fact-finding in order to reduce a conviction. Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

James v. State, 755 N.E.2d 226, 232 n.4 (Ind. Ct. App. 2001) (because State charged defendant with Class D felony resisting law enforcement and aggravated battery based solely on single act that injured police officer, appellate court could not reduce Class D felony resisting to Class A misdemeanor resisting because that would require court to determine that defendant resisted law enforcement at different point in time than at time officer was injured).

2. Vacate conviction

If there is no less serious offense to which the court may reduce a conviction, one of the convictions must be vacated; in the interest of efficient judicial administration, the trial court need not undertake a full sentencing re-evaluation, but rather the reviewing court will make this determination itself, being mindful of the penal consequences that the trial court found appropriate.

Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (reviewing court vacated battery conviction and let Class C felony robbery conviction stand because battery conviction in its lowest form, Class B misdemeanor, and robbery in its lowest form, Class C felony, still violated double jeopardy and battery conviction carried the less severe penal consequences).

Britt v. State, 810 N.E.2d 1077 (Ind. Ct. App. 2004) (as result of double jeopardy violation, Court vacated possession of marijuana conviction as a Class D felony while affirming Class A misdemeanor possession conviction; Court kept lesser-penalized conviction because of inconsistent judgments that found defendant guilty of cultivating less than 30 grams of marijuana while possessing over 30 grams of marijuana; vacation of conviction and sentence for included offense of possession will result in defendant standing convicted of offense having additional element of proof but a lesser penalty).

Moala v. State, 969 N.E.2d 1061 (Ind. Ct. App. 2012) (Court was required to vacate defendant's class C misdemeanor operating while intoxicated conviction and impose a sentence based on his conviction for class B misdemeanor public intoxication, which carried a more severe penalty).

Owens v. State, 60 N.E.3d 1106 (Ind. Ct. App. 2016) (because trial court made domestic violence determination on defendant's battery conviction, his criminal recklessness conviction had the less serious penal consequence and thus should be vacated to cure double jeopardy violation).

3. Exception

Although the court generally should reduce a conviction before vacating it, courts have discretion to vacate the conviction if doing so will result in an overall longer sentence. Guffey v. State, 42 N.E.3d 152 (Ind. Ct. App. 2015) (because the vacated individual sentences were "part of an overall plan" by the trial court, the judge would be permitted to impose a harsher sentence for the conviction on Count 1 if it chose to do so).1

Sanders v. State, 734 N.E.2d 646 (Ind. Ct. App. 2000) (where trial court originally imposed enhanced consecutive sentence to maximize punishment of defendant, court vacated conviction that would least reduce sentence to honor trial court's sentencing decision).

4. Multiple true findings in single juvenile delinquency adjudication

The double jeopardy prohibition should apply in juvenile cases because multiple true findings may be used by a trial court to enhance penal consequences in subsequent criminal proceedings. H.M. v. State, 892 N.E.2d 679 (Ind. Ct. App. 2008). If the appellate court concludes that multiple true findings in a delinquency adjudication violate double jeopardy principles, the court may reduce either true finding to a less serious classification if that will eliminate the violation or, if not, the court must vacate one of the true findings. D.B. v. State, 842 N.E.2d 399, 404 (Ind. Ct. App. 2006).

C.H. v. State, 15 N.E.3d 1086 (Ind. Ct. App. 2014) (true findings for unlawful entry into a car and criminal trespass violated Richardson test).

D.J. v. State, 88 N.E.3d 236 (Ind. Ct. App. 2017) (there is reasonable possibility juvenile court used same facts to find D.J. committed criminal confinement and robbery).

D. APPLICATION TO PROBATION

Because probation is a form of criminal punishment, it also raises double jeopardy concerns, insofar as a defendant cannot be required to re-serve probation time already served. Kincaid v. State, 778 N.E.2d 789 (Ind. 2002). "The constitutional guarantee against multiple punishments for the same offense requires that punishment already exacted must be fully credited upon a new conviction for the same offense." Id. at 792 (quoting North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969)).

1. No credit applied to executed sentence for time spent on probation

If a defendant violates his terms of probation and is ordered to serve an executed sentence, he is not entitled to credit against the executed sentence for time spent on probation. Kincaid v. State, 778 N.E.2d 789, 791-92 (Ind. 2002).

2. Credit applied to new probation period for time on probation

Where a defendant serves probation time for a conviction which is subsequently vacated, and then serves a second term of probation for a second conviction based on the very same offense, the federal constitution requires that the defendant receive credit for the first sentence to be applied to the second sentence. Kincaid v. State, 778 N.E.2d 789 (Ind. 2002).

E. WAIVER

By pleading guilty under an agreement, a defendant waives any double jeopardy problem. Games v. State, 743 N.E.2d 1132 (Ind. 2001). However, the plea could always be challenged as involuntary or a product of ineffective assistance of counsel. Atchely v. State, 730 N.E.2d 758 (Ind. Ct. App. 2000). When a defendant pleads guilty without the benefit of a plea agreement, the Court of Appeals has held there is no waiver. Kunberger v. State, 46 N.E.3d 966, 971 (Ind. Ct. App. 2015).

Mapp v. State, 770 N.E.2d 332 (Ind. 2002) (there is no exception to this rule for facially duplicative charges).

Mays v. State, 790 N.E.2d 1019 (Ind. Ct. App. 2003) (although advising defendant to plead guilty to offenses which violate double jeopardy principles may be seriously questioned, it is not per se ineffective where defendant does not present any evidence to support his claim).

But see:

Kincaid v. State, 778 N.E.2d 789 (Ind. 2002) (waiver of double jeopardy claims via a plea agreement does not apply to situation where there is no bargain by defendant to forego crediting days already served on probation for prior conviction on same offense that had been vacated; such a situation does not constitute a voluntary agreement to forego defendant's constitutional right to credit for time served).

Wharton v. State, 42 N.E.2d 539 (Ind. Ct. App. 2015) (defendant pleaded guilty in open court without an agreement that might have brought him some benefit in return; thus, he did not waive his right to challenge his convictions).

Fields v. State, 825 N.E.2d 841 (Ind. Ct. App. 2005) (notwithstanding plea agreement, trial court did not err at sentencing when it merged attempted robbery and conspiracy to commit robbery convictions to comply with IC 35-41-5-3; merger at sentencing is not a collateral attack).

Griffin v. State, 540 N.E.2d 1187, 1188 (Ind. 1989) (a defendant who pleads guilty to charges which are facially duplicative of previous convictions is entitled to challenge the resulting convictions).

II. SIXTH AMENDMENT RIGHT TO JURY TRIAL & PROOF BEYOND A REASONABLE DOUBT - BLAKELY

The U.S. Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. See Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); and Jones v. United States, 526 U.S. 227 (1999). The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in a jury verdict or admitted by the defendant without any additional findings, i.e., the presumptive or standard sentence. Blakely v. Washington, 124 S.Ct 2531, 2537 (2004).

However, Blakely only applies to punitive measures, and does not include other, not punitive forms of punishment.

Prickett v. State, 856 N.E.2d 1203 (Ind. 2006) (Blakely does not apply to restitution or sex offender registry orders because the registry's purpose is not punishment). But see Wallace v. State, 905 N.E.2d 371 (Ind. 2009).

Combs v. State, 851 N.E.2d 1053 (Ind. Ct. App. 2006) (when considering whether a defendant's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B) (discussed in part III, below), appellate court should not consider factors which violate Blakely).

As a new rule of constitutional procedure, the courts will apply Blakely retroactively to all cases on direct review at the time Blakely was announced and would be "rather liberal" in approaching whether an appellant and her lawyer have adequately preserved and raised a Blakely issue. Smylie v. State, 823 N.E.2d 679 (Ind. 2005). Smylie and Blakely do not apply retroactively to belated appeals. Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007). However, where a defendant's re-sentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the re-sentencing. Kline v. State, 875 N.E.2d 435 (Ind. Ct. App. 2007). See also Ben-Yisrayl v. State, 908 N.E.2d 1223 (Ind. Ct. App. 2009).

A. PRE-APRIL 25, 2005, STATUTORY SCHEME—AGGRAVATING FACTORS- SMYLIE

Indiana's system prior to April 25, 2005, for enhanced sentences contravenes Blakely, *supra.* Indiana's scheme was not a "range" system but provided for a "fixed term" presumptive sentence as a mandatory starting point for each class of felonies, Ind. Code § 35-50-2-3 to 7. Smylie v. State, 823 N.E.2d 679 (Ind. 2005). The statutes also created upper and lower boundaries for each felony sentence, requiring the judge to engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term was to be imposed. Id. It is this type of judicial fact-finding that concerned the Court in Blakely and rendered Indiana's sentencing system unconstitutional. Id.

Thus, under the sentencing scheme prior to April 25, 2005, any aggravator used to enhance a sentence beyond the presumptive and which is not based on a prior conviction or an admission of a defendant must be proven to a jury beyond a reasonable doubt. Id. See also Oregon v. Ice, 129 S.Ct. 711 (2009).

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (imposition of consecutive sentences based on aggravators not found by a jury does not violate Blakely, *supra*); see also Oregon v. Ice, 129 S.Ct. 711 (2009).

1. Specific aggravators

The following are examples of aggravators that must be proven to a jury.

Edwards v. State, 822 N.E.2d 1106 (Ind. Ct. App. 2005) (although evidence tending to show planning and preparation was presented to the jury, these facts were not necessarily reflected in the jury verdict and thus were improper aggravators).

Williams v. State, 840 N.E.2d 433 (Ind. 2006) (defendant did not admit to the particular facts relied on by the trial court in assessing nature and circumstances of crime--that the defendant hit his sister's car three times, eventually striking her and exposing her to serious injury, and, thus, they may not be used to enhance defendant's sentence).

Miller v. State, 891 N.E.2d 58 (Ind. Ct. App. 2008) (trial court improperly relied upon the following unproven facts: (1) the defendant's acts were part of an ongoing scheme or plan rather than an isolated incident of extremely poor judgment; (2) the negative emotional impact on the victim; (3) the defendant used gifts to foster the relationship; and (4) the defendant violated the position of trust with the victim).

The following are examples of aggravators that need not be proven to a jury.

Ryle v. State, 842 N.E.2d 320 (Ind. 2005) (defendant's prior juvenile adjudications and fact that he was on probation when he committed the crime are proper sentencing considerations for a trial judge and need not be submitted to a jury under Blakely).

Trusley v. State, 829 N.E.2d 923 (Ind. 2005) (defense counsel's statement during guilty plea colloquy was sufficient to constitute an admission by defendant that victim was under twelve at time of his death).

2. Judicial statements about aggravators

Statements which are "derivative" of criminal history are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under Blakely, but they cannot serve as separate aggravating circumstances. The Sixth Amendment is not implicated or endangered when language of an aggravator is meant to describe factual circumstances, not to serve as a fact itself. Thus, the precise language of an aggravator need not be submitted to a jury or admitted by a defendant in order to pass Sixth Amendment requirements established in Blakely. Morgan v. State, 829 N.E.2d 12 (Ind. 2005).

Haas v. State, 849 N.E.2d 550 (Ind. 2006) (judicial statements that the defendant was at risk to commit future crimes and the nature and circumstance of the crime was heinous were not properly supported by facts proven to a jury and thus could not be used as aggravators; further, these judicial statements and the underlying facts upon which they are based could not both serve as aggravators).

While a separate aggravator must be proven to the jury in order to pass constitutional muster, a moral-penal observation that is supported by the verdict is not a separate aggravator. In order to qualify as a moral-penal observation, the statement must be: 1) supported by facts found by jury or otherwise admitted, and 2) meant as a concise description of what the underlying facts demonstrate.

Garland v. State, 855 N.E.2d 703 (Ind. Ct. App. 2006) (trial court's comment that victim was "of tender age" was a moral-penal observation supported by verdict, not a separate aggravator).

B. APRIL 25, 2005 AMENDMENT - ADVISORY SENTENCING SCHEME

The legislature amended Indiana's statutory sentencing scheme on April 25, 2005, to an advisory sentencing scheme. Ind. Code § 35-39-1-7.1(d) provides that regardless of the presence or absence of aggravating circumstances or mitigating circumstances, a court may impose any sentence that is: (1) authorized by statute; and (2) permissible under the Constitution of the State of Indiana. Thus, defendants who commit crimes after April 25, 2015 are not entitled to a jury determination of factors that lead to their sentence, since Blakely does not apply to advisory sentencing schemes. Marbley-El v. State, 929 N.E.2d 194 (Ind. 2010).

There is a split in the Court of Appeals as to whether the new statutory changes can be retroactively applied to crimes committed before April 25, 2005. Some cases have held that the Indiana amendments to sentencing statutes in response to Blakely are substantive and cannot be applied retroactively. However, other cases have held that the change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of the advisory sentencing scheme is proper when defendant is sentenced after the effective date of the amendment even though the offense was committed before.

Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006) (Indiana amendments to sentencing statutes in response to Blakely are substantive and cannot be retroactively applied; amendments appear to affect some kind of disadvantageous change upon a defendant to extent they permit imposition of a maximum sentence without any finding of aggravating circumstances by any fact finder). See also Walsman v. State, 855 N.E.2d 645 (Ind. Ct. App. 2006).

Ben-Yisrayl v. State, 908 N.E.2d 1223 (Ind. Ct. App. 2009) (defendant's re-sentencing for an offense which occurred long before Indiana's advisory scheme must be held using pre-April 25, 2005, statute, in accordance with Blakely requirements).

Townsend v. State, 860 N.E.2d 1268 (Ind. Ct. App. 2007) (in dicta, judges are split as to whether footnote in Prickett v. State, 856 N.E.2d 1203 (Ind. 2006) expresses the Indiana Supreme Court's intention to apply the sentencing statute (whether it is advisory or presumptive) at the time of the offense or at the time of sentencing).

But see:

Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005) (change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before).

C. NON-RECIDIVISM FINDINGS RESULTING IN ADDITIONAL PUNISHMENTS

There are certain findings that may be implicit in a jury's verdict that may allow for seperate aggravators at sentencing without violating Blakely.

Hitch v. State, 51 N.E.3d 216 (Ind. 2016) (statute prohibiting a defendant from owning firearms due to a domestic violence determination is not so punitive as to negate the court's assumption that the legislature intended to create a civil, non-punitive regulatory regime; domestic violence determination thus does not need to be proven by a jury beyond a reasonable doubt in order to be constitutional; overruling Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005) and Kazmier v. State, 863 N.E.2d 912 (Ind. Ct. App. 2007), which previously held that the domestic violence prohibition was punitive).

Parker v. State, 754 N.E.2d 614 (Ind. Ct. App. 2001) (IC 35-50-2-11, which provides for an additional five-year imprisonment if the State can prove beyond a reasonable doubt that defendant used a firearm while committing a crime, did not violate due process in this instance because jury implicitly found that defendant used firearm in commission of offense by finding defendant guilty of class A felony robbery).

D. LWOP AND DEATH PENALTY

In Ring v. Arizona, 536 U.S. 584 (2002), the U.S. Supreme Court held that Apprendi applies to capital sentencing schemes, because an additional fact – a statutorily prescribed aggravating circumstance – must be found before a defendant becomes eligible for death. Because Indiana's sentences of death and life without parole follow the same statutory scheme, Ring applies to life without parole cases, as well, in Indiana; before a sentence of death or life without parole can be imposed, at least one charged aggravating circumstance must be found beyond a reasonable doubt by a jury. Bostick v. State, 773 N.E.2d 266 (Ind. 2002).

Leone v. State, 797 N.E.2d 743 (Ind. 2003) (defendant who pleads guilty and forgoes right to a jury trial also waives right to have jury find aggravating circumstances beyond a reasonable doubt).

Brown v. State, 783 N.E.2d 1121, 1126 (Ind. 2003) (jury's finding beyond a reasonable doubt that charged aggravating circumstance exists is implicit in jury's unanimous recommendation that defendant be sentenced to life without parole).

State v. Barker, 809 N.E.2d 312 (Ind. 2004) (provision in IC 35-50-2-9 allowing trial court to sentence defendant if jury cannot agree on penalty "recommendation" can be constitutionally applied; statute was amended in 2002 to require special verdict forms on aggravating circumstance; if jury unanimously finds at least one aggravator but cannot agree on penalty recommendation, court holds that Ring v. Arizona, 536 U.S. 584 (2002) is satisfied and trial court can follow statute; if jury cannot agree on existence of at least one aggravating circumstance, trial court must discharge jury and convene new penalty phase jury, as required in Bostick).

Kiplinger v. State, 922 N.E.2d 1261 (Ind. 2010) (where jury found defendant guilty of "knowing or intentional" murder and felony murder – rape, and returned a special verdict that the aggravating circumstance ((b)(1) (intentional killing while committing or attempting to commit rape) outweighed the mitigating circumstances, but did not return a special verdict form finding the existence of the aggravating circumstance beyond a reasonable doubt, and could not unanimously agree on a sentencing "recommendation," the trial court's sentence of LWOP was not supported by adequate jury findings; unlike situation where jury did not return a special verdict finding the existence of an aggravating circumstance beyond a reasonable doubt, here, the jury's trial-phase verdict did not constitute a finding of the aggravating circumstance because their verdict did not require a finding that the killing was intentional).

III. INDIANA APPELLATE REVIEW OF SENTENCES

"The judicial amendments to the Indiana Constitution drafted in the 1960's confer a distinct responsibility on the appellate courts: 'the power to review all questions of law and to review and revise the sentence imposed." Walker v. State, 747 N.E.2d 536, 537 (Ind. 2001) (quoting Ind. Const. art. VII, § 4).

A. APPELLATE REVIEW UNDER "ADVISORY" SENTENCING SCHEME

Inappropriate sentence and abuse of discretion claims are to be analyzed separately. King v. State, 894 N.E.2d 265 (Ind. Ct. App. 2008). Unless the trial court is imposing the advisory sentence for a felony, it is required to issue a sentencing statement. Ind. Code § 35-38-1-1.3

(amended effective July 1, 2014). See also Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007) *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement itself must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. The standard of review on appeal of a trial court's sentencing decision is abuse of discretion. Id. at 490. Unlike the pre-Blakely statutory regime, the relative weight or value assignable to aggravating and mitigating factors is not subject to review for abuse; but the defendant may challenge the appropriateness of his sentence under Indiana Appellate Rule 7(B). Id. at 491.

1. Methodology of review

The Supreme Court has not adopted a "consistent methodology in reviewing sentences." Cardwell v. State, 895 N.E.2d 1219, 1233 (Ind. 2008). They "most frequently review sentences by describing the nature of the offense and character of the offender, but sometimes independently assign weights to aggravators and mitigators, or compare the defendant's sentence to others' or the hypothetical "worst offender." Id. at 1224-25.

