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Section IV

Briefs and Appendices

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

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

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

Communicating With Your Client and Trial Counsel

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

Assembling the Appendix

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

Researching Issues

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

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

As the research runs its course, counsel must select the issue(s) to be raised. Issues with a good chance of leading to reversal are the best candidates, although sometimes it is important to raise an issue

to preserve it for possible later review in federal court on a habeas corpus petition. Counsel do not have an obligation to raise frivolous issues, even at the insistence of a client. But Indiana does not allow for the filing of Anders briefs as in federal court. Rather, appointed counsel must file an advocative brief in every direct appeal.

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

Writing Successful Briefs

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

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

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

Beyond Briefs: Addenda, Amendments, and Additional Authority

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

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

A. APPENDIX

I. The Rules

Rule 49. Filing of Appendices

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

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

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

Rule 50. Contents of Appendices

* * *

B. Appendices in Criminal Appeals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 51. Form and Assembly of Appendices

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

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

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

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

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

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

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

The Court on Appeal will review only those claims supported by the Record on Appeal, which includes the Transcript and Clerk's Record. The relevant portions of the Clerk's Record must be submitted to the appellate court in a document called the Appendix. Before the adoption of the Appellate

Rules in 2001, these documents were compiled by the clerk. Now the onus is on counsel to compile them into an Appendix.

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

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

A. Deadlines

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

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

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

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

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

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

C. Documents Included & Page Numbering

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

is to include the CCS first, followed by the documents from the clerk's record from the oldest filing to the most recent.

1. Exclude the Transcript

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

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

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

3. Number All Pages Consecutively

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

4. Seeking an Exemption

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

5. Include a Verification

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

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

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

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

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

E. Certificate of Service/Service on AG Required

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

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

F. Civil Appeals

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

G. Amended or Supplemental Appendices

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

H. Appellee's Appendix

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

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

B. THE SEARCH FOR ISSUES

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

I. Communicate with Your Client and Trial Counsel

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

A. Client Communication

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

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

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

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

Finally, it is important to realize the respective roles of counsel and client in an appeal. At trial, clients must make certain decisions, such as pleading guilty or waiving a jury trial. Counsel has an important role in providing advice, but these decisions are ultimately the client's. In the appellate realm, counsel has considerably more control. See Jones v. Barnes, 463 U.S. 745 (1983). Although appointed counsel must file an advocative brief on behalf of their client, there is no duty to raise a frivolous issue. If a client insists that you raise one or more frivolous claims, it is important to explain why the claims have

no merit and why raising them will detract from the issues being raised. Most clients will accept this. If they do not, you should hold your ground and not raise frivolous issues.

B. Trial Counsel

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

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

II. Review the Record Carefully

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

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

A. Guilty Plea or Trial?

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

Limitations on Sentencing Challenges

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

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

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

B. The Search for Errors

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

1. Preserved Errors

a. Pretrial Motions are Just a Start

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

b. Pretrial Hearings are also a Start

Although preliminary in nature, pretrial hearings also provide a good source of issues for appeal. As discussed in Section I, counsel should request a transcript of pretrial hearings and has "a duty to thoroughly review the entire record of . . . proceedings, including the transcripts from . . . pre-trial hearings." Wilson v. State, 94 N.E.3d 312, 321 (Ind. Ct. App. 2018), trans. denied. Pretrial hearings also preview the State's argument and the trial court's rationale, which can be useful in crafting an appellate argument. These may include motions to suppress evidence based on an illegal search or seizure, motions to suppress statements to police based on involuntariness or improper advisements, and motions in limine that preliminarily restrict the admission of certain evidence.

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

c. Objections at Trial Matter Most

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

2. Unpreserved Errors

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

a. Sentencing Claims

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

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

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

b. Double Jeopardy

Although cases seldom address it explicitly, common practice is to allow double jeopardy claims to be raised on appeal even if they were not explicitly raised in the trial court. Although some cases have specifically invoked the fundamental error doctrine, the better approach is simply to argue a double jeopardy violation is similar to a sentencing error, *i.e.*, one that does not require an objection at trial. See, e.g., Guyton v. State, 771 N.E.2d 1141 (Ind. 2002); Richardson v. State, 717 N.E.2d 32 (Ind. 1999). As

explained above, however, a guilty plea will generally forfeit any claimed violation of double jeopardy. See, e.g., Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004); Games v. State, 743 N.E.2d 1132, 1134-35 (Ind. 2001); but see Jordan v. State, 676 N.E.2d 352, 354 (Ind. Ct. App. 1997) (explaining exception to general rule when plea agreement calls for "imposition of consecutive sentences when the court was without statutory authority to impose consecutive sentences").