Review under Appellate Rule 7(B) is unlike typical appellate review, and is very similar to the trial court's function, considering and weighing aggravators and mitigators. Cardwell v. State, 895 N.E.2d 1219, 1233 (Ind. 2008). This review is intended to "address perceived unfairness in different sentences imposed for similar offenses." Id. See also Pruitt v. State, 834 N.E.2d 90, 121 (Ind. 2005).

Because the number of counts that can be charged and proved is virtually entirely at the prosecutor's discretion, appellate review should focus on the forest - the aggregate sentence - rather than the trees - consecutive or concurrent, number of counts, or length of the sentence on any individual count. Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

"[T]he length of the aggregate sentence and how it is to be served are the issues that matter. … And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).

2. Purpose of Review

In addition to "leaven[ing] the outliers," Appellate Rule 7(B) review is intended to "identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

3. Effect of 2014 Criminal Code Revision

Despite recent changes to the Indiana Criminal Code that have, under certain circumstances, notably decreased the sentences for drug offenses, Courts have declined to consider the reduction in penalties for offense effective after July 1, 2014 when addressing appropriateness of sentences for offenses committed before July 1, 2014, given the clear, unambiguous language of the savings clause statutes. Marley v. State, 17 N.E.3d 335 (Ind. Ct. App. 2014).

The savings clause for the 2014 criminal code revision does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution. Whittaker v. State, 33 N.E.3d 1063 (Ind. Ct. App. 2015); Schaadt v. State, 30 N.E.3d 1 (Ind. Ct. App. 2015).

B. POWER TO INCREASE SENTENCES

Constitutional authority to review and revise criminal sentences under Article 7, Section 4 also includes the power to **increase** a defendant's sentence. Wright v. State, 108 N.E.3d 307, 320 (Ind. 2018). The State may not initiate a challenge to a sentence imposed by a trial court. However, if a defendant seeks appellate review and revision of a sentence, the State may respond and urge the imposition of a greater sentence without proceeding by cross-appeal. In the exercise of appellate authority to review and revise criminal sentences, the appellate court may affirm, reduce or increase a sentence. McCullough v. State, 900 N.E.2d 745 (Ind. 2009).

Akard v. State, 937 N.E.2d 811 (Ind. 2010) (court of appeals erroneously increased defendant's sentence from 93 years to 118 years, where the State did not request a greater sentence at trial and asserted on appeal 93 years is an appropriate sentence. Supreme Court noted "these are strong indicators that the trial court sentence is not inappropriately lenient."). Wright v. State, 108 N.E.3d 307, 320–21 (Ind. 2018) (Court declined to exercise power to increase sentence where sixty-year sentence essentially amounted to a life-sentence for thirty-three-year-old credit restricted felon).

Moore v. State, 907 N.E.2d 179 (Ind. Ct. App. 2009) (court will not apply McCullough retroactively without specific direction from Indiana Supreme Court).

Kucholick v. State, 977 N.E.2d 351 (Ind. 2012) (Indiana Supreme Court agreed that a modest sentence revision of defendant's seven-year sentence for Class C felony criminal recklessness was warranted, but on transfer revised defendant's sentence again from four years with two years in community corrections/two suspended to four years executed with two years on probation and two years in community corrections based on defendant shooting at the house of a person who just obtained a civil judgment against him).

Holt v. State, 62 N.E.3d 462 (Ind. Ct. App. 2016) (4-year sentence for two counts of C felony child molesting was not inappropriately lenient to warrant increase; Bradford, J., dissenting, would increase sentence to eight years for each conviction given young age of victims and nature of offense).

C. WAIVER

A defendant, through a knowing and voluntary plea agreement, can waive his right to appeal a discretionary sentencing decision. Creech v. State, 887 N.E.2d 73 (Ind. 2008). See also Akens v. State, 929 N.E.2d 265 (Ind. Ct. App. 2010). The trial court is not required to engage in a colloquy with the defendant regarding his or her intention to waive appellate rights; moreover, appointment of appellate counsel does not invalidate a waiver provision. Brattain v. State, 891 N.E.2d 1055 (Ind. Ct. App. 2008).

However, a plea agreement's generalized statement that the defendant "waives right to appeal," without more, has been held to be insufficient to establish a knowing and voluntary waiver of the defendant's right to appeal his sentence. Johnson v. State, 145 N.E.3d 785, 786-7 (Ind. 2020). The Indiana Supreme Court recently reiterated that "the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a

defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence." Williams v. State, 164 N.E.3d 724 (Ind. 2021).

1. Unenforceable where sentence is contrary to law

A waiver of the right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the defendant did not bargain for the sentence. Crider v. State, 984 N.E.2d 618 (Ind. 2013).

2. Invalid if trial court advises defendant of right to appeal

Where defendant's plea agreement waives the right to appeal his sentence, the appellate court will not enforce the waiver if the trial court advised the defendant about his right to appeal during both the plea and sentencing hearings where neither the prosecutor nor defense counsel alerted the trial court to the error. Abrajan v. State, 917 N.E.2d 709 (Ind. Ct. App. 2009).

Ricci v. State, 894 N.E.2d 1089 (Ind. Ct. App. 2008) (distinguishing Creech, court noted that trial court here clearly and unambiguously stated at plea hearing that defendant had not surrendered the right to appeal his sentence; purported waiver in plea agreement is a nullity).

Holloway v. State, 950 N.E.2d 803 (Ind. Ct. App. 2011) (Ricci applies where, despite waiver in plea agreement, trial court told defendant he had the right to appeal his sentence and neither defense nor prosecutor objected).

Williams v. State, 51 N.E.3d 1205 (Ind. Ct. App. 2016) (Court resolved ambiguity in whether plea deal was open or closed in favor of defendant and thus allowed direct appellate review of her sentence).

Merriweather v. State, 151 N.E.3d 1281, 1285 (Ind. Ct. App. 2020) (given unequivocal advisement at the plea hearing, before he had received the benefit of any bargain, and then again at the sentencing hearing, that he retained the right to appeal his sentence, written waiver of that right was a nullity).

But see:

Mechling v. State, 16 N.E.3d 1015 (Ind. Ct. App. 2014) (State was not estopped from enforcing provision in plea agreement in which defendant waived right to appeal sentence even though State failed to object when, at end of sentencing hearing, trial court erroneously advised him that he had right to appeal his sentence).

Hawkins v. State, 990 N.E.2d 508 (Ind. Ct. App. 2013) (knowing and voluntary waiver found where plea agreement explicitly stated that defendant was waiving his right to appeal the appropriateness of his sentence and trial court read that provision at the guilty plea hearing and asked if defendant understood it; Court distinguished Ricci (above), and held that trial court's advisements were neither conflicting nor ambiguous).

Ivy v. State, 947 N.E.2d 496 (Ind. Ct. App. 2011) (erroneous advisement that defendant could modify the last two years of his sentence to a work release program was of no consequence because defendant received benefit of his bargain prior to sentencing

hearing and defendant did not make any claim that language of the plea agreement was confusing or misunderstood). See also Starcher v. State, 66 N.E.3d 621 (Ind. Ct. App. 2016).

3. Scope of waiver

Johnson v. State, 145 N.E.3d 785, 787 (Ind. 2020) (general waiver of "right to appeal," particularly when contained in the same sentence as an unenforceable waiver of post-conviction relief, insufficiently explicit to establish a knowing and voluntary waiver of defendant's right to appeal his sentence").

Westlake v. State, 987 N.E.2d 170 (Ind. Ct. App. 2013) (because defendant's plea agreement did not specifically refer to abuse of discretion arguments or include a catchall that prohibited sentencing appeals, defendant's waiver of his right to challenge his sentence under Appellate Rule 7(B) did not foreclose his argument that trial court abused its discretion by failing to consider a mitigator).

Archer v. State, 81 N.E.3d 212 (Ind. 2017) (defendant did not waive her right to appeal amount of restitution she was ordered to pay because her plea agreement did not set forth the amount of restitution or provide any mechanism for how it was to be determined).

Bowling v. State, 960 N.E.2d 837 (Ind. Ct. App. 2012) (no error in denying a belated direct appeal to defendant who, along with a written plea agreement, signed a written advisement and waiver of rights that contained the language "by pleading guilty you have agreed to waive your right to appeal your sentence so long as the Judge sentences you within the terms of your plea agreement").

D. STANDARD OF REVIEW

1. Felonies

a. After January 1, 2003

As of January 1, 2003, Ind. App. Rule 7(B) allows revision of the sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." An offender does not have to prove his sentence is inappropriate under Appellate Rule 7(B) as it relates both to his character and the nature of his offense, but rather the appellate court has to consider both of those factors.

Reis v. State, 88 N.E.3d 1099 (Ind. Ct. App. 2017) (defendant did not waive review of his sentence by acknowledging the egregious nature of his offenses). See also Connor v. State, 58 N.E.3d 215 (Ind. Ct. App. 2016); Scott v. State, 162 N.E.3d 578 (Ind. Ct. App. 2021) and Turkette v. State, 151 N.E.3d 782 (Ind. Ct. App. 2020).

But see:

Swallow v. State, 19 N.E.3d 396 (Ind. Ct. App. 2014) (citing Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008), Court noted that if the defendant has not demonstrated his sentence is inappropriate based on the nature of the offense,

appellate court needs not address his character); see also Sanders v. State, 71 N.E.3d 839 (Ind. Ct. App. 2017).

The Indiana Supreme Court changed the thrust of Rule 7(B) from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. Neale v. State, 826 N.E.2d 635 (Ind. 2005). See also Rutherford v. State, 866 N.E.2d 867 (Ind. Ct. App. 2007). Thus, this standard provides the appellate courts with more power to revise sentences than did the manifestly unreasonable language and clarifies the Supreme Court's intent to provide the appellate courts with a more meaningful review.

Serino v. State, 798 N.E.2d 852 (Ind. 2003) (formulation of Ind. App. Rule 7(B) places central focus on role of trial judge, while reserving for appellate court the chance to review matter in a climate more distant from local clamor). See also Bostick v. State, 804 N.E.2d 218, 226 (Ind. Ct. App. 2004).

Neale v. State, *supra* (Court of Appeals erred in paraphrasing Ind.App.R. 7(B) in the negative, which suggests a greater degree of restraint on reviewing court than the rule is intended to impose); see also Rutherford v. State, 866 N.E.2d 867 (Ind. Ct. App. 2007).

Combs v. State, 851 N.E.2d 1053 (Ind. Ct. App. 2006) (when considering whether a defendant's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B) (discussed in part III, below), appellate court should not consider factors which violate Blakely v. Washington, 124 S.Ct. 2531 (2004) (discussed in part II, above)).

The appellate court should review the aggregate sentence, rather than individual elements of the sentence, such as consecutive or concurrent, number of counts, or length of any of the individual sentences. Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008).

Webb v. State, 941 N.E.2d 1082 (Ind. Ct. App. 2011) (defendant may not limit appellate review of his sentence by merely challenging an individual sentence within a single order that includes multiple sentences); see also Moyer v. State, 83 N.E.3d 136 (Ind. Ct. App. 2017) (Court must review defendant's aggregate sentence in its entirey, including situations where defendant pleads guilty via a single plea agreement to offenses charged under separate cause numbers).

b. Prior to January 1, 2003

"The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. App. Rule 7(B) (formerly Ind.App.R. 17(B)). See also Cooper v. State, 687 N.E.2d 350, 355 (Ind. 1997). A sentence is not manifestly unreasonable if any reasonable person could find that sentence to be appropriate to the particular offense and offender for which the sentence was imposed. Ferrell v. State, 565 N.E.2d 1070, 1073 (Ind. 1991); Johnson v. State, 654 N.E.2d 788, 791 (Ind. Ct. App. 1995).

2. Misdemeanors

Because there are no presumptive sentences for misdemeanors, in reviewing the appropriateness of sentences for misdemeanor charges only, the appellate courts have to employ an "abuse of discretion" standard.

Ruggieri v. State, 804 N.E.2d 859 (Ind. Ct. App. 2004) (under abuse of discretion standard, Court affirmed consecutive sentences totaling one and a half years imprisonment for defendant's Class A and B misdemeanor convictions).

But see:

Carroll v. State, 922 N.E.2d 755 (Ind. Ct. App. 2010) (analyzing consecutive, maximum sentences for two convictions of Class A misdemeanor dog bite resulting in serious bodily injury under Indiana Appellate Rule 7(B)).

Smith v. State, 154 N.E.3d 838 (Ind. Ct. App. 2020) (partially executed 365-day sentence for resisting law enforcement inappropriate for 65-year-old Defendant in declining mental health whose physically disabled wife relies on him as her primary caretaker).

3. Probation revocations

Although some of the language used in Stephens v. State, 818 N.E.2d 936 (Ind. 2004) suggests that Ind. Appellate Rule 7(B) may be used as standard when reviewing whether a defendant's probation revocation sentence was unreasonable, abuse of discretion should be used as standard of review. Sanders v. State, 825 N.E.2d 952 (Ind. Ct. App. 2005). While probation may be revoked on evidence of violation of a single condition, the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation. Heaton v. State, 984 N.E.2d 614, 618 (Ind. 2013).

Ripps v. State, 968 N.E.2d 323 (Ind. Ct. App. 2012) (trial court abused its discretion by revoking 69-year-old defendant's probation and ordering him to serve the entire suspended portion of his sentence for violating terms of his probation; defendant was suffering from serious health issues, was attempting to adhere to his probation conditions and had previously served time in prison for a crime that was later vacated because of *ex post* facto violation).

Johnson v. State, 62 N.E.3d 1224, 1231 (Ind. Ct. App. 2016) (under the circumstances reflected in the record, including the level of defendant's functioning and resources, his previous successful placement on work release, the nature of the violation, and the severity of the court's sentence, trial court abused its discretion in finding that violation warranted serving the entirety of the remaining portion of executed sentence in DOC).

Brown v. State, 162 N.E.3d 1179 (Ind. Ct. App. 2021) (abuse of discretion to order execution of entire remaining 16 out of 20-year sentence for technical violation of probation). Puckett v. State, 956 N.E.2d 1182 (Ind. Ct. App. 2011) (trial court abused its discretion by considering multiple improper factors before requiring defendant to serve the entirety of his previously-suspended sentence).

Jones v. State, 838 N.E.2d 1146 (Ind. Ct. App. 2005) (trial court did not abuse its discretion by ordering defendant to serve thirty years of his previously forty-year suspended sentence instead of ordering continuing probation).

4. Juvenile disposition

Ind. Appellate Rule 7(B) does not apply to juvenile dispositions. T.K. v. State, 899 N.E.2d 686 (Ind. Ct. App. 2009) (juvenile was never a "defendant" and his appeal is not a "criminal appeal," thus Rule 7, by its plain language, does not apply).

5. Contempt

Because there is no longer a statute setting out the punishment for contempt, it is unclear whether Appellate Rule 7(B) should apply in reviewing contempt sentences. Downs v. State, 827 N.E.2d 646 (Ind. Ct. App. 2005).

Jones v. State, 847 N.E.2d 646 (Ind. Ct. App. 2005) (under any standard, 102-day sentence for indirect contempt was proper).

E. EFFECT OF PLEA AGREEMENT

A defendant may, on appeal, challenge the appropriateness of a sentence imposed under the terms of a plea agreement where the trial court exercises discretion in imposing the sentence. Even where a plea agreement sets forth a sentencing cap or a sentencing range, the court must still exercise some discretion in determining the sentence it will impose. Childress & Carroll v. State, 848 N.E.2d 1073 (Ind. 2006).

Even if the plea agreement requires a specific term of years, if the court has the discretion to determine the amount of those years that will be executed, the trial court's discretion is subjected to an appropriateness review by the appellate courts. Rivera v. State, 851 N.E.2d 299 (Ind. 2006). However, where a plea agreement calls for a specific term of executed years, if the trial court accepts the parties' agreement, it has no discretion to impose anything other than the precise sentence upon which they agreed, and sentence is not available for Rule 7(B) review. Hole v. State, 851 N.E.2d 302 (Ind. 2006).

Comer v. State, 936 N.E.2d 1266 (Ind. Ct. App. 2010) (where a plea agreement included a condition that defendant serve his probation before his executed sentence and if he successfully completed probation the executed time would be modified to suspended time, Court lacked jurisdiction to review the sentence when defendant violated probation and was ordered to serve the entire sentence executed).

PRACTICE POINTER: A defendant who was not advised of his right to appeal his sentence imposed pursuant to a plea agreement may file permission to file a belated appeal pursuant to Indiana Post-Conviction Rule 2(1). Collins v. State, 817 N.E.2d 230 (Ind. 2004). See also Baysinger v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005) and Salazar v. State, 854 N.E.2d 1180 (Ind. Ct. App. 2006). See also Kling v. State, 837 N.E.2d 502 (Ind. 2005) (discussing the roles of the State Public Defender office and local appellate public defender in filing belated appeals from guilty pleas).

F. APPROPRIATENESS OF PLACEMENT

The location where a sentence is to be served is an appropriate focus for application of the appellate court's review and revise authority under Indiana Appellate Rule 7(B). Biddinger v. State, 868 N.E.2d 407 (Ind. 2007). Thus, a defendant challenging placement of a sentence must convince the appellate court that the given placement itself is inappropriate, not whether another sentence is more appropriate. Fonner v. State, 876 N.E.2d 340 (Ind. Ct. App. 2007).

Livingston v. State, 113 N.E.3d 611, 614 (Ind. 2018) (revising sentence for dealing to 23 years with remainder to be served on community corrections placement; defendant pleaded guilty without benefit of agreement and dedicated her time to becoming a productive member of her community and helping others who suffer from addiction).

King v. State, 894 N.E.2d 265 (Ind. Ct. App. 2008) (defendant failed to persuade court that placement in DOC was inappropriate, because he presented no evidence at sentencing specifying what type of mental health treatment he allegedly needs).

Schumann v. State, 900 N.E.2d 495 (Ind. Ct. App. 2009) (defendant's sentence to DOC is not inappropriate simply because the parties agreed and intended him to serve a portion of his sentence with the Department of Mental Health; validity of defendant's plea may be problematic, but that is an issue for post-conviction relief).

Westlake v. State, 893 N.E.2d 769 (Ind. Ct. App. 2008) (finding 14-year sentence for Class B felony inappropriate; judgment remanded with instructions to impose an aggregate term of seven-years imprisonment, with two years suspended, and executed portion of sentence to be served in community corrections program). See also Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006).