c. Constitutionality of a Statute

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

d. Fundamental Error

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

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

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

(1) Jury Instructions: Wrong Burden of Proof

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

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

(2) Jury Instructions: Attempted Murder

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

(3) Conviction for Uncharged Offenses

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

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

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

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

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

(5) Judicial Misconduct or Overreaching

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

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

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

(6) Prosecutorial Misconduct

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

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

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

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

(7) Admission of Evidence

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

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

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

(8) Waiver of Jury Trial

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

3. Harmless Error

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

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

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

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

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

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

Hernandez v. State, 45 N.E.3d 373, 379 (Ind. 2015) (trial court's error in failing to give final jury instruction on defense of necessity was not harmless).

Oaks v. Chamberlain, 76 N.E.3d 941, 951 (Ind. Ct. App. 2017) (trial court's erroneous exclusion of impeachment testimony that went to central questions of case was not harmless), trans. denied.

Thornton v. State, 25 N.E.3d 800, 805 (Ind. Ct. App. 2015) (trial court's violation of confrontation clause in admitting detective's testimony of alleged accomplice's out of court statements was not harmless where jury was unable to reach verdict on all but one charge, and defendant was unable to cross-examine alleged accomplice).

Gil v. State, 988 N.E.2d 1231, 1234 (Ind. Ct. App. 2013) (trial court's failure to provide defendant with written statement of probation terms, and where defendant never acknowledged he understood probation term was not harmless).

D.G. v. State, 947 N.E.2d 445, 449 (Ind. Ct. App. 2011) (failing to assess blind six-year-old victim's competency at juvenile delinquency proceedings involving child molestation allegation was not harmless error).

C. An Issue to Avoid: Ineffective Assistance of Counsel

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

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

If your client is facing a long sentence, you should ***not*** raise an ineffectiveness claim unless there are extraordinary circumstances, such as an error by counsel on the face of the record that is so significant it will surely lead to a reversal. See, e.g., Garland v. State, 719 N.E.2d 1184, 1186 (Ind. 1999) (trial counsel failed to object on proper grounds to Bruton violation). Moreover, counsel should not attempt to raise claims of trial counsel ineffectiveness as fundamental error. See, e.g., Jewell v. State, 877 N.E.2d 864, 873 (Ind. Ct. App. 2007) (finding claims that defense counsel failed to cross-examine and impeach, investigate, and file notice of alibi were "more appropriately addressed as ineffective assistance of counsel" and addressing them as such).

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

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

D. Strategies and Sources for Legal Research

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

1. IPDC Manuals and Website

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

- Confessions Handbook: offers a useful starting point in researching state and federal claims to challenge confessions.
- Pretrial/Criminal Trial Law Manuals: offers a systematic and comprehensive analysis of pretrial and criminal trial issues.
- Evidence: includes citations to controlling and persuasive authority organized around the Indiana Rules of Evidence.
- Juvenile Delinquency: provides a comprehensive overview of procedures and precedent relevant to delinquency proceedings from their beginning to end.
- Search and Seizure Handbook: a detailed outline for litigating search and seizure issues including novel arguments from other jurisdictions.
- Sentencing: provides a thorough overview of the relevant statutes and precedent for numerous types of sentencing challenges.

2. Other Treatises

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

3. Cases

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

a. Argue Federal and State Constitutional Claims Separately

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

b. Disclose Directly Adverse Authority

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

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

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

4. Statutes, Court Rules, and Other Sources

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

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

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

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

E. No Anders Briefs in Indiana

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

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

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

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

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

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

C. BRIEF OF APPELLANT

I. The Rule

Rule 46. Arrangement and Contents of Briefs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Technical and Substantive Requirements

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

A. Front Page and Electronic Briefs

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

B. Table of Contents/Table of Authorities

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

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

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

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

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

C. Statement of Supreme Court Jurisdiction

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

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

D. Statement of Issues

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

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

1. Be Succinct—and Persuasive

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

2. Be Careful about Grouping Issues

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

3. Be Purposeful in Ordering the Issues

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

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

E. Statement of the Case

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

1. Include Only Information Relevant to the Issues Presented

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

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

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

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

3. Cite the Appendix or Transcript

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

F. Statement of Facts

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

1. Focus on Relevant Facts

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

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

2. Tell an Interesting Story

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

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

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

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

4. Be Accurate and Cognizant of the Standard of Review

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

Appellate Rule 46(A)(6)(b) specifically requires that the facts "be stated in accordance with the standard of review appropriate to the judgment or order being appealed." For example, in reviewing a claim of sufficiency of the evidence, an appellate court "considers only the probative evidence and reasonable inferences supporting the judgment to assess whether a reasonable trier of fact could have

found the defendant guilty beyond a reasonable doubt." Brown v. State, 868 N.E.2d 464, 470 (Ind. 2007). This does not mean you cannot include favorable facts or put a positive spin on them. See generally Srivastava v. Indianapolis Hebrew Congregation, Inc., 779 N.E.2d 52, 61 n.3 (Ind. Ct. App. 2002) (observing that rule's language suggests "the door is open to providing facts which are not favorable to the judgment, but are necessary to decide the case based on the standard of review"). It simply means that you must include those facts most favorable to the judgment; you cannot simply pick out the best ones for your client. Defendants do sometimes prevail under this standard, as the defendant did in Brown.

5. Do not be Argumentative

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

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

6. Cite the Transcript or Appendix

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

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

7. Edit for Clarity and Persuasiveness

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

G. Summary of the Argument

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

1. Provide the Big Picture with Specific Reasons

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

2. Check for Flow and Organization

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

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

3. Do More than Repeat Argument Headings

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

4. Omit Citations to Authority

Although not explicitly addressed in the rule, common practice is to omit citations to cases, statutes, and other authorities in the summary of the argument. If a case is particularly significant and well-known, e.g., Batson or Miranda, counsel may mention it without a full citation. Trying to delve into the nuances of particular cases or statutes in the summary of the argument is not advisable. It is unlikely to lead to a succinct or clear summary of the argument.

H. Argument

The Argument section will invariably be the longest and most time-consuming section to write. Part B of this section provides an overview of how you might approach issue selection and research. All that work must eventually make it onto paper in the Argument section, which should be divided into one or more argument headings for each issue or sub-issue. Beyond that, Rule 46(A)(8) provides a few specifics about what must be included.

1. Cogent Reasoning with Citations

Each argument must be "supported by cogent reasoning." This includes citations to supporting authorities (cases, statutes, rules, etc.) and the relevant pages of the Appendix or Transcript.

a. Constitutional claims: federal and state

If a claim is grounded in the federal constitution, be sure to cite the relevant sections of the constitution along with case law that has interpreted that provision. This is necessary to preserve the claim for possible review later in federal court through a habeas corpus petition. Simply citing the constitutional provision is not a cogent argument. Not explaining how the cases apply to your set of facts similarly fails to meet the requirement of a cogent argument.

As explained in Part B, it is important to separate federal and state constitutional claims and argue each separately. Again, simply citing a state constitutional provision is not sufficient. Failing to argue how the state provision differs from the federal provision will likely result in waiver of the claim.

b. Disclose and Respond to Directly Adverse Authority

Be mindful of your ethical obligation to disclose "directly adverse" legal authority under Professional Conduct Rule 3.3(a)(2). You should not cite only the favorable cases. If a case seems directly adverse, you should include it in your brief. The other side and the court will likely find it. This will be the best, and only, opportunity to explain why the case does not doom your claim.

c. Beware of Footnotes

Arguments should be made in text, not in footnotes. See, e.g., 21st Amendment, Inc. v. Indiana Alcohol & Tobacco Commission, 84 N.E.3d 691, 696 n.2 (Ind. Ct. App. 2017). Footnotes are appropriate to explain something tangential to the issue raised but are not appropriate to make arguments. Moreover, because most judges read briefs on a tablet or laptop, footnotes take the reader away from the important body of your brief, which could mean the reader returns in the text in a place that misses an important part of your argument. This is especially concerning when a footnote spills over to a second page.

2. Standard of Review and Key Facts, Including Their Resolution Below

a. Standard of Review

The argument for each issue must include "a concise statement of the applicable standard of review." This should not be viewed as a mechanical requirement satisfied by a quick search and parrots the standard used in the first case that pops up. Careful thought should be given to what the appropriate standard of review should be, and counsel should argue for that standard with appropriate citation to authority.

In essence the standard of review refers to the level of deference to the lower court's ruling; how wrong must the trial court be to warrant reversal? On factual issues, appellate courts give a great deal of deference; on legal claims, the appellate court gives little or no deference. Not surprisingly, "sometimes standards of review decide cases." Robinson v. State, 5 N.E.3d 362, 363 (Ind. 2014).