G. LENGTH OF SENTENCE

A defendant can appeal the length of his sentence based on one of two grounds: (1) the sentence imposed was not authorized by statute; or (2) though authorized by statute, the sentence is inappropriate in light of the nature of the offense and the character of the offender under Ind. Appellate Rule 7(B).

When determining whether a sentence is appropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. Rich v. State, 890 N.E.2d 44, 53 (Ind. Ct. App. 2008).

In felony cases, when a trial court imposes a sentence other than the advisory sentence, the court shall issue a statement of reasons for selecting the sentence that it imposes. Ind. Code § 35-38-1-1.3. Thereafter, the appellate court can review those reasons and the omission of any reasons arguably supported by the record for abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). A defendant may also ask the Court to exercise its independent constitutional authority to review and revise a criminal sentence under Ind. Const. art. VII § 4,6 and codified in Indiana Appellate Rule 7(B). Tyler v. State, 903 N.E.2d 463, 468 (Ind. 2009).

A cursory review of cases addressing challenges under Ind. Appellate Rule 7(B) indicate that there are several factors that can serve as a basis for appeal under Ind. Appellate Rule 7(B). Specifically, courts consider: (1) Consecutive versus concurrent sentencing decisions; (2) Decision to suspend a sentence; (3) Exceeding life expectancy; (4) Absence of physical injury;

(5) Nature of the offense; (6) Circumstances of the crime; (7) Overlooked defenses; (8) Defendant's criminal history; (9) Relation of sentence to that of co-defendants in same case; (10) Defendant's mental illness; (11) Defendant's age; (12) Character of defendant; (13) Contempt; and (14) Advisory sentence is inappropriate.

There can be other factors as well.

Estes v. State, 827 N.E.2d 27 (Ind. 2005) (267-year sentence for fourteen counts of child molesting against two victims was inappropriate because it was well outside the typical range of sentences imposed for the same crime in reported Indiana decisions; held, remanded to impose four consecutive standard terms for Class A felony, totaling 120 years). See also Laster v. State, 918 N.E.2d 428 (Ind. Ct. App. 2009) (96-year sentence for 2 Class A and 4 Class C child molesting convictions revised to 36 years); Tyler v. State, 903 N.E.2d 463 (Ind. 2009) (110-year sentence revised to 77.5 years for multiple counts of molestation).

Frye v. State, 837 N.E.2d 1012 (Ind. 2005) (40-year sentence for burglary and habitual offender inappropriate despite defendant's extensive criminal history; no violence involved in offense and only marginal pecuniary loss; sentence reduced to 25 years). See also Hollin v. State, 877 N.E.2d 462 (Ind. 2007) and Feeney v. State, 874 N.E.2d 382 (Ind. Ct. App. 2007).

Merlington v. State, 814 N.E.2d 269 (Ind. 2004) (45-year sentence for possession of methamphetamine with intent to deliver was inappropriate in light of weighty mitigating effect of defendant's young age and lack of criminal history). See also James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007).

Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003) (maximum sentence for OWI causing death was inappropriate for defendant who was employed, did not have prior criminal record, pled guilty, and was remorseful for his actions; sentence reduced from eight years to three and one-half years).

Gleason v. State, 985 N.E.2d 702 (Ind. Ct. App. 2012) (aggregate 11-year sentence for battery, criminal recklessness, and failure to stop after an accident that resulted in injury was inappropriate and should be revised to 6 years. While aggravating weight of defendant's criminal history justified imposition of consecutive sentences, Court did not find it sufficiently aggravating to justify an 11-year executed term).

Fointno v. State, 487 N.E.2d 140 (Ind. 1986) (one hundred and four year sentence for defendant convicted of rape, criminal deviate conduct, confinement, robbery and intimidation was manifestly unreasonable and would be reduced to eighty-year term; although defendant demonstrated degenerate and outrageous conduct in confining victim and her young daughter in car for two hours, during which time he forced victim to perform various sexual acts, defendant had no prior criminal record, had served as fireman for ten years with no serious problems and did not beat or brutalize victim).

Hill v. State, 499 N.E.2d 1103 (Ind. 1986) (court reduced manifestly unreasonable sentence of fifty years to thirty-five years where defendant was only eighteen at time of burglary, burglary conviction was his first adult conviction, defendant was not armed during offense, defendant was convicted of A rather than B felony because of injuries received by victims of burglary, while defendant and his accomplices were seeking to avoid apprehension rather than as direct result of force; maximum sentence should be reserved for worst crimes).

Pierce v. State, 949 N.E.2d 349 (Ind. 2011) (Court reduced defendant's 124-year sentence for four counts of child molesting involving one victim, enhanced by 10 years for repeat sexual offender adjudication, to 80 years).

Examples where statutory maximum was inappropriate.

Cox v. State, 792 N.E.2d 878 (Ind. Ct. App. 2003) (three-year maximum sentence for theft was inappropriate, where sole aggravating factor was invalid and there were two valid mitigating factors). See also Asher v. State, 790 N.E.2d 567 (Ind. Ct. App. 2003) (three-year sentence for child seduction conviction was inappropriate).

Bennett v. State, 787 N.E.2d 938 (Ind. Ct. App. 2003) (maximum sentence for robbery and elevated sentences for confinement, handgun and receiving stolen property charges was inappropriate).

Mann v. State, 742 N.E.2d 1025 (Ind. Ct. App. 2001) (maximum sentence for voluntary manslaughter was manifestly unreasonable when trial court recognized significant mitigating circumstance of lack of criminal history). See also Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002).

Brewer v. State, 646 N.E.2d 1382 (Ind. 1995) (sixty-year sentence for murder, which was maximum sentence available, was unreasonable and was to be reduced to fifty years, given defendant's character, surrender to police and subsequent confession after murder had gone unsolved for nearly fifteen years).

However, when aggravating factors clearly outweigh the mitigating factors, a longer sentence is not inappropriate.

Ross v. State, 676 N.E.2d 339 (Ind. 1996) (sixty-year sentence imposed for defendant's premeditated murder of his children's mother was not manifestly unreasonable, despite defendant's reduced mental capacity and numerous letters regarding defendant's fine character, in light of defendant's prior criminal history, unsuccessful attempts at rehabilitation, heinous nature of crime, and concern that defendant could be repeat offender). See also Jones v. State, 790 N.E.2d 536 (Ind. Ct. App. 2003).

Carter v. State, 471 N.E.2d 1111 (Ind. 1984) (twenty-five-year sentence for dealing in cocaine and eight years for dealing in LSD were not manifestly unreasonable, as they were not only in accordance with statutory mandate but actually mitigated from statutorily dictated presumptive terms).

Johnson v. State, 837 N.E.2d 209 (Ind. Ct. App. 2005) (total executed sentence of 151 years for criminal deviate conduct and several other convictions related to rape of a woman was not inappropriate in light of nature of defendant's offenses and his character).

Gillem v. State, 829 N.E.2d 598 (Ind. Ct. App. 2005) (twenty-eight-year sentence for two counts of OWI causing death and one count of OWI causing serious bodily injury was not inappropriate given nature of offense, defendant's several prior convictions and fact he did not seek formal treatment for his use of alcohol). See also Evans v. State, 85 N.E.3d 632 (Ind. Ct. App. 2017) (affirming 38.5-year sentence for 3 counts of OWI/death and one count of OWI/SBI); Newkirk v. State, 898 N.E.2d 473 (Ind. Ct. App. 2008) and Wells v. State, 836 N.E.2d 475 (Ind. Ct. App. 2005) (eight-year sentence for OWI causing serious bodily injury

and operating while HTV affirmed).

Farris v. State, 787 N.E.2d 979 (Ind. Ct. App. 2003) (maximum sentence of eight years for forgery was not inappropriate in light of defendant's character and "heinous" nature of crime). See also Gray v. State, 790 N.E.2d 174 (Ind. Ct. App. 2003) (affirming ten and one-half-year sentence with three years suspended for home improvement fraud) and Reeves v. State, 953 N.E.2d 665 (Ind. Ct. App. 2011) (notwithstanding some redeeming aspects of defendant's character, the very egregious nature of his crimes, reckless disregard for bondholders' money and negative aspects of his character justified 54-years aggregate sentence for nine counts of securities fraud).

Martin v. State, 784 N.E.2d 997 (Ind. Ct. App. 2003) (maximum eight-year sentence for battery resulting in serious bodily injury was not inappropriate in light of nature of offense and character of offender; risk that defendant will commit another crime was high in that he was given several opportunities at rehabilitation before committing instant crime). See also Goodall v. State, 809 N.E.2d 484 (Ind. Ct. App. 2004); Kincaid v. State, 839 N.E.2d 1201 (Ind. Ct. App. 2005) (20-year sentence for aggravated battery of infant son affirmed).

State v. Kimbrough, 979 N.E.2d 625 (Ind. 2012) (Court of Appeals erred in vacating and reducing the defendant's 80-year aggregate sentence for 4 counts of child molesting as an A felony and 2 counts as a C felony based on their finding that the trial court abused its discretion by failing to consider the defendant's lack of a criminal history as a mitigator. Under the new sentencing scheme, the trial court no longer has an obligation to "weigh" aggravating and mitigating factors against one another when imposing a sentence).

1. Consecutive sentences

Defendant has no constitutional right to serve sentences concurrently. Mott v. State, 273 Ind. 216, 402 N.E.2d 986, 987 (1980). However, there is a point where consecutive sentences will result in an inappropriate sentence, such as when there are numerous mitigating factors that weigh against imposition of consecutive sentences. Laster v. State, 918 N.E.2d 428 (Ind. Ct. App. 2009).

Before a trial court can impose a consecutive sentence, it must articulate, explain, and evaluate the aggravating circumstances that support the sentence. Lander v. State, 762 N.E.2d 1208, 1215 (Ind. 2002).

a. Multiple Victims

Multiple victims or crimes can justify the imposition of consecutive sentences. Tyler v. State, 903 N.E.2d 463 (Ind. 2009).

Vance v. State, 860 N.E.2d 617 (Ind. Ct. App. 2007) (three consecutive one-year sentences for misdemeanor criminal recklessness convictions were appropriate to vindicate fact there were separate harms against more than one person).

Light v. State, 926 N.E.2d 1122 (Ind. Ct. App. 2010) (aggregate 125-year sentence for three counts of Class A felony child molest is appropriate where defendant and her boyfriend videotaped themselves having sexual encounters with a six year-old, a one year-old, and their own two-month-old infant).

Holmes v. State, 642 N.E.2d 970 (Ind. 1994) (sixty-year sentence for each of two murder counts and twenty years for attempted robbery, to run consecutively, was not unreasonable, did not deny defendant opportunity for rehabilitation and reformation, and was not unconstitutionally excessive).

Petruso v. State, 441 N.E.2d 446 (Ind. 1982) (presumptive thirty-year terms for attempted murder and kidnapping, augmented by nine and three years due to aggravating circumstances, with sentences to be served consecutively, did not violate of Indiana constitutional prohibition against cruel and arbitrary punishment and provision for rehabilitation and reformation).

However, this is not a presumption, and other mitigating factors can weigh against the imposition of consecutive sentences.

Laster v. State, 956 N.E.2d 187 (Ind. Ct. App. 2011) (while four separate robbery victims justified consecutive sentences, that does not necessarily mean the defendant should receive quadruple the amount of time that he would receive if there had only been one robbery victim; Court reduced 40-year executed sentence to 32 years executed and 8 suspended).

Sanchez v. State, 938 N.E.2d 720 (Ind. 2010) (consecutive sentences for molesting two sisters inappropriate where defendant's acts were isolated incidents, and he did not use significant force or hurt the sisters).

b. Multiple Crimes – child molest cases

Multiple incidents of the same crime can justify a harsher sentence, but where the incidents involve the same victim, enhanced, consecutive sentences may be inappropriate. But trial courts may impose consecutive advisory sentences in cases involving multiple acts of child molesting against a single victim. Faith v. State, 131 N.E.3d 158 (Ind. 2019).

Horton v. State, 949 N.E.2d 346 (Ind. 2011) (aggregate 324-year sentence revised to an aggregate term of 110 years for six counts of child molesting in a position of trust by a defendant with little criminal history).

Harris v. State, 897 N.E.2d 927 (Ind. 2008) (maximum, consecutive 100-year sentence for two counts of child molesting was inappropriate; remanded to revise sentence to 50 years for each count to be served concurrently); see also Rivers v. State, 915 N.E.2d 141 (Ind. Ct. App. 2009) (imposing two Class A felony advisory sentences for child molesting to run consecutively was inappropriate; sentence reduced to 60 years); Smith v. State, 889 N.E.2d 261 (Ind. Ct. App. 2008) (presumptive, consecutive 120-year sentence inappropriate; sentence reduced to 60 years).

Serino v. State, 798 N.E.2d 852 (Ind. 2003) (revising defendant's inappropriate sentence on multiple counts of child molestation from 385 years to three consecutive standard terms or 90 years total).

Hamilton v. State, 955 N.E.2d 723 (Ind. 2011) (reducing 50-year sentence for one Class A felony count of molesting defendant's 9-year-old step-granddaughter to 35 years).

Carter v. State, 31 N.E.3d 17 (Ind. Ct. App. 2015) (98-year executed sentence for three Class A and two Class C felony child molesting convictions was "out of range of appropriate results," even where defendant occupied position of trust with complaining witness and his offenses were "undeniably serious"; held, reversed and remanded to impose aggregate sentence of 68 years).

Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003) (it was inappropriate to order consecutive sentences for two convictions for child molesting by sexual intercourse).

Walker v. State, 747 N.E.2d 536 (Ind. 2001) (consecutive sentences, resulting in 80-year sentence, for two Class A felony child molesting convictions was manifestly unreasonable). But see Scott v. State, 771 N.E.2d 718 (Ind. Ct. App. 2002) (distinguishing Walker and affirming 100-year sentence) and Haycroft v. State, 760 N.E.2d 203 (Ind. Ct. App. 2001).

Other factors can justify an upward departure in this situation, however.

Horton v. State, 936 N.E.2d 1277 (Ind. Ct. App. 2010) (324-year sentence for molesting girlfriend's daughter over six months was appropriate; nature of offense was egregious where defendant infected victim with two types of herpes and caused her physical pain of the utmost intimate and sensitive nature).

Haddock v. State, 800 N.E.2d 242 (Ind. Ct. App. 2003) (distinguishing Serino (above) and affirming defendant's 326-year sentence for multiple counts of child molesting, confinement, and vicarious sexual gratification, with acts occurring over several years and accompanied by bondage, violence, and threats to hurt or kill victims or their mother).

Merrifield v. State, 272 Ind. 579, 400 N.E.2d 146 (1980) (trial court was justified in ordering fifty-year attempted murder sentence to be served consecutively to sentences for other crimes).

c. Habitual offender

If the defendant is found to be a habitual offender under separate cause numbers, the trial court may not order the two habitual offender enhancements to run consecutively. This is so even when the underlying sentences are mandatory consecutive. Breaston v. State, 907 N.E.2d 992, 995 (Ind. 2009).

Starks v. State, 523 N.E.2d 735 (Ind. 1988) (sentencing court exceeded its legislative authorization when it imposed consecutive felony sentences, both of which were enhanced by thirty years because of habitual offender status at single criminal trial). See also Ingram v. State, 761 N.E.2d 883 (Ind. Ct. App. 2002) and Weaver v. State, 676 N.E.2d 22 (Ind. Ct. App. 1997).

d. State-sponsored criminal activity

Similar incidents occurring over a short period of time may be considered as just one incident for sentencing purposes.

Beno v. State, 581 N.E.2d 922 (Ind. 1991) (improper to impose consecutive, maximum aggregate 74-year sentence for multiple drug dealing convictions based on nearly identical State-sponsored sales as part of an ongoing operation). See also Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008).

Davis v. State, 142 N.E.3d 495 (Ind. Ct. App. 2020) (consecutive sentences not appropriate where the police enticed defendant to make drug sales as part of a sting operation in drug buys that happened over two years apart).

Walton v. State, 81 N.E.3d 679 (Ind. Ct. App. 2017) (consecutive sentences inappropriate for related drug convictions, i.e., two controlled buys and a subsequent search of defendant's home).

Kocielko v. State, 943 N.E.2d 1282 (Ind. Ct. App. 2011) (imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of multiple violent crimes committed by the defendant against a single victim in a single confrontation).

But see:

Vermillion v. State, 978 N.E.2d 459 (Ind. Ct. App. 2012) (disagreeing with Kocielko and finding no error in imposing consecutive sentences for two acts of sexual misconduct with a minor that were part of a "single confrontation").

See Chapter 4, *Sentencing Decision*, Subsection VII, *Concurrent/Consecutive Sentences*, B.2.(e).(2), *Improper Considerations*, for a discussion on limiting consecutive sentences based on a series of controlled buys in a state-sponsored sting.

2. Suspended sentence

Appellate review under Indiana Appellate Rule 7 may include consideration of all aspects of the penal consequences imposed by the trial court in sentencing the defendant, including the decision whether or not to suspend a portion of the sentence.

Davidson v. State, 926 N.E.2d 1023 (Ind. 2010) (declining to narrowly interpret the word "sentence" in Appellate Rule 7 to constrict appellate courts to consider only the appropriateness of the aggregate length of the sentence without considering also whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge; this does not preclude a reviewing court from determining a sentence to be inappropriate due to its overall sentence length despite the suspension of a substantial portion thereof).

Sharp v. State, 970 N.E.2d 647 (Ind. 2012) (evaluation of a defendant's sentence may include consideration of the defendant's status as a credit-restricted felon because this penal consequence was within the contemplation of trial court when it was determining defendant's sentence).

Moyer v. State, 83 N.E.3d 136 (Ind. Ct. App. 2017) (court will review entire aggregate sentence imposed on defendant who pleaded guilty in agreement that covered three cause nubmers; defendant cannot limit review of sentence by challenging individual sentence within an order that included multiple sentences).

3. Exceeding life expectancy

The fact that a sentence may exceed the defendant's normal life expectancy does not violate the Eighth and Fourteenth Amendments, Miller v. State, 483 N.E.2d 46, 48 (Ind. 1985), or the Ind. Const., Art. 1, §18. Petruso v. State, 441 N.E.2d 446, 450 (Ind. 1982).

Bostick v. State, 804 N.E.2d 218 (Ind. Ct. App. 2004) (court's review of sentence is not guided by whether defendant will live long enough to see her release date).

Brown v. State, 10 N.E.3d 1 (Ind. 2014) (noting that lengthy sentences for juvenile offenders "forswear altogether the rehabilitative ideal"; juvenile's 150-year sentence for murder and burglary essentially "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict, he will remain in prison for the rest of his days.'"). See also Fuller v. State, 9 N.E.3d 653 (Ind. 2014) and Taylor v. State, 86 N.E.3d 157 (Ind. 2017).