For example, de novo review is appropriate in reviewing determinations of probable cause or reasonable suspicion. Ornelas v. United States, 517 U.S. 690 (1996). Deferential review leads to varied results, but independent review is necessary to control and clarify legal principles. De novo review in such cases provides law enforcement officers with a clear set of rules to be applied in the future. Id.

Although most evidentiary rulings involve factual matters in which discretion is generally afforded to the trial court, a ruling may be reviewed "de novo because it turns on a misunderstanding of a rule of evidence, specifically the hearsay rule." Hirsch v. State, 697 N.E.2d 37, 40 (Ind. 1998); see also Powell v. State, 714 N.E.2d 624 (Ind. 1999) (holding that a question may be hearsay).

Finally, the standard of review in sentencing claims varies based on the type of challenge brought. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007).

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence -- including a finding of aggravating and mitigating factors if any -- but the record does not support the reasons, or the sentencing statement

> omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91.

However, a challenge to the appropriateness of the sentence is reviewed under a less deferential, almost *de novo* standard. Id. at 491 ("Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize[] independent appellate review and revision of a sentence imposed by the trial court"); see also Cunningham v. State, 469 N.E.2d 1, 8 (Ind. Ct. App. 1984) ("We are in as good a position as the trial court to make these determinations based on the record before us in a proper case. All the material available to the trial court is equally available to us on appeal.").

b. Resolution of Claims in the Trial Court

In addition to the standard of review, the Argument for each issue must include the key "procedural and substantive facts necessary for consideration of the issues presented on appeal, including a statement of how the issues . . . were raised and resolved by [the] . . . trial court." App. R. 46(A)(8)(b). Although important, this information can be dull and should usually not be the opening salvo of each issue. But be sure to include the information somewhere in the Argument. If an issue was not raised in the trial court, it might be necessary to argue it as fundamental error, as explained in Part B. If the issue was raised below and the State or trial court said something that bears particularly poorly on their position, consider including that information. In some cases, a judge's erroneous explanation can lead to reversal. See generally Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019) ("Had the trial court not made the statement at sentencing . . . we would be in a different position.").

3. Argument Headings

Each issue raised must have its own argument heading a/k/a point heading. Headings provide an important visual cue to your readers, allowing them to break the lengthy argument into understandable pieces. In addition, the headings should be persuasive, advancing your position in a single sentence.

a. Spacing and Typeface

Argument headings should be single-spaced and set apart somehow from the rest of the text. Bold is preferable to ALL CAPS, which research shows is the most difficult to read (and many view AS YELLING AT THEM). For ease of reading, you should also indent and align your text on the left margin rather than centering it.

b. Complete Sentences

Many lawyers will make their argument headings an affirmative statement of the Issues Presented. For example, if the Issue Presented is "Whether the criminal confinement statute is unconstitutionally vague as applied to a Defendant who merely lied about a radio contest, which led individuals to leave their workplace to go to his home," the argument heading could read "The criminal confinement statute is unconstitutionally vague as applied to a Defendant who merely lied about a radio contest, which led individuals to leave their workplace to go to his home." Regardless of the language used, an argument heading should be a complete sentence.

c. Sub-Headings

Finally, if the argument for a particular issue is several pages long or has separate components, consider including sub-point headings. These will help guide the reader through the argument by breaking it into its most important pieces. Full sentences are less important here.

4. Citations for Evidentiary Rulings

Rule 46(A)(8)(d) makes special mention of evidentiary rulings, requiring counsel to include a citation "to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C)." The rule does not require, as do jury instructions in (e) below, verbatim quotations of the objections made. Nevertheless, it is important to cite the precise pages where the objections were made and ruled upon. A pretrial motion is usually not sufficient to preserve an error; therefore, it is important to cite the point(s) at which the objection was made at trial.

Finally, if counsel is raising a claim that the trial court erroneously excluded evidence, citation should be made to the offer of proof in the trial court. See generally State v. Wilson, 836 N.E.2d 407, 409 (Ind. 2005) ("The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling.").