State v. Stidham, 157 N.E.3d 1185, 1198 (Ind. 2020) (juvenile alleged that his term-of-years sentence was a "de facto" life-without-parole sentence that violated the Eighth Amendment and Article 1, Section 16 of the Indiana Constitution; court instead revised sentence downward on grounds it was inappropriate under Appellate Rule 7(B)). See also Wilson v. State, 157 N.E.3d 1163 (Ind. 2020) (revising defendant's 181-year sentence downward for crimes committed while he was a juvenile).

4. Absence of physical injury

Although the absence of physical injury does not mean that the trial court should not impose an enhanced sentence, the court may not sentence a defendant to the maximum enhancement permitted by law when there was no physical injury and property loss was minimal.

Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998) (maximum sentence was unreasonable where defendant hijacked victim's car, locked her in trunk and drove her around for almost twenty-four hours because victim suffered no physical injury and sustained minimal property damage; remanded for sentences to be ordered to run concurrently and not consecutively).

Buchanan v. State, 767 N.E.2d 967 (Ind. Ct. App. 2002) (Court reduced defendant's sentence for child molesting from 50 to 40 years; while absence of brutality does not in any way lessen severity of sexual assault crimes, presence of aggravated brutality distinguishes defendants who commit such acts and justifies substantially aggravated term where it is present).

5. Nature of offense

Excessiveness of a sentence is also related to the actual crime committed, and a sentence can be excessive and unconstitutional if it makes no measurable contribution to acceptable goals

of punishment or is grossly out of proportion to the severity of the crime. Coker v. Georgia, 433 U.S.584, 592 (1977). Prison sentences may be so disproportionate to the severity of the crime that they constitute violations of the Eighth Amendment or Ind. Constitution Article 1 § 16. Cunningham v. State, 469 N.E.2d 1 (Ind. Ct. App. 1984) (16-year sentence for failing to disclose other income sources on a food stamp application was manifestly unreasonable).

Committing a crime in a less egregious manner than others may have committed can be a factor weighing against imposition of a greater sentence.

> Hayes v. State, 906 N.E.2d 819 (Ind. 2009) (nature of Class B felony promoting prostitution offense in this case did not warrant maximum sentence).
>
> Norris v. State, 27 N.E.3d 333 (Ind. 2015) (selling a small number of pills in a controlled buy is a relatively innocuous offense, and thus the maximum penalty wasinappropriate absent significant aggravating factors).
>
> Long v. State, 865 N.E.2d 1031 (Ind. Ct. App. 2007) (defendant's actions were not significantly more heinous than those involved in any voluntary manslaughter case); But see Eversole v. State, 873 N.E.2d 1111 (Ind. Ct. App. 2007) (seriousness of defendant's crime—shooting and killing his estranged wife's boyfriend after learning that his wife did not want to work out their marriage—justified advisory sentence for voluntary manslaughter despite defendant's good character).

However, when the circumstances of the case are more serious, the court is less inclined to find against a maximum imposed sentence.

> Spitler v. State, 908 N.E.2d 694 (Ind. Ct. App. 2009) (nature of defendant's offense in aiding escape was so unique and egregious as to substantially outweigh the positive aspects of his character; maximum eight-year sentence affirmed).
>
> Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003) (maximum eight-year sentence for involuntary manslaughter was justified by facts and circumstances of case, which amounted to degree of recklessness beyond that normally associated with crime of involuntary manslaughter); see also Pitts v. State, 904 N.E.2d 313 (Ind. Ct. App. 2009).
>
> Carroll v. State, 922 N.E.2d 755 (Ind. Ct. App. 2010) (although defendant had no criminal history and expressed regret for dogs' attacks, seriousness of injuries and defendant's minimizing of responsibility justified consecutive, maximum terms for two convictions of Class A misdemeanor dog bite resulting in serious bodily injury).
>
> Bushhorn v. State, 971 N.E.2d 80 (Ind. 2012) (Court reinstated trial court's original sentence, reversing Court of Appeals' finding that the sentence was inappropriately harsh in light of defendant's character and the nature of the crimes - kidnapping and criminal confinement).

Mitigation of the threat or risk of violence can also weigh against the nature of the offense.

> Frye v. State, 837 N.E.2d 1012 (Ind. 2005) (where defendant committed burglary and theft without being armed and while victim was away from her home, the nature of the crime as mitigating and the aggravated sentence inappropriate; these facts together

decreased likelihood of violence). See also Hollin v. State, 877 N.E.2d 462 (Ind. 2007) and Feeney v. State, 874 N.E.2d 382 (Ind. Ct. App. 2007).

Carpenter v. State, 950 N.E.2d 719 (Ind. 2011) (40-year sentence for possession of firearm by a SVF and being an habitual offender was inappropriate in light of the adverse character of defendant and the un-aggravated nature of the offense as a whole; Court reduced sentence to 20 years).

6. Circumstances of crime

Where the circumstances of a crime approach an element of the offense, an enhanced sentence is inappropriate.

Hunter v. State, 854 N.E.2d 342 (Ind. 2006) (although some escapes occur before a conviction, fact of defendant's prior conviction approaches an element of the offense of escape and therefore is of minimal weight).

There may be other circumstances that motivated the crime that may weigh against imposition of greater sentences.

Griffin v. State, 963 N.E.2d 685 (Ind. Ct. App. 2012) (55-year advisory sentence for murder was inappropriate under Indiana Appellate Rule 7(B). While the nature of the crime was particularly brutal, Court could not ignore the pervasive evidence that the homicide was in response to a premeditated sexual assault. Court noted it would be "less than diligent in our assessment of the nature of the offense if we ignored" evidence that the murder victim had sexually assaulted the defendant days earlier. Based on the tragic circumstances surrounding the offense and the character of the offender as he conducted himself prior to the incident, a 45-year sentence was held appropriate).

Duncan v. State, 857 N.E.2d 955 (Ind. 2006) (Court revised defendant's sixty-two-year sentence for felony murder to minimum sentence of forty-five years where her conduct fell "far short" of conduct displayed by vast majority of felony murders).

Reid v. State, 876 N.E.2d 1114 (Ind. 2007) (it was inappropriate to order 22-year-old defendant to serve 50 years for conspiracy to commit murder, given that no one was injured, both potential victims pleaded for leniency and defendant may not have had the ability to orchestrate conspiracy).

Payton v. State, 818 N.E.2d 493 (Ind. Ct. App. 2004) (aggregate 39-year sentence for child molesting/habitual was "by far not the worst we have reviewed," and thus, was not appropriate; held, sentence reduced to 25 years).

Serban v. State, 959 N.E.2d 390 (Ind. Ct. App. 2012) (11-year sentence for corrupt business influence and theft was not inappropriate where defendant, an attorney, stole $283,000 from many clients over three years, which not only victimized those individuals who had placed their trust in him, but also degraded the legal profession).

7. Overlooked defenses

If a defense or a statutory mitigating factor is not mentioned at trial, this factor "weighs heavily" in assessing the appropriateness of a sentence.

Abbott v. State, 961 N.E.2d 1016 (Ind. 2012) (but for police officer's choice of location of stopping defendant's car within 1,000 feet of a school, defendant would have only been guilty of a class D felony rather than a B felony and would have received no more than maximum three-year sentence for possession of less than three grams of cocaine; thus, maximum 20-year sentence inappropriate; held, sentence revised to twelve years); see also Walker v. State, 968 N.E.2d 1292 (Ind. 2012).

8. Defendant's criminal history

A defendant's criminal history, even if extensive, may be only marginally significant when compared with the nature and gravity of the instant offense. Neale v. State, 826 N.E.2d 635 (Ind. 2005).

The relevance of the criminal history to the instant offense is a factor in considering whether or not to use the prior convictions as aggravators.

Edmonds v. State, 840 N.E.2d 456 (Ind. Ct. App. 2006) (consecutive sentences for class B felony robbery and class B felony confinement convictions was inappropriate, where record did not contain any evidence that defendant's prior disorderly conduct and intimidation convictions were related in any way to present offenses).

Ruiz v. State, 818 N.E.2d 927 (Ind. 2004) (defendant's four prior alcohol-related misdemeanors were at best marginally significant as aggravator in considering sentence for child molesting as a class B felony).

Baxter v. State, 727 N.E.2d 429 (Ind. 2000) (maximum sentence was unreasonable where it was based on defendant's criminal history, which consisted of three juvenile arrests, one resulting in conviction, and three arrests, two resulting in convictions; however, all arrests and convictions were either for nonviolent offenses or based on mistaken identification).

Hunter v. State, 854 N.E.2d 342 (Ind. 2006) (maximum sentence for escape was inappropriate even though defendant had four prior misdemeanors and one prior felony).

A lack of criminal history can be significant.

Marlett v. State, 878 N.E.2d 860 (Ind. Ct. App. 2007) (even where circumstances of Class B felony criminal confinement were egregious, maximum sentence was inappropriate in light of lack of criminal history).

9. More than one person involved in crime – disparity between defendant's and co-defendant's sentence

The fact that an alleged accomplice remains uncharged does not render the imposition of an enhanced sentence inappropriate. Johnson v. State, 687 N.E.2d 345 (Ind. 1997). Although there is no authority requiring co-participants to receive proportional sentences, the Indiana Supreme Court has considered the "stark" disparity between defendant's and co-defendant's sentences in its Appellate Rule 7(B) review. See Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008) (because defendant's culpability and actions were the same, or less than a co-defendant, the disparity between a 34-year sentence and a 1-year sentence was stark enough to warrant a reduction to aggregate term of 17 years).

Edgecomb v. State, 673 N.E.2d 1185 (Ind. 1996) (where principal alone went into home and beat victim, it was manifestly unreasonable for defendant to receive same sentence as principal).

Cooper v. State, 687 N.E.2d 350 (Ind. 1997) (defendant's 60-year sentence for murder was not excessive although others at scene of crime and who allegedly shared some responsibility for victim's death had not been charged or punished).

10. Defendant's mental illness

The Indiana Supreme Court has been inclined to reduce sentences based on the trial court's failure to consider the defendant's mental illness as a mitigating factor. Such failure often results in a sentence being inappropriate. Crawford v. State, 770 N.E.2d 775, 783 (Ind. 2002). See also Gambill v. State, 675 N.E.2d 668, 678 (Ind. 1996); Mayberry v. State, 670 N.E.2d 1262, 1271 (Ind. 1996); Barany v. State, 658 N.E.2d 60, 67 (Ind. 1995); Tackett v. State, 642 N.E.2d 978, 980 (Ind. 1994); and Wampler v. State, 67 N.E.3d 633 (Ind. 2017).

In fact, a presumptive sentence for a severely mentally ill individual was held to be manifestly unreasonable. Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000).

However, other factors can still outweigh the defendant's mental illness.

Leone v. State, 797 N.E.2d 743 (Ind. 2003) (even though defendant was found guilty but mentally ill, life without parole was not inappropriate; Sullivan, J., dissenting, noted Supreme Court had never before *affirmed* a life sentence without parole for a person found guilty but mentally ill following a guilty plea).

Wolf v. State, 793 N.E.2d 328 (Ind. Ct. App. 2003) (maximum eight-year sentence for operating vehicle after lifetime suspension was not inappropriate for crime or for the offender, despite clinical therapist's testimony that defendant suffered from substance abuse and post-traumatic stress disorder and recommended that she receive either work release or in-home detention).

PRACTICE POINTER: Some courts have reduced a defendant's sentence based on the trial court's failure to consider the defendant's mental illness without addressing whether the sentence was manifestly unreasonable and by referring to the sentence as simply "erroneous." See Archer v. State, 689 N.E.2d 678, 686 (Ind. 1997); Chapter 4, *Sentencing Decision*, subsection III.C.4, *Non-statutory Mitigating Factors; Mental Illness*.

11. Age of defendant

Crimes committed by juveniles rarely and under unusual circumstances warrant the imposition of the maximum, or aggravated, sentence. Both at initial sentencing and on appellate review it is necessary to consider an offender's youth and its attendant characteristics. Brown v. State, 10 N.E.3d 1 (Ind. 2014) (reducing 16-year-old defendant's 150-year sentence for murder/burglary to 80 years; Court noted that sentencing considerations for youthful offenders, particularly for juveniles, are not coextensive with those for adults). See also Fuller v. State, 9 N.E.3d 653 (Ind. 2014) and Taylor v. State, 86 N.E.3d 157 (Ind. 2017).

Wilson v. State, 157 N.E.3d 1163, 1182 (Ind. 2020) (since defendant was only sixteen, "his age is a major factor that requires careful consideration during Appellate Rule 7(B) review"). See also State v. Stidham, 157 N.E.3d 1185 (Ind. Ct. App. 2020).

Cherrone v. State, 726 N.E.2d 251 (Ind. 2000) (maximum consecutive sentence for sixteen-year-old convicted of murder and attempted robbery, without history of significant criminal activity, was manifestly unreasonable).

Evans v. State, 725 N.E.2d 850 (Ind. 2000) (maximum sentence for dealing in cocaine was unreasonable where offender was nineteen with no violent criminal history). See also Love v. State, 741 N.E.2d 789 (Ind. Ct. App. 2001).

Pagan v. State, 809 N.E.2d 915 (Ind. Ct. App. 2004) (20-year sentence for robbery was inappropriate in light of defendant's relative youth and non-violent criminal history).

James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007) (maximum, consecutive sentence of twenty-eight years for a sixteen-year-old who pled guilty to two Class C felony burglaries and four Class D felonies, including escape, theft and two counts of fraud was inappropriate, despite defendant's troubling character and criminal history beginning at nine years old).

Brown v. State, 720 N.E.2d 1157 (Ind. 1999) (consecutive sentences were remanded to run concurrently due to defendant's age of 16 and his being influenced by co-defendant nearly twice his age).

Carter v. State, 711 N.E.2d 835 (Ind. 1999) (in murder prosecution, trial court's imposition of sixty-year sentence on fourteen-year-old defendant was manifestly unreasonable, in light of defendant's very youthful age; sentence reduced to fifty years).

Borton v. State, 758 N.E.2d 641 (Ind. Ct. App. 2001) (50-year sentence for attempted robbery and conspiracy to commit robbery was manifestly unreasonable in light of defendant's young age and his limited juvenile non-violent history); see also Feeney v. State, 847 N.E.2d 382 (Ind. Ct. App. 2007) (40-year sentence for multiple burglary convictions inappropriate for 18-year-old with no criminal history).

Hollin v. State, 877 N.E.2d 462 (Ind. Ct. App. 2007) (despite 18-year-old's "numerous transgressions," court reduced 40-year sentence for conspiracy to commit burglary/habitual to aggregate 20-year sentence).

Knight v. State, 930 N.E.2d 20 (Ind. 2010) (considering 17-year-old defendant's young age and co-defendant's 36-year sentence, court revised 70-year aggregate sentence for burglary, robbery, and confinement to 40 years).

However, the closer a juvenile is to his or her 18th birthday, the more reasonable the aggravated sentence may be.

Monegan v. State, 756 N.E.2d 499 (Ind. 2001) (life without parole was not manifestly unreasonable where defendant was less than 40 days from his eighteenth birthday and has a long criminal history).

Other factors may also weigh in favor of a harsher sentence, regardless of the juvenile's age. Davies v. State, 758 N.E.2d 981 (Ind. Ct. App. 2001) (108-year sentence was not unreasonable for sixteen-year-old offender convicted of brutal sexual assault and murder in light of lengthy juvenile history). See also Rose v. State, 810 N.E.2d 361 (Ind. Ct. App. 2004); Wesby v. State, 535 N.E.2d 133 (Ind. 1989); and Walker v. State, 758 N.E.2d 563 (Ind. Ct. App. 2001).

Brooks v. State, 934 N.E.2d 1243 (Ind. Ct. App. 2010) (although defendant was only 14 years-old at the time of the murder, his advisory 55-year sentence was appropriate; Court noted defendant "is not a little boy who can be trusted to mend his erring ways; he is a hardened individual who, in the midst of committing a series of crimes, robbed and murdered a random victim.").

Phelps v. State, 969 N.E.2d 1009 (Ind. Ct. App. 2012) (slightly-enhanced sentence of 35-years with 5 years suspended for attempted murder was not inappropriate where 15-year-old defendant stole handgun from his former step-father, entered school property from which he was banned and shot an eighth grader twice in front of other students after a brief verbal altercation; moreover, he displayed the inability to control his anger, abused substances and refused to take advantage of rehabilitation efforts offered within the school system).

Coy v. State, 999 N.E.2d 543 (Ind. Ct. App. 2013) (maximum concurrent sentences, totaling eight years, was appropriate for 19-year-old with no criminal history whose reckless driving killed his teenage friend).

12. Character of defendant

If the defendant has not demonstrated his sentence is inappropriate based on the nature of the offense, the appellate court need not address his character. Swallow v. State, 19 N.E.3d 396 (Ind. Ct. App. 2014) (*citing* Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008)).

But see:

Reis v. State, 88 N.E.3d 1099 (Ind. Ct. App. 2017) (defendant did not waive review of his sentence by acknowledging the egregious nature of his offenses). See also Connor v. State, 58 N.E.3d 215 (Ind. Ct. App. 2016).

The character of the defendant can weigh against imposing a harsher penalty.

Kovats v. State, 982 N.E.2d 409 (Ind. Ct. App. 2013) (maximum sentence inappropriate in light of defendant's character, which showed she was not among the worst offenders).

Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006) (where trial court improperly enhanced sentence, appellate court reduced sentence to presumptive with remaining time on work release, in light of defendant's character).

Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003) (maximum sentence for Class B felony dealing in controlled substance was manifestly unreasonable where nature of offense supported enhanced sentence, but character of defendant did not; defendant had extensive drug habit at time crime was committed, and trial court violated defendant's constitutional rights by failing to consider treatment as alternative to incarceration).

Westlake v. State, 893 N.E.2d 769 (Ind. Ct. App. 2008) (14-year sentence for Class B felony dealing in cocaine and C felony neglect was inappropriate in light of defendant's "unusually and extraordinarily mitigating" character).

Kemp v. State, 887 N.E.2d 102 (Ind. Ct. App. 2008) (thirty-two-year sentence for four counts of forgery, four counts of theft and one count of corrupt business influence was inappropriate in light of the defendant's character, although the court found his offense of stealing from a church and its consequence despicable).

Cotto v. State, 829 N.E.2d 520 (Ind. 2005) (despite defendant's extensive criminal history, maximum sentence for Class A felony possession of methamphetamine in excess of three grams within 1000 feet of a school was inappropriate where he pled guilty, admitted he had a drug addiction, expressed remorse and asked for mercy); see also McFall v. State, 71 N.E.3d 383 (Ind. Ct. App. 2017).