5. Verbatim Quotations for Instructional Errors

Unlike subsection (d), which does not require verbatim quotations of evidentiary objections, subsection (e) explicitly requires counsel challenging a jury instruction to quote the instruction "verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." App. R. 46(A)(8)(e). Failure to comply with this requirement may lead to waiver of the claimed error. See, e.g., Hall v. State, 769 N.E.2d 250, 254 (Ind. Ct. App. 2002) (finding an instructional error waived based on non-compliance with Rule 46(A)(8), citing both subsection (a) and (e)); cf. Snell v. State, 866 N.E.2d 392, 395 n.1 (Ind. Ct. App. 2007) (observing that the appellant had failed to include the language of tendered instructions in her brief and failed to cite pages of Appendix where the instructions could be found, but observing that the State had cited the relevant pages—and not applying waiver).

Compliance with this rule is easy, and non-compliance is risky. If you fail to comply with the rule and the State argues waiver in its brief, the best course of action would be to file an amended brief that includes the verbatim instruction and objections. See Section IV.G, infra.

I. Conclusion & Signature

The conclusion will almost always be the shortest section of your brief. It should also be the easiest section to write. In a single sentence provide a "precise statement of the relief sought." For example, "For the foregoing reason, John Smith respectfully requests this Court vacate his conviction for burglary." If the error is one that requires a new trial, "For the foregoing reasons, John Smith respectfully requests this Court reverse his burglary conviction and remand the case for a new trial." If you are asking for something else, be precise—and be sure it is the proper remedy for the type of error alleged. "For the foregoing reasons, John Smith respectfully requests this Court revise his sentence for burglary to the advisory term of ten years."

Be specific. Do ***not*** simply ask the court to "reverse the trial court" or "for all proper and just relief in the premises," whatever that may mean. Moreover, do not include a lengthy summary of your arguments.

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

Finally, as with all filed documents, include a certificate of service as required by Appellate Rule 24(D).

J. Appealed Order

You must attach some sort of document from the Appendix when you file your brief, as required by Rule 46(A)(12). After uploading your brief, the field below will allow upload of a separate attachment. Once filed, each judge will be able to review both the brief and attachment, which will also be available to the public unless the document is confidential.

If you do not attach something, the staff in the clerk's office will refuse to accept the filing.

1. Non-Sentencing Claims

If you are challenging the denial of your request to suppress evidence, attach the trial court's written order denying your motion (if there is one). Sometimes, however, it can be a challenge to find something to attach. You may be raising a sufficiency challenge; the trial court did not address this in any sort of "written opinion, memorandum of decision or findings of fact and conclusions . . . ." In such a case, you could simply append the abstract of judgment. You must attach something.

2. Sentencing Claims

In cases in which you are challenging a sentence, you should include the written sentencing order. If your claim on appeal revolves around improprieties in the sentencing statement, quotations from the transcript may be more helpful to the judges—and potentially your client. Indiana appellate courts are not limited to examining the written sentencing statement but may also examine the trial court's oral sentencing statement. See McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007) ("The approach employed by Indiana appellate courts in reviewing sentences in non-capital cases is to examine both the written and oral sentencing statements to discern the findings of the trial court.").

3. Multiple Claims

Finally, if you are raising multiple claims, you will likely have more than one document to attach. Appellate Rule 46(A)(12) does not limit you to a single attachment. If the judge entered separate orders addressing two claims you have raised on appeal, upload both documents as attachments to your brief.

D. BRIEF OF APPELLEE

I. The Rule

Rule 46. Arrangement and Contents of Briefs

B. Appellee's Brief. The Appellee's Brief shall conform to Section A of this Rule, except as follows:

(1) *Agreement with Appellant's Statements.* The appellee's brief may omit the statement of Supreme Court jurisdiction, the statement of issues, the statement of the case, and the statement of facts if the appellee agrees with the statements in the appellant's brief. If any of these statements is omitted, the brief shall state that the appellee agrees with the appellant's statements.

(2) *Argument.* The argument shall address the contentions raised in the appellant's argument.

(3) *Rule 46(A)(12).* Items listed in Rule 46(A)(12) may be omitted.

II. Practical Considerations

If you find yourself in the enviable position of prevailing in the trial court, the State may appeal. The single most important piece of advice: be sure to file a response. If you are trial counsel and do not feel competent to litigate the appeal, make sure counsel is appointed. Failing to file an appellee's brief will allow the court to reverse the trial court upon a mere showing of *prima facie* error. Newman v. State, 719 N.E.2d 832, 838 (Ind. Ct. App. 1999).

A. Agreement with the Appellant's Statements

The appellate rules specifically allow for the omission of several sections of an appellee's brief if the appellee includes a statement that it agrees with or adopts the Appellant's statements in that section of the brief. This is often done with the Statement of the Case. If the State has accurately summarized the relevant procedural aspects of the case, save yourself and the court some time by simply agreeing with its Statement of the Case.

An appellee should seldom, if ever, agree with the appellant's Statement of Issues or Statement of Facts. As explained in Part C above, considerable time and energy should be spent crafting these sections to make them subtly persuasive. If the State has done its job, you do not want to agree with sections that seek to persuade the court about the State's view of the issues or facts. Rather, you should carefully craft a Statement of Issues that address the same issues but is written in a way persuasive to your client and a Statement of Facts that includes the legally significant facts and any helpful emotional facts crafted in a manner consistent with the standard of review and persuasive to your client's point of view.

Finally, be sure not to regurgitate the trial court's findings of facts, even if they are particularly favorable. Doing so fails to satisfy the requirement that the facts be in "narrative form." GMC v. Sheets, 818 N.E.2d 49, 51 n.1 (Ind. Ct. App. 2004).

B. Argument

Your argument must address the issues raised by the State, even if you think some of them are silly or not particularly persuasive. If an argument is not supported by cogent reasoning, you may argue

that point and cite authority urging the court to find the issue waived. The court of appeals is fairly generous in finding arguments to meet this standard, however, so rely on this approach sparingly—and always respond to the merits of the argument as well.

Finally, adopt an affirmative tone rather than being defensive. It is easy to quote the State's argument and then respond to it, but this is seldom effective. Quoting the State's argument presents it yet again to the court—in the State's language. Avoid "the State argues [quoting the argument]," and instead simply argue the point you'd like to make. Adopt an affirmative tone in responding to the State's argument without again making it.

C. No Appealed Order

Rule 46(B)(3) makes clear that an appellee does not need to append the appealed order. If the State has failed to attach the order as required under Rule 46(A)(12), however, you may and should append the order(s) for the court's convenience.

E. REPLY BRIEF OF APPELLANT/CROSS-APPEALS

I. The Rule

Rule 46. Arrangement and Contents of Briefs

C. Appellant's Reply Brief. The appellant may file a reply brief responding to the appellee's argument. No new issues shall be raised in the reply brief. The reply brief shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service. See Rule 24(D).

D. Cross-Appeals.

(1) *Designation of Parties in Cross-Appeals.* When both parties have filed a Notice of Appeal, the plaintiff in the trial court or Administrative Agency shall be deemed the appellant for the purpose of this Rule, unless the parties otherwise agree or the court otherwise orders. When only one party has filed a Notice of Appeal, that party is the appellant, even if another party raises issues on cross-appeal.

(2) *Appellee's Brief.* The Appellee's Brief shall contain any contentions the appellee raises on cross-appeal as to why the trial court or Administrative Agency committed reversible error.

(3) *Appellant's Reply Brief.* The Appellant's Reply Brief shall address the arguments raised on cross-appeal.

(4) *Cross-Appellant's Reply Brief.* The Cross-Appellant's Reply Brief may only respond to that part of the appellant's reply brief addressing the appellee's cross-appeal.

(5) *Scope of Reply Briefs.* No new issues shall be raised in a reply brief. A reply brief under this section shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service. See Rule 24(D).

II. Practical Considerations

When you receive the State's brief in an appeal, you should review it carefully and decide whether to file a reply. Just as the State gets to go both first and last in closing arguments at trial, the Appellant bears the burden of proof on appeal and also gets to go first and last. The State seldom waives rebuttal argument at trial; appellants should seldom waive the opportunity to file a reply brief.

A. Remember Your Audience

Counsel will not know at the briefing stage which Court of Appeals' judges will be assigned to decide any given case. They may all be long-time criminal practitioners or trial judges that grasp the nuances of your case, or they may be civil lawyers who have never tried a criminal case and have little understanding of the particulars of the issues raised. In any event, it is likely that a law clerk will do most of the drafting of the opinion. The law clerk could be one of the career clerks that is intimately familiar with the issues and diligent in reviewing the record, or the law clerk may have just graduated from law school and not seen or read a criminal case since their first year of law school. Therefore, it is almost always best to file a reply if the State raises any point that is disputable.

B. Purpose: Respond--Not Raise New Issues

The express language of the rule provides: "No new issues may be raised in the reply brief." App. R. 46(C). Case law is in accord. Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005). If you failed to raise a significant issue in your initial brief, such as one premised on a newly issued case, the proper remedy is to seek leave to amend your brief under Rule 47.