Hubbert v. State, 163 N.E.3d 958 (Ind. Ct. App. 2021) (18-year executed sentence for dealing methamphetamine inappropriate, considering quantity sold and fact that defendant's addiction was the underlying source of his criminal behavior; court also noted significant mitigator of defendant's visual impairment which substantially affects his opportunities while incarcerated; held, all but four years of sentence be served on probation with substance-abuse counseling and placement in community corrections).

Mullins v. State, 148 N.E.3d 986 (Ind. 2020) (24.5-year sentence reduced to 18 years for drug crimes, considering defendant's youth, difficult upbringing and limited criminal history).

Eiler v. State, 938 N.E.2d 1235 (Ind. Ct. App. 2010) (22-year sentence with four years suspended for Class A felony dealing in cocaine was inappropriate, in light of defendant's age, his minimal criminal history, his taking responsibility for his actions, and fact that he was family's main financial provider, as well as fact he sold cocaine only to same people with whom he used and did not profit financially from doing so; held, sentence revised to 22 years with 10 years suspended to be served in minimum security facility or on work release); see also Schaaf v. State, 54 N.E.3d 1041 (Ind. Ct. App. 2016) (40-year sentence for two counts of dealing heroin reduced from 40 to 30 years despite defendant's criminal history).

But the character of a defendant may also weigh in favor of a harsher sentence.

Vazquez v. State, 839 N.E.2d 1229 (Ind. Ct. App. 2005) (maximum sentence for conspiracy to commit dealing in cocaine was not inappropriate where defendant was involved in a large-scale drug operation and defendant's character is that of a serial criminal whose frequent contacts with criminal justice system have not caused him to reform but rather escalate nature of his offenses). See also Donegan v. State, 809 N.E.2d 966 (Ind. Ct. App. 2004); Field v. State, 843 N.E.2d 1008 (Ind. Ct. App. 2006); and Hale v. State, 875 N.E.2d 438 (Ind. Ct. App. 2007).

Leffingwell v. State, 810 N.E.2d 369 (Ind. Ct. App. 2004) (maximum eight-year sentence for Class C felony child molesting was appropriate where defendant violated conditions of his bond and violated position of trust he held with his stepdaughter).

Hedger v. State, 824 N.E.2d 417 (Ind. Ct. App. 2005) (maximum three-year sentence for cruelty to an animal was not inappropriate considering defendant's criminal history and fact that he stabbed and cut throat of his three-year-old son's dog in front of the child).

Williams v. State, 861 N.E.2d 714 (Ind. Ct. App. 2007) ("[t]he anger and rage necessary to stab a household pet to death are not character traits indicative of someone deserving less than a maximum sentence").

Anderson v. State, 989 N.E.2d 823 (Ind. Ct. App. 2013) (three-year sentence for criminal mischief and animal cruely was not inappropriate in light of the defendant's character and the offenses when the defendant was are of the dilapidated state of a property that she abandoned where she had kept upwards of 37 dead cats in her refrigerators and freezers).

13. Prosecutor's Recommendation

The Indiana Supreme Court has held that exceeding the sentence the prosecutor recommended, absent more significant aggravating factors, may be inappropriate under the circumstances.

Jackson v. State, 145 N.E.3d 783 (Ind. 2020) (36-year sentence for three counts of rape, which exceeded the 27-year sentence the prosecutor recommended, was inappropriate where 52-year-old-defendant had led a law-abiding life and prosecutor did not object to a split sentence with part of that time served on probation; Court revised sentence to 27 years with 7 years suspended to probation).

14. Contempt

Power to punish contempt is limited by reasonableness. Matter of Craig, 552 N.E.2d 53 (Ind. Ct. App. 1990).

Matter of Cudworth, 815 N.E.2d 1019 (Ind. Ct. App. 2004) (six-month sentence was not inappropriate although it was maximum sentence available absent a jury trial).

Matter of Gardner, 713 N.E.2d 346 (Ind. Ct. App. 1999) (eleven and one-half year sentence for criminal contempt based on his refusal to testify at deposition of another's case although State offered him immunity was manifestly unreasonable; because Indiana Code classifies perjury and obstruction of justice, offenses comparable to criminal contempt, as Class D felonies, defendant should be sentenced as if he committed Class D felony; sentence reduced to three years).

15. Advisory/presumptive sentence inappropriate

An advisory sentence can be inappropriate if a trial court fails to take into account any mitigating factors that might exist.

Sanquenetti v. State, 917 N.E.2d 1287 (Ind. Ct. App. 2009) (advisory sentence of four years for Class C felony nonsupport of a dependent conviction was inappropriate where defendant pled guilty, there was no evidence of hardship or sacrifice suffered by children or custodial parent, and defendant's failure to pay support was not made in callous disregard of her children's needs).

Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000) (in light of the defendant's severe, longstanding mental illness, lack of any criminal history, and absence of any aggravating circumstances, the presumptive thirty-year sentence for voluntary manslaughter was manifestly unreasonable).

Westlake v. State, 893 N.E.2d 497 (Ind. Ct. App. 2008) (Court revised 14-year advisory sentence for Class B felony dealing in cocaine and C felony neglect to aggregate term of seven years imprisonment, with two years suspended and executed portion of sentence to be served in community corrections program in light of defendant's "unusually and extraordinarily mitigating" character, her relatively minor criminal history, mental illness and successful participation in pre-conviction release program)

A trial court must also ensure that the advisory sentence being imposed is authorized by the statute.

Mauricio v. State, 941 N.E.2d 497 (Ind. 2011) (trial court imposed a 50-year sentence, which was claimed to be the "presumptive" sentence under the statute; however, under the statute at the time the offense was committed, the presumptive sentence was 40 years).

H. AMOUNT OF FINE

A fine may be inappropriate in light of the nature of the offense and offender.

Like v. State, 760 N.E.2d 1188 (Ind. Ct. App. 2002) (imposition of maximum fine of $10,000 for class B felony was clearly, plainly, and obviously unreasonable in this case because defendant had no other adult convictions and had sold only .32 grams of methamphetamine).

Cooper v. State, 831 N.E.2d 1247 (Ind. Ct. App. 2005) ($2,500 fine in battery case was inappropriate; there was no evidence defendant could ever be able to pay fine, she lost her job because of conviction and could not make her house or car payments).

PRACTICE POINTER: In Indiana, even if a sentence is not inappropriate, the court may choose to exercise its constitutional power to review and revise sentences under Article 7, Section 4 of the Indiana Constitution. In Beatty v. State, 567 N.E.2d 1134 (Ind. 1991), the court chose to exercise this power in order to discourage future hostage-takers from injuring innocent people and reduced a constitutional sentence of a defendant who took hostages but refrained from harming them. In Bacher v. State, 686 N.E.2d 791 (Ind. 1997), the court found that consecutive sentences were not unconstitutional, but it remanded for new sentencing because maximum, enhanced sentences should be reserved for only the worst offenders, which did not include the defendant.

IV. CONSTITUTIONAL ANALYSIS OF SENTENCES

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. 8. "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense." Ind. Const. art. 1, §16.

If a punishment makes no measurable contribution to acceptable goals of punishment, so that it constitutes nothing more than purposeless and needless imposition of pain and suffering, or if it is grossly disproportionate to the severity of the crime, it is excessive and unconstitutional. Coker v.

Georgia, 433 U.S. 584, 592 (1977). See also Carter v. State, 471 N.E.2d 1111, 1115 (Ind. 1984) and Inman v. State, 393 N.E.2d 767 (Ind. 1979).

A. PROPORTIONALITY

Prison sentences may be so disproportionate to the severity of the crime that they constitute violations of the Eighth Amendment to the Federal Constitution or Article 1, Section 16 of the Indiana Constitution. Norris v. State, 394 N.E.2d 144, 150 (Ind. 1979). See also Cunningham v. State, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984). A sentence, even under a valid statute, may be unconstitutional by reason of its length if it is so severe and entirely out of proportion to the gravity of the offenses committed as to shock public sentiment and violate the judgment of a reasonable person. Pritscher v. State, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996).

PRACTICE POINTER: Although Indiana case law confuses and incorrectly combines the two analyses, the Indiana Constitution guarantees of proportional and appropriate sentences require two different analyses. Under a proportionality analysis, a reviewing court is concerned that all penalties shall be proportioned to the nature of the offense; whereas, in determining if a sentence is inappropriate, the court is guided by Indiana Appellate Rule 7(B), considering whether the sentence is appropriate to the particular offense and the offender for which such sentence was imposed. Young v. State, 620 N.E.2d 21, 27 (Ind. Ct. App. 1993) (applying old "manifestly unreasonable" standard). The inappropriateness requirement is based on the appellate court's constitutional power to revise sentences. Ind. Const. art. VII, Section 4.

1. Ind. Const. Art. I, sec. 16 and 18

Prison sentences may be so disproportionate to the severity of the crime that they constitute a violation of the Indiana Constitution. Schnitz v. State, 650 N.E.2d 717, 724 (Ind. Ct. App. 1995). Under the Indiana Constitution, the defendant has a right, in all cases, to have the proportionality of his sentence reviewed. Taylor v. State, 511 N.E.2d 1036, 1039 (Ind. 1987).

a. Disproportionate to sentences for other offenses

Under Article 1, Section 16 of the Indiana Constitution, the measure in determining whether a penalty for one crime is greater than another is the maximum duration of the penalty, not the possible duration of imprisonment. McVea v. State, 293 N.E.2d 786, 788 (Ind. Ct. App. 1973).

(1) Compared to similar or more heinous crime

The nature and extent of penal sanctions are primarily legislative considerations. Person v. State, 661 N.E.2d 587, 593 (Ind. Ct. App. 1996). Separation of powers requires that courts take a highly restrained approach when reviewing legislative prescriptions of punishments. State v. Moss-Dwyer, 686 N.E.2d 109, 111 (Ind. 1997). Therefore, judicial review of a legislatively sanctioned penalty is very deferential. Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993). Courts will only disturb the legislative determination of the appropriate penalty for criminal behavior upon a showing of clear constitutional infirmity. Steelman v. State, 602 N.E.2d 152, 160 (Ind. Ct. App. 1992). A court is not allowed to set aside the legislative determination as to the appropriate penalty merely because it seems too severe. Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993).

Therefore, the courts rarely, if ever, declare a penalty unconstitutional, even when compared to less serious crimes.

> Giden v. State, 150 N.E.3d 654, 659 (Ind. Ct. App. 2020) (escape statute, which makes the violation of a home detention order a Level 6 felony, did not violate the Proportionality Clause even though another statute, makes the unauthorized absence from home detention a Class A misdemeanor. However, in a footnote, court urged legislature to consider amending escape statute to include staggered penalties based on type of violation), *trans. denied*.
>
> State v. Moss-Dwyer, 686 N.E.2d 109, 111 (Ind. 1997) (Class C felony offense of giving false information on application for handgun permit was more analogous to several other crimes involving misinforming or deceiving public officials, such as perjury, bribery and obstruction of justice than it was to carrying a handgun without a license).
>
> Coleman v. State, 588 N.E.2d 1335 (Ind. 1992) (enhancement of delivery of cocaine to class A felony based on weight did not violate state constitutional guarantee of proportionality, despite defendant's claim that statute permits longer sentence for dealing tiny amount of pure drug mixed with large quantity of adulterant).
>
> Cole v. State, 790 N.E.2d 1049 (Ind. Ct. App. 2003) (classifying a knowing failure to deposit public funds as a class B felony does not shock public sentiment or violate judgment of reasonable people; defendant argued that other class B felonies are more serious crimes, and noted that only "knowing" *mens rea* was required; because crime is so difficult to detect, it may justify a stricter penalty for sake of deterrence).
>
> Ponciano v. State, 851 N.E.2d 305 (Ind. Ct. App. 2006) (Legislature could have reasonably determined that criminally reckless act of shooting from a vehicle is more serious and dangerous than criminally reckless discharge of a firearm by a person who does not occupy a vehicle; statute does not shock public sentiment or violate judgment of reasonable people).

Further, courts will not disturb sentences when lesser offenses contain similar elements and *mens rea* requirements.

> Matthews v. State, 944 N.E.2d 29 (Ind. Ct. App. 2011) (as mental state required for class D felony criminal recklessness is "recklessly, knowingly or intentionally" and thus is different from mental state required for class B or class C felony battery which is "knowingly or intentionally," there is no proportionality violation).
>
> Mann v. State, 895 N.E.2d 119 (Ind. Ct. App. 2008) (although the injury required for both Class B felony aggravated battery and Class C felony battery causing serious bodily injury is the same, the intent required for the offenses is different; thus, because the legislature could rationally conclude that a defendant who intends to inflict injury on another are more blameworthy than a defendant who intended to touch another rudely, it follows that a more severe punishment for aggravated battery is not disproportionate).

Stader v. State, 453 N.E.2d 1032 (Ind. Ct. App. 1983) (difference in presumptive sentencing between crime of confinement while armed with deadly weapon and confinement committed without deadly weapon was justified by inherent dangerousness presented by armed perpetrator and, thus, did not violate Indiana Constitution).

There are rare circumstances where the courts will declare a penalty disproportionate and unconstitutional.

Conner v. State, 626 N.E.2d 803 (Ind. 1993) (six-year sentence for distribution of non-controlled substance represented to be controlled was disproportionate to sentence for distribution of real marijuana and, thus, violated Art. I, § 17 of Indiana Constitution).

Poling v. State, 853 N.E.2d 1270 (Ind. Ct. App. 2006) (Class C felony neglect of dependent is disproportionate because under IC 35-46-1-4, same act of cruel confinement of a dependent can constitute either a class C or class D felony).

Morris v. State, 921 N.E.2d 40, 44 (Ind. Ct. App. 2010) (if theft and conversion "are indeed one and the same," they violate the proportionality clause of the Indiana Constitution). But see Lane v. State, 953 N.E.2d 625 (Ind. Ct. App. 2011).

Matter of Gardner, 713 N.E.2d 346 (Ind. Ct. App. 1999) (eleven and one-half year sentence for criminal contempt for failing to testify was manifestly unreasonable; because Indiana Code classifies perjury and obstruction of justice, offenses comparable to criminal contempt, as Class D felonies, defendant should be sentenced as if he committed Class D felony; sentence reduced to three years).

(2) Lesser included offense compared to greater offense

Imposition of a sentence for a lesser offense which is greater than the maximum punishment for the greater offense constitutes cruel and unusual punishment because the penalty is not proportioned to the nature of the offense. Landaw v. State, 279 N.E.2d 230, 231 (Ind. 1972). See also Hobbs v. State, 252 N.E.2d 498, 501 (Ind. 1969) and Dembowski v. State, 240 N.E.2d 815, 817 (Ind. 1968). However, imposition of a penalty for a lesser included offense which is the same as the penalty for the greater offense is constitutional. Cobb v. State, 412 N.E.2d 728, 743 (Ind. 1980). For a definition of a lesser included offense, see Ind. Code § 35-31.5-2-168.

Stuck v. State, 421 N.E.2d 622 (Ind. 1981) (where possible sentence for second degree murder was same as for first degree murder, life imprisonment for second degree murder was not unconstitutional). See also Millar v. State, 417 N.E.2d 1105 (Ind. 1981).

The proper remedy where the sentence for a lesser offense exceeds that for the greater offense is to reduce the sentence for the lesser to the maximum penalty for the greater. Landaw v. State, 279 N.E.2d 230, 231 (Ind. 1972).

Gullett v. State, 299 N.E.2d 190 (Ind. 1973) (trial court properly reduced defendant's sentence on lesser to maximum penalty for higher rather than discharge defendant).

b. Disproportionate to nature of offense

The Indiana proportionality analysis considers both the nature and gravity of the offense. Schnitz v. State, 650 N.E.2d 717, 724 (Ind. Ct. App. 1995).

Pittman v. State, 45 N.E.3d 805, 819 (Ind. Ct. App. 2015) (minimum sentence of six years executed for attempted stalking of mother of defendant's child not disproportionate to offense).
Knapp v. State, 9 N.E.3d 1274 (Ind. 2014) (nature of Class D felony offenses for which defendant was on probation when he committed murder were not insufficient to justify later imposing LWOP sentence).

Brown v. State, 667 N.E.2d 1115 (Ind. 1996) (60-year sentence for murder was not disproportionate to offense; defendant had never given fully truthful account of crime, killing was preplanned and intentional, court gave weight to position taken by victim's family and sentence could have ranged much higher than it finally did).

Wolfe v. State, 562 N.E.2d 414 (Ind.1990) (imposing 281-year sentence upon defendant convicted of five counts of attempted murder was not excessive in violation of Eighth Amendment and Article 1, Section 16 of Indiana Constitution, in view of brutal nature of crimes, permanent physical and emotional damage suffered by victims, and defendant's lack of remorse and extensive criminal history).

Hazelwood v. State, 3 N.E.3d 39 (Ind. Ct. App. 2013) (because suspension of license privileges for life does not constitute punishment, defendant's constitutional claims that his lifetime suspension is a disproportionate and cruel and unusual punishment necessarily fail).

(1) Consecutive sentences

Where aggravating factors exist, such as the nature of the offense and the character of the offender, courts will use those in determining whether a consecutive sentence imposed is disproportionate under the Indiana Constitution. Sears v. State, 668 N.E.2d 662 (Ind. 1996) (consecutive maximum sentences for murder, attempted murder, robbery and kidnapping, resulting in 200 years was not cruel, unusual, and disproportionate punishment, where defendant killed one victim, robbed another at gunpoint, pulled trigger while struggling with third, and kidnapped fourth using gun). See also Ellis v. State, 736 N.E.2d 731 (Ind. 2000).

Pritscher v. State, 675 N.E.2d 727 (Ind. Ct. App. 1996) (consecutive sentences totaling thirty-eight years after defendant pled guilty to three counts of dealing in cocaine were not disproportionate to nature of offenses and aggravating factors, including history of criminal activity, no history of trying to get drug treatment, and violation of probation terms by dealing illegal drugs).

Trei v. State, 658 N.E.2d 131 (Ind. Ct. App. 1995) (consecutive sentences of forty-five years for unlawful sexual conduct with minor and twenty years for

each of two counts of confinement were not individually unreasonable, vindictive or disproportionate in light of four aggravating factors).