C. Keep it Relatively Short and Specific

The State will argue many things. Some of them are crucial points and some are far less important. Do not respond point-by-point to every paragraph of the State's brief. Rather, address the most significant points. For example, if the State argues that a claim is waived, be sure to address it. Failure to file a reply brief could lead the Court of Appeals to address the issue under the prima facie error standard, which will make it considerably easier for the State to prevail. See Buchanan v. State, 956 N.E.2d 124, 127 (Ind. Ct. App. 2011). Moreover, if the State argues that a specific case or statute definitely resolves the issue, argue why that is not correct. Be specific and cite authority. Finally, depending on the structure and arguments in the State's brief, you may want to change the point headings from your original brief to tailor them to the arguments being raised in the reply brief, especially when the State raises something not mentioned in your brief, such as waiver of a claim that was not raised in the trial court.

D. Be Sure to Respond to a Cross-Appeal

If the State raises one or more issues on cross-appeal in its brief, it is imperative to file a reply brief that responds to the cross-appeal. The failure to do so allows the cross-appellant to prevail upon a mere showing of *prima facie* error. Lewis v. Marion County Office of Family & Children, 814 N.E.2d 1022, 1029 (Ind. Ct. App. 2004).

F. ADDENDUM TO BRIEF

I. The Rule

Rule 46. Arrangement and Contents of Briefs

H. Addendum to Brief. Any party or any entity granted *amicus curiae* status may elect to file a separate Addendum to Brief. An Addendum to Brief is not required and is not recommended in most cases. An Addendum to Brief is a highly selective compilation of materials filed with a party's brief at the option of the submitting party. If an Addendum to Brief is submitted, it must be filed and served at the time of the filing and service of the brief it accompanies. An Addendum to Brief may include, for example, copies of key documents from the Clerk's Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony from the Transcript, or full text copies of statutes, rules, regulations, etc. that would be helpful to the Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief. An Addendum to Brief may not exceed fifty (50) pages in length and should ordinarily be much shorter in length. The Addendum to Brief shall have a front page that is styled similarly to the brief it accompanies (see Form App. 43-1), except that it shall be clearly identified as an Addendum to Brief, and the first document in the Addendum to Brief shall be a table of contents. An Addendum to Brief may not contain argument. All pages of the Addendum to Brief, including the front page (see Rule 43(I)) and table of contents, shall be consecutively numbered at the bottom beginning with numeral one; however, the front page, table of contents, and certificate of service shall not be included in the fifty (50) page length limit of this rule.

II. Technical and Substantive Requirements

Before electronic filing, an Addendum was potentially a significant tool in some appeals. Although each judge receives a copy of your brief, it was unlikely in a paper world that most judges would consult the Transcript or Appendix in most cases. Therefore, the Addendum would allow counsel to highlight key documents (beyond the appealed order that is an attachment to your brief under Rule 46(A)(12)) or other exhibits that you believed each judge should see.

In the efiling era, however, judges will read your brief on a screen and have relatively quick and easy access (with a few clicks) to the Appendix and Transcript. In a rare case with an especially important document, counsel might want to file an Addendum for even quicker and easier access. But in most cases, as the text of the rule makes clear, an Addendum is "not recommended."

A. Deadlines

An Addendum must be filed at the same time as the brief it is accompanies.

B. Front Page

An Addendum must include a front page similar to the brief it supports but be titled "Addendum to Appellant's Brief."

C. Documents Included & Page Numbering

The Addendum cannot exceed fifty (50) pages; it should be much shorter. Include only essential documents from the Appendix or excerpts of the Transcript.

1. Include a Table of Contents

The first page inside the cover of the Addendum must be a table of contents that lists all the documents that follow.

2. Number Pages

You should number the pages consecutively, "including the front page (see Rule 43(I)) and table of contents."

3. Include a Verification and Certificate of Service

The Addendum must be served on opposing counsel just as the brief it supports. The last page should therefore include a verification similar to that for an Appendix and a certificate of service similar to that included at the end of your brief.

D. Appropriate Cases

An Addendum should be used selectively in those cases where it is important that its contents are viewed by all the judges in the case. If the material you seek to include is already in your brief (such as a jury instruction, which must be quoted verbatim as explained above), do not file an Addendum. If, however, a certain exhibit is crucial to your case, an Addendum is the appropriate means to allow each judge to view it. If your brief references an ordinance or regulation that may be judicially noticed but is not easily available to the court, consider including it in an Addendum. See, e.g., City of Crown Point v. Misty Woods Props., LLC, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (denying a motion to strike an Addendum that included an ordinance that was not part of the Clerk's Record).