(2) Juveniles

Douglas v. State, 481 N.E.2d 107 (Ind. 1985), *den. of post-conv. relief aff'd in part, rev. in part*, 634 N.E.2d 81, *opinion corrected on reh'g*, 640 N.E.2d 73 (Ind. 1994) (30-year sentence imposed upon juvenile defendant for attempted robbery reflected concern for acceptable goals of punishment, was not manifestly unreasonable or grossly disproportionate to severity of offense where defendant had previously been detained at Boys School where he formulated robbery plan, had committed crime shortly after his release from school, criminal act could have resulted in murder of victim, and only mitigator considered was age).

(3) Enhancements

For cases dealing with cruel and unusual punishment and habitual offender enhancements, see Chapter 8 *Habitual Offender Enhancement*, Subsection VI.A., *Constitutional Issues, Cruel and Unusual Punishment*.

Best v. State, 566 N.E.2d 1027 (Ind. 1991) (20-year sentence for DWI, which was enhanced to D felony due to prior conviction for DWI and which made defendant habitual offender, was unconstitutionally disproportionate to offense). See also Clark v. State, 561 N.E.2d 759 (Ind. 1990).

McGowen v. State, 671 N.E.2d 872 (Ind. Ct. App. 1996) (enhanced sentence of thirty years for Class A felony of dealing in cocaine was not disproportionate to offense, so as to violate state constitution).

Schnitz v. State, 650 N.E.2d 717 (Ind. Ct. App. 1995) (enhancement of dealing in cocaine from class B felony to class A felony because delivery occurred within one thousand feet of school did not result in unconstitutionally disproportionate criminal penalty, in light of seriousness of crime and legislative determination that school children should have extra protection from adverse effects of drug trafficking).

Lindsey v. State, 877 N.E.2d 190 (Ind. Ct. App. 2007) (eight-year sentence for a Class A misdemeanor and HSO was not disproportionate).

White v. State, 978 N.E.2d 475 (Ind. Ct. App. 2012) (defendant failed to carry the heavy burden that feticide enhancement statute is unconstitutional; separation of powers doctrine requires restraint when reviewing legislative penalties).

(4) Death Penalty

Because Art. I, Sec. 16 of Indiana Constitution requires heightened proportionality in sentencing, and because of gravity of death sentence, trial courts may not consider non-statutory aggravating circumstances in determining whether death is appropriate penalty. Aggravating circumstances are limited to those set out in Ind. Code § 35-50-2-9(b). Bivins v. State, 642 N.E.2d 928 (Ind. 1994).

c. No comparative proportionality review

The court is not required to compare the sentence in a particular case to sentences of others convicted of the same crime or of similar crimes. Gambill v. State, 675 N.E.2d 668, 678 (Ind. 1996) (*citing* Willoughby v. State, 660 N.E.2d 570, 584 (Ind. 1996)). See also Baird v. State, 604 N.E.2d 1170 (Ind. 1992).

(1) Death penalty

The Indiana Constitution does not mandate comparative proportionality review of the death sentence; proportionality addresses whether the sentence given to defendant is appropriate to the nature of the particular offense and offender, not whether the sentence is reasonable in light of all other cases imposing a similar sentence. Stevens v. State, 691 N.E.2d 412, 438 (Ind. 1997).

(2) Comparing to those sentenced after beneficial amendment

Simply because a defendant was sentenced under a statute which was later amended, reducing the penalty does not result in the defendant's sentence being disproportionate.

Johnson v. State, 654 N.E.2d 788 (Ind. Ct. App. 1995) (proportionality in sentencing did not require that sentence defendant received for rape and kidnapping under statutes in effect at time he committed crimes be compared with sentence he would have received had crimes been committed after statutes were revised).

Davis v. State, 446 N.E.2d 1317 (Ind. 1983) (sentence for life imprisonment for kidnapping was not affected by subsequent enactment of lesser statutory penalty). See also Owens v. State, 419 N.E.2d 969 (Ind. 1981).

2. U.S. Constitution, Amend. VIII

The cruel and unusual provision of the Eighth Amendment is applicable to punishment imposed by state courts. Robinson v. California, 370 U.S. 660 (1962). However, the length of sentences actually imposed is purely a matter of legislation. Rummel v. Estelle, 445 U.S. 263, 274 (1980).

PRACTICE POINTER: The Proportionality guarantee of the U.S. Constitution is a part of death penalty jurisprudence and is one of several respects in which the Supreme Court has held that "death is different" as to have imposed protections that the Constitution nowhere else provides. Harmelin v. Michigan, 501 U.S. 957, 994 (1991). The Court has found that the Eighth Amendment prohibits capital punishment both for certain categories of offenses and categories of offender.

In a 5-4 decision, Harmelin v. Michigan, 501 U.S. 957, 965 (1991), the Majority of the Supreme Court was split as to whether there exists a proportionality guarantee in the Eighth Amendment. In a more recent 5-4 decision, the Court held that the only clearly established law in its jurisprudence is that a "gross disproportionality principle" applies to three strikes laws and similar laws. Lockyer v. Andrade, 538 U.S. 63 (2003). But such a standard is to be applied only in exceedingly rare cases. Id. The majority opinion appears to hold that because the Court's jurisprudence on disproportionality is not clear or consistent, lower courts can

come to almost any decision and not violate "clearly established" law. Id. at 71-72. See also Solem v. Helm, 463 U.S. 277 (1983) and Rummel v. Estelle, 445 U.S. 263 (1980). Harmelin's split decision was also upheld for habitual offender-style statutes in Ewing v. California, 538 U.S. 11 (2003).

a. No proportionality guarantee

Two Supreme Court justices determined that the Eighth Amendment contains no proportionality guarantee. Harmelin v. Michigan, 501 U.S. 957, 965 (1991). See also Ewing v. California, 538 U.S. 11, 31-32 (2003).

U.S. v. Magana, 118 F.3d 1173, 1209 (7th Cir. 1997) (following opinion that there is no proportionality guarantee in Eighth Amendment). See also U.S. v. Kramer, 955 F.2d 479, 488 (7th Cir. 1992).

b. Narrow proportionality guarantee

Three Supreme Court justices concluded that the Eight Amendment encompasses a narrow proportionality principle and applies to all sentences. Harmelin v. Michigan, 501 U.S. 957, 997 (1991). See also Ewing v. California, 538 U.S. 11, 14-31 (2003). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991).

Smith v. State, 636 N.E.2d 124 (Ind. 1994) (recognizing that "narrow proportionality principle" applies to non-capital cases under Eighth Amendment).

c. Extensive proportionality guarantee

Four Supreme Court justices dissented, claiming that the Eighth Amendment requires a proportionality guarantee which is applied by using the three-factor test of Solem v. Helm. Harmelin v. Michigan, 501 U.S. 957, 1009-1028 (1991). See also Ewing v. California, 538 U.S. 11, 38-62 (2003). There are three factors relevant to the proportionality determination: (1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses imposed for the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 290-91 (1983).

Leslie v. Doyle, 125 F.3d 1132 (7th Cir. 1997) (agreeing that Eighth Amendment embodies principle of proportionality). See also Koo v. McBride, 124 F.3d 869, 875 (7th Cir. 1997) and U.S. v. Contreras, 937 F.2d 1191, 1195, n. 3 (7th Cir. 1991).

Young Soo Koo v. McBride, 124 F.3d 869 (7th Cir. 1997) (citing three-factor Solem test when discussing proportionality).

In Graham v. Florida, 130 S.Ct. 2011 (2010), gross disproportionality review intersected with the "categorical ban" review applied in capital cases. Four justices found a categorical ban against life without parole sentence for a juvenile offender convicted of a non-homicide offense; the Chief Justice concurred in result, applying gross disproportionality analysis. Id.

In Miller v. Alabama, 132 S.Ct. 2455 (2012), the Court held that the Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders. However, 8th Amendment requires no finding that juvenile is permanently incorrigible before imposing LWOP sentence. Jones v. Mississippi, 141 S. Ct. 1307 (2021).

Prior to Harmelin v. Michigan, the Indiana courts held that an extensive U.S. Constitutional proportionality analysis was limited to death penalty and life without parole cases. Taylor v. State, 511 N.E.2d 1036, 1039 (Ind. 1987). But see Woods v. State, 471 N.E.2d 691 (Ind. 1984) (sentence of four years for illegal possession of handgun enhanced by thirty years on HO finding, was upheld using proportionality test under Eighth Amendment).

However, since Harmelin v. Michigan, the Indiana Supreme Court has recognized that a "narrow proportionality principle" applies to non-capital cases under the Eighth Amendment. Smith v. State, 636 N.E.2d 124, 127 (Ind. 1994).

Regardless of whether a proportionality analysis under the Eighth Amendment applies in non-capital cases, a proportionality analysis under the Eight Amendment will be very limited.

> Rummel v. Estelle, 445 U.S. 263 (1980) (mandatory life sentence imposed upon defendant under Texas recidivist statute did not violate prohibition against cruel and unusual punishment although total amount taken during all three underlying crimes amounted to less than $250).
>
> Wilson v. State, 157 N.E.3d 1163 (Ind. 2020) (enhanced protections afforded to defendants who were juveniles when they committed their crimes, before they could be sentenced to life in prison without parole, did not apply to defendant's 181-year sentence; although defendant's sentence was a de facto life sentence, U.S. Supreme Court cases providing for enhanced protections for juvenile offenders only applied to life-without-parole sentences).

B. CRUEL AND UNUSUAL PUNISHMENT

The cruel and unusual punishment prohibition found in Article I, Section 16 of the Indiana Constitution "proscribes atrocious or obsolete punishment, rather than the duration or amount." Ellis v. State, 736 N.E.2d 731(Ind. 2000) (quoting Dunlop v. State, 724 N.E.2d 592, 597 (Ind. 2000)). Cruel and unusual punishment is that which "constitutes only purposeless and needless imposition of pain and suffering." Id. Thus, a challenge to the length of a sentence as cruel and unusual punishment under the Indiana Constitution is erroneous and will not be considered by the court.

However, a defendant may argue that her placement in a certain penal institution constitutes cruel and unusual punishment. Usually, these claims concern the discretion and actions of prison officials rather than the sentencing court. Direct appeal from a conviction is not the proper avenue for a defendant to raise such an allegation. The proper course is to pursue a writ of mandate or prohibition or a civil rights action. Jefferson v. State, 399 N.E.2d 816, 826 (Ind. Ct. App. 1980).

The following are some cases addressing this issue: Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998); Reed v. State, 479 N.E.2d 1248 (Ind. 1985); Barnes v. State, 435 N.E.2d 235 (Ind. 1982); McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991); and Robinson v. Howell, 902 F.Supp. 836 (S.D. Ind. 1995).

Naked City v. State, 460 N.E.2d 151 (Ind. Ct. App. 1984) (where defendant establishes need for extraordinary medical care at sentencing, judge must hear and weigh evidence of State's ability to provide medical care for defendant, balance rights of defendant and State, and determine appropriate sentence; without such considerations, defendant's sentence may be unreasonable).

C. ROLE OF LEGISLATURE/ COURT

Generally fixing of penalties for crimes is a proper function of the legislature and will not be disturbed by the judiciary unless they exceed constitutional boundaries. Cobb v. State, 412 N.E.2d 728, 743 (Ind. 1980). Thus, courts are not free to set aside legislatively sanctioned penalties because they seem too severe. Schnitz v. State, 650 N.E.2d 717, 724 (Ind. Ct. App. 1995). For an analysis of the roles of the legislature and the court in sentencing, see Chapter 1, Sentencing Authority, Subsections I and III, Role of Court and Role of Legislature.

Graham v. Florida, 130 S.Ct. 2011 (2010) (Eighth Amendment's Cruel and Unusual Punishment Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime).

Miller v. Alabama, 132 S.Ct. 2455 (2012) (Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders).

D. EXCESSIVE FINES

The Supreme Court of the United States unanimously held that the Eighth Amendment's prohibition on excessive fines applies to the states under the Fourteenth Amendment. Timbs v. Indiana, 139 S. Ct. 682, 687-91 (2019).

To determine whether forfeiture constitutes a fine that is unconstitutional under the Excessive Fines Clause, the claimant must show that either the seized property was not an instrumentality of the crime or, if it property was an instrumentality, that the fine would be grossly disproportional. State v. Timbs, 134 N.E.3d 12 (Ind. 2019) ("Timbs II") (remanding to trial court to determine whether forfeiture of defendant's Land Rover vehicle was grossly disproportional to the gravity of the underlying offense under new framework announced by Ind. Sup. Ct.).

State v. Timbs, 169 N.E.3d 361 (Ind. 2021) ("Timbs III") (court evaluated defendant's culpability, harshness of punishment, and severity of offense and concluded defendant met burden to show forfeiture Land Rover was grossly disproportionate in violation of Excessive Fines Clause).

Head v. State, 683 N.E.2d 1336 (Ind. Ct. App. 1997) (an order of restitution in amount equal to damages caused by one's own criminal actions does not constitute a fine, and thus does not trigger an excessive fines analysis under the Indiana Constitution).

E. WAIVER OF CLAIM

An appellate court will not address a claim of an unconstitutional sentence when counsel fails to cite authority or include the presentence report in the record. Arnold v. State, 436 N.E.2d 288, 293 (Ind. 1982). However, an appellate court may, *sua sponte*, revise a sentence under Article 7, Section 4 of the Indiana Constitution, even if the court finds that the sentence is not inappropriate. Beatty v. State, 567 N.E.2d 1134 (Ind. 1991).

V. WHICH STATUTE TO APPLY

As a general rule, the law in effect when the crime was committed controls sentencing. Isaac v. State, 673 N.E.2d 757, 765 (Ind. 1996); Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999). Where a law increases a defendant's punishment, it cannot constitutionally be applied to someone who committed a crime prior to the law's effective date. However, where a law decreases a defendant's punishment, the law is ameliorative. If an amelioratory law is in effect at the time of sentencing and not at the time the defendant committed the crime, the law may be applied retroactively to the defendant so he or she can benefit from the law. Further, if the legislature is intended to cure a defect or mischief that existed in a prior statute, then the statute is a remedial statute that should be retroactively applied.

A. NO EX POST FACTO LAWS

"No *ex post* facto law, or law impairing the obligation of contracts, shall ever be passed." Ind. Const., art. 1, § 24. "No Bill of Attainder or *ex post* facto law shall be passed." U.S. Const., art. 1, § 9.

Because an offender selects the time of the crime and thus freezes the penal consequences as of that event, a court cannot sentence a defendant under a statute which increases his or her sentence and was put into effect after the defendant committed the crime. Mudd v. State, 483 N.E.2d 782, 785 (Ind. Ct. App. 1985). Thus, a conviction under statutes in effect at the time crimes were committed is not improper on the theory of *ex post* facto even if the statutes are amended thereafter. Williams v. State, 442 N.E.2d 1063, 1065 (Ind. 1982).

An "*ex post* facto" law is a legislative act relating to criminal matters, retroactive in its operation, which alters the situation of an accused to his disadvantage or deprives him of some lawful protection to which he is entitled, such as a law which imposes punishment on an act which was not punishable when it was committed; which makes the crime greater than it was when committed or imposes additional punishment therefor; or which changes rules of evidence by which less or different testimony is sufficient to convict. Anderson v. State, 674 N.E.2d 184, 186 (Ind. Ct. App. 1996) (quoting Taylor v. State Election Bd., 616 N.E.2d 380, 383 (Ind. Ct. App. 1993)).

1. Adversely affects defendant

In order for a law to be an *ex post* facto law, the statute, rule or policy must somehow alter the defendant's situation as to place him at a disadvantage. Thus, *ex post* facto prohibition applies only where a substantive right is taken away, not where there is merely a change in procedure. Mediate v. City of Indianapolis, 407 N.E.2d 1194, 1196 (Ind. Ct. App. 1980). An *ex post* facto law includes one "which changes the rules of evidence by which less or different testimony is sufficient to convict." Taylor v. State Election Bd., 616 N.E.2d 380, 383 (Ind. Ct. App. 1993).

a. Increases punishment

If a change in the law or rules would increase the punishment that a defendant would have received under the law that was current when the conduct occurred, courts will not retroactively apply the law as to increase the punishment a defendant would receive.

Gonzalez v. State, 980 N.E.2d 312 (Ind. 2013) (retroactive imposition of a lifetime registration period under the amended Sex Offender Registration Act as applied to defendant, who had been convicted of soliciting a minor and completed his ten-year registration requirement under prior version of Act, violated the Ex Post Facto Clause of the Indiana Constitution).

Vartelas v. Holder, 132 S.Ct. 1479 (2012) (no retroactive application of stricter immigration law related to "admission" for persons with convictions; the relevant provisions of the Illegal Immigration Reform/Responsibility Act are not to be applied retroactively because its effect of placing travel restrictions on the defendant creates a "new disability").

Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005) (prohibiting defendant from possessing a gun in the future consisted an increased punishment and violated the protections against *ex post* facto laws).

Mudd v. State, 483 N.E.2d 782 (Ind. Ct. App. 1985) (*ex post* facto violation and fundamental error to convict defendant of class C felony dealing in marijuana over ten pounds, an enhancement that did not exist at time of his arrest; Court reduced sentence to presumptive for class D felony; remanded for reduction in sentence to presumptive sentence for class D felony).

Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006) (Indiana amendments to sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004) are substantive and cannot be retroactively applied; amendments appear to affect some kind of disadvantageous change upon a defendant to extent they permit imposition of a maximum sentence without any finding of aggravating circumstances by any factfinder). See also Walsman v. State, 855 N.E.2d 645 (Ind. Ct. App. 2006).

Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005) (change from presumptive to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before).

Simmons v. State, 962 N.E.2d 86 (Ind. Ct. App. 2011) (enhancement of defendant's OWI conviction to a C felony because of prior conviction for OWI causing death did not violate the prohibition on *ex post* facto laws; defendant is not being re-punished for his prior crime nor has the penalty for his prior crime increased; instead "he is simply being punished as a recidivist based upon his most recent act of OWI").

Taylor v. State Election Bd., 616 N.E.2d 380, 383 (Ind. Ct. App. 1993) (statute which disqualified elected county council member from office on basis of prior felony convictions did not constitute punishment or *ex post* facto law, but rather a regulation of elected officials based upon their general characteristics, one of which was trustworthiness).

To determine if retroactive application of the new law would be punitive as applied to the defendant, the Indiana Supreme Court follows the seven-factor test from Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). These factors include whether: (1) the sanction involves an affirmative disability or restraint; (2) it has been historically regarded as a punishment; (3) it comes into play only on a finding of scienter; (4) its operation will promote the traditional aims of punishment - retribution and deterrence; (5) the behavior to which it applies is already a crime; (6) an alternative purpose to which it may rationally be connected is assignable for it; and (7) it appears excessive in relation to the alternative purpose assigned. Jensen v. State, 905 N.E.2d 384 (Ind. 2009) (applying Mendoza-Martinez factors, Court determined that retroactive application of lifetime sex offender registration requirement did not violate *ex post* facto prohibition).

Lemon v. State, 949 N.E.2d 803 (Ind. 2011) (retroactive application of statute making defendant a sexually violent predator by operation of law did not violate Indiana's prohibition on *ex post* facto laws because defendant failed to cite any evidence that the intent of the amendment was punitive and because at least four of the seven Mendoza-Martinez factors considered to decide whether the effects of a regulatory scheme are punitive or non-punitive weigh in favor of finding the 2007 amendment non-punitive).

Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011) (although the change in the sex offender registry statutes making the defendant a SVP by operation of law did not violate the *Ex Post* Facto Clause, the change making defendant ineligible to petition for relief from lifetime registration does violate the *Ex Post* Facto Clause. Thus, SVPs who committed offenses before the change in the statute that removed the ability to petition for relief must be allowed to petition for a change in status once a year after he has registered for 10 years).

McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2015) (effects of unlawful entry statute are minor and not punitive as applied to defendant, who wanted to enter school property to take a CDL class).

b. Creates new offense

If the Legislature create a new offense, it cannot be retroactively applied to conduct that occurred prior to its enactment. Nuerge v. State, 677 N.E.2d 1043 (Ind. Ct. App. 1997) (*ex post* facto application of amended child molesting statute). See also Anderson v. State, 674 N.E.2d 184 (Ind. Ct. App. 1996) (offense of aggravated battery did not exist at time of charged incident).

c. Expands elements of crime

If the Legislature adds new provisions containing additional definitions of an existing offense, and defendant's conduct occurred prior to the enactment, application of the new, additional definitions would violate the Indiana prohibition against *ex post* facto laws.

Phillips v. State, 518 N.E.2d 1129 (Ind. Ct. App. 1988) (application of newly enacted provision containing additional definition of offense of sexual deviate conduct with child under twelve years of age to defendant's conduct which occurred prior to enactment would violate proscription in Indiana Constitution against *ex post* facto laws).

d. Deprives defendant of opportunity for early release from imprisonment

Where a revision would cause a defendant to lose credit time or otherwise lengthen the amount of incarceration time, application of the revision may violate the protection against *ex post* facto laws.

Paul v. State, 888 N.E.2d 818 (Ind. Ct. App. 2008) (application of revised law prohibiting educational time credit for two associate's degrees was punishment, and thus violated defendant's constitutional protections against *ex post* facto laws). See also Dowd v. Sims, 95 N.E.2d 628 (Ind. 1950).

Upton v. State, 904 N.E.2d 700 (Ind. Ct. App. 2009) (application of 2008 credit restricted felon statute to defendant violated constitutional prohibition against *ex post* facto laws; by limiting the amount of good time credit earned by certain sex offenders, the law increased Defendant's sentence),

Hawkins v. State, 973 N.E.2d 619 (Ind. Ct. App. 2012) (even though the effect of amendment to educational credit time statute was to deny credit to defendant and not allow him to finish the remaining 50% of his course work while inmates with only one class remaining were allowed to complete their degrees, there was no *ex post* facto violation because the amendment applied prospectively, did not increase defendant's sentence or alter definition of his criminal conduct).

Sorensen v. State, 133 N.E.3d 717 (Ind. Ct. App. 2019) (reversed trial court's application of amended credit restricted felon statute; although statute applied to one of defendant's individual sentences, application to other sentences would violate ex post facto clause, as offenses occurred before statute's effective date).

2. Act occurred prior to change in law

Peugh v. United States, 133 S.Ct. 2072 (2013) (sentencing a person under the stiffer, revised Federal Sentencing Guidelines enacted after the person committed his crimes violated Constitution's *ex post* facto prohibition because, even though the Guidelines are merely advisory, using them as a starting point creates a significant risk that a trial court will impose a substantially longer sentence, amounting to greater punishment than that allowed at the time the crime was committed).

State v. Land, 688 N.E.2d 1307 (Ind. Ct. App. 1997) (application of statute making it Class C felony for failure to provide support to one's dependent child to defendants who amassed child support debt before passage of statute did not violate *ex post* facto clause, where defendants again failed to make child support payments after enactment of statute).

Taylor v. State Election Bd., 616 N.E.2d 380 (Ind. Ct. App. 1993) (State disqualifying elected county council member from office on basis of prior felony convictions did not constitute *ex post* facto law, since member's offenses were punishable when committed).

B. DOCTRINE OF AMELIORATION

The doctrine of amelioration provides for the application of the more lenient sentencing statute in effect at the time of the sentencing as opposed to the statute in effect at the time of the crime. If a statutory amendment mitigates the punishment, there is no constitutional obstacle in the way of

applying an amendment effective after the commission of the crime. Dowdell v. State, 336 N.E.2d 699, 701 (Ind. Ct. App. 1975). Thus, when a defendant is found guilty of an offense, he is to be sentenced in accordance with the statute in force at the time the offense was committed unless an amendment to the statute is effective prior to sentencing and the amendment provides for an ameliorative penalty. State v. Turner, 383 N.E.2d 428, 430 (Ind. Ct. App. 1978).

In order for an ameliorative statute to apply, three requirements must be met: the defendant must benefit from the new statute, legislative intent of broad application must be shown, and the amendment must become effective prior to sentencing.

1. Truly ameliorative: maximum penalty is reduced

Where the new penalty provisions are not "truly amelioratory," it is not error to sentence the defendant under the former penalty provisions effective when the offense occurred. Russell v. State, 395 N.E.2d 791, 797 (Ind. Ct. App. 1979) (where maximum term of imprisonment for offense was same under statute in effect when offense was committed and under statute in effect when defendant was sentenced, latter statute was not "amelioratory"). Case law has interpreted an amendment to a statute to be ameliorative only if the maximum penalty under the new version of the statute is shorter than the maximum penalty under the old version of the statute. Palmer v. State, 679 N.E.2d 887 (Ind. 1997). See also Hellums v. State, 758 N.E.2d 1027 (Ind. Ct. App. 2002).

Hooker v. State, 799 N.E.2d 561 (Ind. Ct. App. 2003) (because maximum penalty for Class C felony under 1990 amendment to IC 35-50-2-6 was not altered, statute was not ameliorative, and defendant was not entitled to be sentenced to presumptive term of four rather than five years).

Winbush v. State, 776 N.E.2d 1219 (Ind. Ct. App. 2002) (although defendant would have received advantage of reduced incarceration under amended version of suspendibility statute in effect when he was sentenced, Court is bound by those cases which have declined to expand doctrine of amelioration beyond those instances in which maximum sentence is reduced).

White v. State, 849 N.E.2d 735 (Ind. Ct. App. 2006) (IC 35-50-2-1.3, which states that "[i]n imposing consecutive sentences in accordance with IC 35-50-1-2[,] a court is required to use the appropriate advisory sentence in imposing a consecutive sentence," does not apply to defendant because it does not represent an ameliorative change in the sentencing statutes. Amendment adds no restrictions on the ability of trial courts to impose consecutive sentences beyond the restrictions already in place by virtue of the statute it references, Ind. Code § 35-50-1-2(c)). See also Robertson v. State, 871 N.E.2d 280 (Ind. 2007).

Russell v. State, 182 Ind.App. 386, 395 N.E.2d 791 (1979) (where maximum term of imprisonment for offense was same under statute in effect when offense was committed and under statute in effect when defendant was sentenced, latter statute was not "amelioratory").

Dowdell v. State, 336 N.E.2d 699 (Ind. 1975) (amendment that increased maximum penalty for crime at same time it decreased minimum time was not ameliorative).

The doctrine of amelioration does not apply to the enactment of a statute that creates an entirely new offense, even if the maximum sentence for the new statute that the defendant could be sentenced under is less than the maximum sentence for the pre-existing statute.

Hellums v. State, 758 N.E.2d 1027 (Ind. Ct. App. 2001) (where statute creating new crime of possessing precursors which defendant could have been convicted was passed after defendant committed offense but before his sentencing, doctrine of amelioration did not require court to sentence defendant for possession of precursors rather than dealing in methamphetamine for which he was charged, because new statute was not intended to reduce punishment for dealing in methamphetamine, but created new offense).

2. Legislative intent for application

The doctrine of amelioration is only appropriate if the legislature intended the statute to apply to all the persons to whom such application would be possible and constitutional. Lunsford v. State, 640 N.E.2d 59, 60-61 (Ind. Ct. App. 1994).

a. Expressed legislative intent

If there is an expressed statement by the legislature that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the proscribed act, then to hold that the more severe penalty should apply would serve no purpose other than to satisfy the constitutionally impermissible desire for vindictive justice. Maynard v. State, 367 N.E.2d 5, 8 (Ind. 1977). See also Dowdell v. State, 336 N.E.2d 699, 702 (Ind. Ct. App. 1975).

Wolfe v. State, 362 N.E.2d 188 (Ind. 1977) (where legislature expressly stated that amending rape statute to provide for determinate sentence instead of indeterminate sentence was to keep those convicted of rape in jail longer, statute was not ameliorative).

b. Implied legislative intent

The courts are split as to what additional legislative intent is needed to apply the doctrine of amelioration, in light of Indiana's general savings clause. Indiana's general savings clause provides that in the absence of an expressed provision for retroactivity, a statutory revision does not apply to any act committed prior to its effective date. Ind. Code § 1-1-5-1. See also Watford v. State, 384 N.E.2d 1030, 1032 (Ind. 1979). The general savings clause supplies legislative intent and directs courts to impose a sentence pursuant to the statute in effect at the time the offense was committed. This is correct when a penalty is increased *ex post* facto.

Most Indiana courts have held that where an amendment to a sentencing statute is ameliorative, the amendment itself is "a sufficient indication of the legislative intent that it be applied to all whom such application would be possible and constitutional." Lewendoski v. State, 389 N.E.2d 706 (Ind. 1979). See also Bell v. State, 654 N.E.2d 856 (Ind. Ct. App. 1995) and Elkins v. State, 659 N.E.2d 563 (Ind. Ct. App. 1995).

However, the Court of Appeals in Lunsford v. State, 640 N.E.2d 59 (Ind. Ct. App. 1994), refused to apply the doctrine of amelioration without the legislature specifically stating

that the sentencing amendment should be applied retroactively. See also Watford v. State, 384 N.E.2d 1030, 1032 (Ind. 1979).

3. Sentenced after effective date

To take advantage of the limited exception provided for ameliorative revisions and statutory punishments, the defendant must have been sentenced after the effective date of the ameliorative amendment.

Palmer v. State, 679 N.E.2d 887 (Ind. 1997) (the mere technical correction of a sentence after the effective date of an ameliorative revision does not require the court to apply the new version of the statute).

Schwass v. State, 554 N.E.2d 1127 (Ind. 1990) (defendant was not entitled to ameliorative effect of statutory amendment of robbery where amendment was not effective until after defendant was sentenced). See also Carter v. State, 512 N.E.2d 158 (Ind. 1987) and Harris v. State, 481 N.E.2d 382 (Ind. 1985).

Watford v. State, 384 N.E.2d 1030 (Ind. 1979) (defendant who was sentenced but had not exhausted appeal prior to amendment was not entitled to benefit from ameliorative amendment).

Rowold v. State, 629 N.E.2d 1285 (Ind. Ct. App. 1994) (regardless of whether doctrine of amelioration applied to habitual offender statute, prior version of habitual offender statute did not apply where defendant was sentenced prior to 1993 amendment and court merely corrected or modified sentence after 1993).

However, when taking advantage of an ameliorative amendment which became effective after the original sentencing but before the resentencing on remand, the court on remand cannot merely be correcting the defendant's sentence but must truly be resentencing the defendant. Riffe v. State, 675 N.E.2d 710 (Ind. Ct. App. 1996). See also Rowald v. State, 629 N.E.2d 1285 (Ind. Ct. App. 1994).

Martin v. State, 714 N.E.2d 1140 (Ind. Ct. App. 1999) (because on reversal and remand defendant stood convicted of different crimes than he stood convicted of on original sentencing, resentencing was not merely correction of defendant's existing sentences but true resentencing; ameliorative amendment that became effective between original sentencing and resentencing applied).

PRACTICE POINTER: Courts have applied the doctrine of amelioration to the habitual offender statute in order for defendants who committed their crimes prior to but were sentenced after the amendment to benefit from the amendment. But see Grundy v. State, 38 N.E.3d 675 (Ind. Ct. App. 2015) (habitual offender revisions do not apply retroactively). For a detailed discussion of the doctrine of amelioration's effect on the habitual offender statute, see Chapter 8, *Habitual Offender Enhancement*, Subsection II.A.5, *Which Statute Applies*. One Court has even applied the doctrine of amelioration to determine that the education credit time statute in effect at the time the defendant earned his GED can apply. See Renfroe v. State, 736 N.E.2d 797 (Ind. Ct. App. 2000), *aff'd on reh'g*, 743 N.E.2d 299.

C. REMEDIAL STATUTES

Remedial statutes that are intended to cure a defect or mischief that existed in a prior statute must be construed to affect the evident purpose for which it was enacted. Thus, remedial statutes can be applied retroactively.

Martin v. State, 774 N.E.2d 43 (Ind. 2002) (where amendment to statute to provide credit for time served on home detention as condition of probation was response to confusion in case law, amendment was remedial and applied retroactively).

D. PROCEDURAL CHANGES

When dealing with a procedural amendment, the prohibition against *ex post* facto law and the doctrine of amelioration do not apply. Rather, procedural rules that are in effect at the time of sentencing apply, regardless of when they were enacted.

1. Ex post facto inapplicable

Ex post facto prohibition applies only where substantive right is taken away, not where there is merely a change in procedure. Mediate v. City of Indianapolis, 407 N.E.2d 1194, 1196 (Ind. Ct. App. 1980).

Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977) (a substantive change in a penal statute is an *ex post* facto law if applied retroactively, but a procedural change is not).

Crawford v. State, 669 N.E.2d 141 (Ind. 1996) (statute permitting murder to be charged by information or indictment was procedural, and thus, no *ex post* facto violation resulted from charging murder defendant by information, even though State was required to bring all murder charges by indictment when killing occurred; statute changed methods State could use to bring murder charge but did not increase defendant's punishment, change elements or facts necessary to prove offense, or deprive defendant of defense or lesser punishment available at time of crime).

Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005) (change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). But see Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006).

2. Amelioration inapplicable

Where a defendant benefits from a procedural amendment, the defendant may take advantage of the amendment as long as it is in effect at the time, he or she wants to apply it.

Willis v. State, 567 N.E.2d 1170 (Ind. Ct. App. 1991) (defendant could get benefit from statutory change in time limit for filing sentence modification made after defendant sentenced since it was not substantive change).

But see:

State v. Crocker, 270 Ind. 377, 385 N.E.2d 1143 (1979) (amendment allowing court to reduce or suspend sentence within six months of imposition was substantive and did not apply to defendant who was sentenced when amendment was not in effect).

However, using rules of statutory construction, a court may consider whether the legislature intended the change to apply to those sentenced before its enactment.

Wooley v. Commissioner of DMV, 479 N.E.2d 58 (Ind. Ct. App. 1985) (legislature intended statute permitting certain habitual traffic offenders to obtain restricted licenses after five-year period of reformation to be applicable to persons whose licenses had been suspended prior to amendment's effective date).

VI. INCARCERATION OF AN INDIGENT FOR FAILURE TO PAY FINE

Revocation of probation and imprisonment for failure to pay restitution and fine violates due process absent findings of willful refusal or that alternative forms of punishment are not adequate to satisfy interests in punishment and deterrence. Bearden v. Georgia, 461 U.S. 660 (1983). For a more detailed review of imposing fines on indigent defendant, see Chapter 6, *Additional Penalties*.

Snowberger v. State, 938 N.E.2d 294 (Ind. Ct. App. 2010) (court erred by finding defendant in violation of condition of probation for failure to pay child support where State could not establish the failure to pay was willfully done by the defendant).

VII. VINDICTIVE SENTENCING

A judge is not allowed to use sentencing for vindictive purposes not authorized by statute or otherwise constitutional reasons. Thus, a judge may violate this rule by improper sentencing as a punishment for a defendant exercising his right to a jury trial or for an improper sentence upon remand or reconviction following appeal. Similarly, in rare cases, a prosecutor's vindictiveness can raise constitutional or other issues.

A. SENTENCED AS PUNISHMENT FOR EXERCISING RIGHT TO JURY TRIAL

It is constitutionally impermissible for a trial court to impose a more severe sentence because the defendant has chosen to stand trial rather than plead guilty. Walker v. State, 454 N.E.2d 425, 429 (Ind. Ct. App. 1983). However, when a defendant proceeds to trial and his accomplice pleads guilty, the sentences need not be identical and there is no requirement of consistency. Williams v. State, 631 N.E.2d 485, 488 (Ind. 1994) (defendant's sentence of 90 years for conviction of conspiracy to commit murder and aiding burglary was not excessive compared to each of his two accomplices who pled guilty and received four-year sentences where defendant had orchestrated the crime).

Pauley v. State, 668 N.E.2d 1212 (Ind. 1996) (although defendant received 60 years for role in murder, but co-defendant pled guilty and received 30 years, defendant failed to demonstrate that trial judge penalized him for invoking his right to trial by jury where defendant's judge was not involved in negotiations that led to co-defendant's plea agreement).

The court will not remand for resentencing upon this issue if the record does not establish some significant indicia that the defendant's exercise of his jury trial right may have contributed to the severity of his resulting sentence.

Hill v. State, 499 N.E.2d 1103 (Ind. 1986) (due process was not violated where defendant, who went to trial, was sentenced to fifty years and co-defendant who pled guilty was sentenced to twenty years; defendant did not direct court to, nor did court find, anything in record indicating that defendant's decision to proceed with jury trial affected severity of sentence).

Walker v. State, 454 N.E.2d 425 (Ind. Ct. App. 1983) (court rejected defendant's contention that fine ten times greater than no-jury cases with similar facts constituted punishment for exercise of right to jury trial despite newspaper article claiming that judge imposed stiffer fine because cost of jury trial).

B. RESENTENCING UPON RECONVICTION OR REMAND

The Fourteenth Amendment Due Process Clause precludes increased sentences following reversal of a conviction and subsequent reconviction if increase is motivated by vindictiveness on the part of the sentencing judge. North Carolina v. Pearce, 395 U.S. 711 (1969).

1. After reversal on direct appeal

Imposition of increased sentence upon retrial is not barred by double jeopardy or equal protection, but due process prohibits threat of increased sentence to discourage appeals. Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989) (holding that the evil that Pearce sought to prevent was not imposition of enlarged sentences after new trial but vindictiveness of sentencing judge). Thus, an increased sentence after appeal may only be imposed based on changed circumstances. Barnett v. State, 599 N.E.2d 232, 233 (Ind. Ct. App. 1992) (*citing* Williams v. State, 494 N.E.2d 1001, 1004-05 (Ind. Ct. App. 1986)).

a. Presumption of vindictiveness

An increased sentence imposed after retrial in the same judicial forum is presumptively vindictive and in violation of due process. Proof of actual vindictiveness is not a prerequisite to the presumption. In re Craig, 571 N.E.2d. 1326, 1328-29 (Ind. Ct. App. 1991) (*citing* North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)) (after reversal of sentence erroneously entered for multiple acts of criminal contempt, it was denial of due process to impose sentence any greater than original sentence for each single act of contempt although record did not indicate existence of retaliatory or vindictive motive of trial court).

Champlain v. State, 717 N.E.2d 567 (Ind. 1999) (although original sentence was sixty-five years with twenty years suspended and sentence on retrial was sixty-five years with ten years suspended, sentence on retrial was not greater than original sentence because defendant's original suspended sentence was revoked for violation of probation and defendant was ordered to serve full sixty-five years).

Barnett v. State, 599 N.E.2d 232 (Ind. Ct. App. 1992) (defendant did not receive greater sentence during resentencing based on fact that first sentence was increased by fifty percent of possible aggravation, and second sentence was increased by seventy-five percent of possible aggravation; in fact, defendant received lesser sentence because original presumptive sentence was increased by five years, and second sentence was only increased by three years). See also Owens v. State, 916 N.E.2d 913 (Ind. Ct. App. 2009).

However, the sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceeding. Wasman v. United States, 468 U.S. 559, 574 (1984). See also Smith v. State, 695 N.E.2d 909, 911 (Ind. 1998). Valid reasons for an increased sentence based on facts occurring since the first sentence must affirmatively appear and a factual basis may be made a part of the record. North Carolina v. Pearce, 395 U.S. 711 (1969).

Wasman v. United States, 468 U.S. 559 (1984) (greater sentence was justified by defendant's subsequent conviction of another offense although actual crime occurred before initial sentencing where court explained reasons).

Smith v. State, 695 N.E.2d 909 (Ind. 1998) (change from five years each of unsupervised and supervised probation to ten years of supervised probation was not improper sign of prosecutor's vindictiveness and was justified due to defendant's behavior in jail awaiting resentencing).

b. Vindictiveness presumption inapplicable

Due process is violated only when there is a realistic danger that the State might be retaliating against the accused for lawfully attacking his conviction. In re Craig, 571 N.E.2d. 1326, 1328 (Ind. Ct. App. 1991). Thus, the vindictiveness presumption does not apply in certain situations.

Alabama v. Smith, 490 U.S. 794 (1989) (even when judge who originally sentenced defendant resentences defendant, presumption of vindictiveness established in Pearce does not apply when defendant originally pled guilty and greater sentence is imposed after retrial following appeal).

Texas v. McCullough, 475 U.S. 134 (1986) (presumption of vindictiveness is inapplicable where first sentence was imposed by jury, sentencing judge actually granted defendant's motion for new trial and defendant was entitled by law to choose to be resentenced by either judge or jury and chose judge).

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (vindictive presumption does not apply where new sentencing is ordered by different judicial authority).

Hicks v. State, 729 N.E.2d 144 (Ind. 2000) (where only sentence, rather than conviction, was remanded, Pearce was inapplicable; further, although enhancement was increased, actual number of years remained same on remand).

Gray v. State, 871 N.E.2d 408 (Ind. Ct. App. 2007) (trial court did not violate defendant's due process rights by imposing murder and attempted murder sentences consecutive to one another after they were first imposed concurrently; sentence imposed following second trial was five years less than sentence imposed following first trial, and there was no evidence trial court was motivated by vindictiveness).

Hull v. State, 839 N.E.2d 1250 (Ind. Ct. App. 2005) (on resentencing for two murder convictions, no error to increase defendant's sentence from 75 years to 90 years, where defendant committed perjury after original sentencing).

Golden v. State, 553 N.E.2d 1219 (Ind. Ct. App. 1990) (where trial court imposed illegal sentence originally, imposition of legal sentence, even when more severe than initial penalty, does not violate fundamental fairness).

Sanjari v. State, 981 N.E.2d 578 (Ind. Ct. App. 2013) (trial court's resentencing of defendant after reversal on double jeopardy grounds was not vindictive when the judge sentenced the defendant to the same aggregate sentence that he had received on his conviction prior to his appeal).

c. Considering aggravators and mitigators

As long as the second sentence is no longer than the original sentence, it is proper for the court to reconsider the aggravators and mitigators on resentencing. Aggravators, applied to one charge at original sentencing, can even be applied to a different charge, on resentencing. Flowers v. State, 518 N.E.2d 1096 (Ind. 1988).

Gootee v. State, 942 N.E.2d 111 (Ind. Ct. App. 2011) (no abuse of discretion in reworking concurrent/consecutive sentencing scheme on remand in order to arrive at same aggregate sentence that trial court had imposed at defendant's first sentencing).

Jackson v. State, 105 N.E.3d 1081 (Ind. 2018) (trial court on remand from a reversal of a criminal gang enhancement is to resentence the defendant on all the felonies underlying that enhancement).

Caraway v. State, 977 N.E.2d 469 (Ind. Ct. App. 2012) (after defendant's 65-year sentence for murdering his wife was reversed and remanded because trial court failed to acknowledge his guilty plea as a mitigator, trial court did not abuse its discretion by re-sentencing defendant to 65 years after he was unable to show that such a sentence was an outlier and inappropriate under Appellate Rule 7(B), given the nature of the offense or his character).

Misztal v. State, 620 N.E.2d 37 (Ind. Ct. App. 1993) (court on remand did not err in finding aggravators not found by original sentencing court where defendant's conviction for murder was reduced to voluntary manslaughter; resulting sentence for voluntary manslaughter was still less than earlier sentence).

Williams v. State, 494 N.E.2d 1001 (Ind. Ct. App. 1986) (where on appeal, defendant's habitual offender enhancement was vacated, trial court did not err by increasing defendant's underlying sentence based on aggravators which he did not address at original sentencing because new increased sentence without habitual offender enhancement was still shorter than original sentence with habitual offender enhancement).

For a detailed analysis on this subject, see Chapter 8, *Habitual Offender Enhancement*, Subsection V.A.3, *Challenging Habitual Offender Determinations*; *Attacking Prior Convictions*.

2. After post-conviction relief

A person convicted of an offense is entitled to pursue post-conviction remedies without apprehension that the state will retaliate by subjecting him to a significantly increased potential period of incarceration. Blackledge v. Perry, 417 U.S. 21, 28 (1974).

a. Authority

Ind. Code § 35-50-1-5 provides that a sentencing court may impose a more severe penalty than that originally imposed, and the post-conviction rule outlines the procedural conditions under which that may be done, i.e., reasons must include reliance on identifiable conduct by defendant occurring after original sentencing. Thus, Ind. Code § 35-50-1-5 is constitutional and consistent with amendments to Ind. Post-Conviction Rule 1, § 10. Linthicum v. State, 511 N.E.2d 1026, 1029 (Ind. 1987).

(1) Ind. Post-Conviction Rule 1, § 10

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule [PCR 1] and a conviction is subsequently obtained, or

(b) If a sentence has been set aside pursuant to his rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

(c) The provisions of subsections (a) and (b) limiting the severity of the penalty do not apply when:

(1) a conviction, based upon a plea agreement, is set aside;

(2) the state files an offer to abide by the terms of the original plea agreement within twenty (20) days after the conviction is set aside; and

(3) the defendant fails to accept the terms of the original plea agreement within twenty (20) days after the state's offer to abide by the terms of the original plea agreement is filed.

(2) Ind. Code § 35-50-1-5

If: (1) prosecution is initiated against a petitioner who has successfully sought relief under any proceeding for post-conviction remedy and a conviction is subsequently obtained; or (2) a sentence has been set aside under a post-conviction remedy and the successful petitioner is to be resentenced, then the sentencing court may impose a more severe penalty than that originally imposed, and the court shall give credit for time served. Ind. Code § 35-50-1-5.

b. Defendants who originally pled guilty

Section (c) of Ind. Post-Conviction Rule 1, §10 was added by amendment on November 4, 1985, and applies only to petitioners whose post-conviction petitions were filed after January 1, 1986, the effective date of the rule. Tolson v. State, 493 N.E.2d 454, 455 (Ind.

1986). See also Little v. State, 501 N.E.2d 447, 450 (Ind. 1986). Thus, relief given from plea agreements was not exempt from the rule prior to 1986.

Dukes v. State, 661 N.E.2d 1263 (Ind. Ct. App. 1996) (where defendant filed petition for post-conviction relief in 1993, trial court was not prohibited from imposing greater sentence for defendant's conviction for theft and burglary after defendant's plea agreement to theft, in which burglary charge was dropped, was set aside). See also Newville v. State, 511 N.E.2d 1047 (Ind. 1987) and Little v. State, 501 N.E.2d 447 (Ind. 1986).

c. Failure to rely on subsequent conduct

A trial court may not impose a more severe sentence upon re-sentencing without including in the record a statement of identifiable conduct occurring after imposition of original sentence that the court relied upon for imposition of a more severe sentence. Ogburn v. State, 549 N.E.2d 389 (Ind. Ct. App. 1990).

d. Applies to related charges

The trial court may not inflict a sentence greater than the one initially imposed; such limitation operates not only as to the offense for which the defendant was initially sentenced, but also as to all his other crimes flowing from the occurrences that gave rise to the initial charges and of which the State had pertinent information and an opportunity to charge. Dean v. State, 499 N.E.2d 185, 189 (Ind. 1986) (*citing* Bates v. State, 426 N.E.2d 404, 406 (Ind. 1981)).

McBroom v. State, 530 N.E.2d 725 (Ind. 1988) (conviction and sentence for confinement on retrial violated Ind. Post-Conviction Rule 1, § 10 because state accepted defendant's plea to murder without pursuing confinement charge, and on retrial state added confinement charge; sentence, if convicted, there would be more severe penalty within meaning of Ind. Post-Conviction Rule 1, § 10 (prior to 1985)).

Dean v. State, 499 N.E.2d 185, 189 (Ind. 1986) (where defendant originally entered plea for class C felony, which was set aside, defendant's second sentence based on jury verdict finding him guilty of class A robbery and class B burglary which have minimum sentences of twenty years and six years, respectively, had to be reduced to five years, presumptive sentence for class C felony for which he was originally sentenced).

Ault v. State, 705 N.E.2d 1078 (Ind. Ct. App. 1999) (because enhanced penalty of eight years coupled with restitution order for lesser offense was not more severe penalty than presumptive ten-year sentence imposed for original, greater offense, court did not error in imposing sentence for lesser offense).

C. PROSECUTORIAL VINDICTIVENESS

It is not prosecutorial vindictiveness for a prosecutor to ask for a more severe sentence at sentencing than what the prosecutor offered in plea agreement, which court did not accept. Snyder v. State, 655 N.E.2d 1238, 1243 (Ind. Ct. App. 1995).

VIII. INCARCERATION OF JUVENILES

"The General Assembly shall provide institutions for the correction and reformation of juvenile offenders." Ind. Const. Art. 9, § 2.

Although Article 9, Section 2 of the Indiana Constitution clearly requires that the General Assembly provide institutions for juvenile offenders, it does not require that all juveniles – irrespective of their crimes or background – be housed only in such institutions. Ratliff v. Cohn, 693 N.E.2d 530, 536 (Ind. 1998).

IX. PRINCIPLES OF REFORMATION, NOT VINDICTIVE JUSTICE

"The penal code shall be founded on the principles of reformation, and not of vindictive justice." Ind. Const. art. 1, § 18.

Notwithstanding society's valid concerns with protecting itself and providing retribution for serious crimes, the criminal justice system must afford an opportunity for rehabilitation of the offender where reasonably possible. Fointno v. State, 487 N.E.2d 140, 144 (Ind. 1986).

A. ADMONITION TO LEGISLATURE

Ind. Const. art. 1, § 18, which provides that the penal code shall be founded on the principles of reformation and not vindictive justice, is merely an admonition to the legislature to consider reformation in enacting penal laws. Fleenor v. State, 514 N.E.2d 80, 90 (Ind. 1987). See also Williams v. State, 430 N.E.2d 759, 766 (Ind. 1982) and Driskill v. State, 7 Ind. 338 (1855).

Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998) (Section 18 of the Indiana Constitution applies to the penal code as a whole and not to fact-specific challenges).

Holmes v. State, 671 N.E.2d 841 (Ind. 1996) (there was no apparent tension between applying most stringent harmless error standard to erroneous admission of victim impact evidence and constitutional prohibition against vindictive justice).

Hunter v. State, 676 N.E.2d 14 (Ind. 1996) (death penalty does not violate Indiana Const. art. 1, § 18).

Williams v. State, 426 N.E.2d 662 (Ind. 1981) (sentence which extends beyond normal life expectancy does not violate constitutional provision that penal code be based on principles of reformation).

Erickson v. State, 438 N.E.2d 269 (Ind. 1982) (habitual offender statute does not violate Ind. Const. art, I § 18, which guarantees that penal code shall be founded on principles of reformation, and not of vindictive justice). See also Funk v. State, 427 N.E.2d 1081 (Ind. 1981) and Wise v. State, 400 N.E.2d 114 (Ind. 1980).

Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995) (53-year sentence, consisting of fifty years for attempted murder and concurrent three-year sentences for criminal recklessness did not amount to vindictive justice in violation of constitution; sentences, although aggravated, were expressly permitted by statute).

Occasionally, courts will look beyond whether the statute is based on principles of rehabilitation instead of vindictive justice and consider the individual offender and offenses. Considerations of rehabilitation are included in certain statutory mitigators, such as IC 35-38-1-7.1(b)(10), imprisonment of person will result in undue hardship to himself or his dependents, and IC 35-38-1-7.1(b)(7), person likely to respond affirmatively to probation or short-term imprisonment.

Coble v. State, 476 N.E.2d 102 (Ind. 1985) (32-year sentence for conviction of two burglaries and habitual offender count did not violate state constitution as not being based on principles of reformation, although burglaries may have been result of defendant's drinking, where jury had ample evidence to find he possessed criminal intent and committed crimes despite his drinking and major portion of his sentence was thirty years for habitual offender count).

Abercrombie v. State, 441 N.E.2d 442 (Ind. 1982) (resentencing judge specifically considered possibility of reformation of defendant and explicitly stated his conclusion at time sentence was pronounced, refuting contention by defendant that court erred in not considering principles of reformation as mandated by former IC 35-4.1-4-7 and Indiana Constitution).

B. JUVENILES

Lengthy sentences for juvenile offenders "forswear altogether the rehabilitative ideal. Miller v. Alabama, 132 S.Ct. 2455, 2465 (2012). An excessively long sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict, he will remain in prison for the rest of his days." Graham v. Florida, 560 U.S. 48 at 70 (2010). See also Brown v. State, 10 N.E.3d 1 (Ind. 2014); Fuller v. State, 9 N.E.3d 653 (Ind. 2014); and Taylor v. State, 86 N.E.3d 157 (Ind. 2017).

Wilson v. State, 157 N.E.3d 1163 (Ind. 2020) (enhanced protections afforded to defendants who were juveniles when they committed their crimes before they could be sentenced to life in prison without parole, did not apply to defendant's 181-year sentence for murder, armed robbery, and criminal gang activity; although sentence was a de facto life sentence, Supreme Court cases providing for enhanced protections for juvenile only applied to life-without-parole sentences); See also State v. Stidham, 157 N.E.3d 1185 (Ind. 2020).

Hunter v. State, 676 N.E.2d 14 (Ind. 1996) (incarceration with adults of certain youths who have been convicted of most serious and violent crimes does not violate Article 1, Section 18 of Indiana Constitution).

Person v. State, 661 N.E.2d 587 (Ind. Ct. App. 1996) (statutory provision of mandatory executed sentence for possession of handgun by minor did not violate limitations on penal sanctions imposed by Indiana Constitution; given focus of juvenile justice system upon care, treatment and rehabilitation of wayward children, there was no constitutional violation in legislative determination that children who dangerously possess handguns should serve mandatory five-day jail term).

C. SENTENCING UNDER FORMER STATUTE

Refusing to permit amendments of a defendant's sentence so as to conform with sentencing provisions which were enacted after his sentencing or after the commission of the crime does not violate the Indiana Constitutional provision that the penal code be founded on principles of reformation and not of vindictive justice.

State v. Alcorn, 638 N.E.2d 1242 (Ind. 1994) (application of saving clause providing that amended death penalty statute, allowing trial court to impose sentence of life imprisonment without parole as alternative sentence to death and requiring court to instruct jury concerning range of statutory penalties, only applies to murders committed after amendments' effective date did not violate any principle of reformation nor result in vindictive justice).

Gee v. State, 508 N.E.2d 787 (Ind. 1987) (savings clause, providing that defendant who inflicts injury in course of robbery shall be prosecuted and sentenced under law in effect at time offense was committed, did not violate constitutional provisions that penal code shall be founded on principles of reformation). See also Weatherford v. State, 654 N.E.2d 899 (Ind. Ct. App. 1995).

Ballard v. Duckworth, 656 F.Supp. 693 (N.D. Ind. 1986) (life sentence imposed under kidnapping statue repealed during year defendant was convicted and sentenced was not unconstitutional vindictive justice).

D. JURY INSTRUCTIONS

Because Article 1, Section 18 of the Indiana Constitution is directed at the legislature, it is not erroneous for the court to refuse to give a jury instruction explaining the constitutional provision.

Woods v. State, 547 N.E.2d 772 (Ind. 1989), *reh'g granted on other grounds*, 557 N.E.2d 1323 (1990), *cert. den'd* (trial court did not err in refusing murder defendant's tendered instruction in penalty phase of case, based on Article 1, Section 18 of Indiana Constitution in that provision seems to be addressed to law-making bodies and would likely mislead or confuse jury). See also Baird v. State, 604 N.E.2d 1170 (Ind. 1992) and Emory v. State, 420 N.E.2d 883 (Ind. 1981).

Allison v. State, 527 N.E.2d 234 (Ind. Ct. App. 1988) (defendant was not entitled to instruction on provision of Bill of Rights that penal code shall be founded on principles of reformation and not of vindictive justice, despite claim that jury could have found that State vindictively abused penal code in enticing her to commit additional offenses when it could have arrested her after first one).