Instead of an Addendum, counsel might consider embedding an exhibit, such as a picture, within the body of the brief. Although Appellate Rule 46 does not explicitly address the issue, many lawyers have included exhibits within a brief. See, e.g, T.H. v. State, 86 N.E.3d 420, 423 (Ind. Ct. App. 2017) (embedding a highly contested estimate for vehicle repairs).

Addenda may sometimes be appropriate when filing a Reply Brief or Petition for Rehearing. They can effectively point out an error in what the Attorney General is arguing, or the court of appeals found. For example, if you and the State disagree about the meaning of crucial testimony or procedures in the trial court, an Addendum is an effective way to allow the judges to read it for themselves. For example, in a juvenile delinquency appeal, the Appellant argued that the juvenile court erred by incorporating all the testimony from a child hearsay hearing into the denial hearing. After incorporation, the State simply rested. The Attorney General responded that there was no separate child hearsay hearing but rather everything that had occurred was part of the denial hearing. To support that incorporation had occurred, the Appellant prepared a short Addendum that included portion of the transcript where the prosecutor referred to the hearing as a "child hearsay hearing" as well as the State's motion requesting such a hearing. The court of appeals agreed with the Appellant's view. L.H. v. State, 878 N.E.2d 425, 429 n.3 (Ind. Ct. App. 2007).

G. AMENDED BRIEFS

I. The Rule

Rule 47. Amendment of Briefs and Petitions

On motion for good cause, the Court may grant leave for a party to file an amended brief or Petition. The motion shall describe the nature of and reason for the amended brief or Petition. The movant shall tender with the motion the amended brief or Petition titled as such on the front page. Except as the Court otherwise provides, the filing of an amended brief or Petition has no effect on any filing deadlines.

II. Technical and Substantive Requirements

The court of appeals is generally quite generous in allowing counsel to file an amended brief, generally granting 90% or more of requests filed each year. The rule requires "good cause," and counsel must file a motion explaining why "good cause" exists to allow the amended brief.

The rule should not be casually invoked as a de facto extension of time because counsel was careless in putting together the brief. If there was a problem, however, it is better to try to cure it with an amended brief than suffer later when an opinion is issued.

The (now former) Indiana Supreme Court administrator has written that a motion to file an amended brief should include at least three basic pieces of information: "(1) a description of the desired amendment(s); (2) some indication of why the amendment(s) are necessary, and (3) information showing why the movant failed to place the desired amendment(s) in the original" document. Kevin S. Smith, Extensions of Time and Motions to Amend, The Appellate Advocate 3 (Spring 2006).

A. Appropriate Cases

Counsel may consider seeking leave to file an amended brief in two general sets of circumstances.

1. Counsel Messed Up

The client should not have to pay for the sins of the lawyer. If you messed something up and learn of the error before an opinion is issued, an amended brief is the most effective way to remedy the error. Some examples include:

- Filed the wrong (not-quite-final) version of the brief.
- Discovered something wrong with the brief after filing.
- Failed to quote an instruction, and the State has argued waiver.
- Raised a weak ineffective assistance of counsel claim and now realize this will burn the client's only ticket to post-conviction relief.

2. The Law Changed after Filing the Brief

If the law changed or a significant new case was issued after you filed your original brief, an amended brief is a better option than simply filing a Notice of Additional Authority. As explained in Part H below, additional authority may only bolster an argument already raised in a brief. A significant new case may create an entirely new or different issue, which must be included in your brief or an amended brief.

B. Tender an Amended Brief with the Motion

The rule requires the moving party to "tender with the motion the amended brief or Petition titled as such on the front page."

H. ADDITIONAL AUTHORITIES

I. The Rule

Rule 48. Additional Authorities

When pertinent and significant authorities come to the attention of a party after the party's brief or Petition has been filed, or after oral argument but before decision, a party may promptly file with the Clerk a notice of those authorities setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, with a parenthetical or a single sentence explaining the authority.

II. Technical and Substantive Requirements

Diligent counsel will keep abreast of new case developments after the filing of a brief, including the weeks or months during which a case is fully briefed and pending a decision.

A. When Appropriate: Bolstering a Claim, not Raising a New Claim

As explained above, an amended brief is the appropriate vehicle to raise an issue that was not raised in your initial brief to the court of appeals. A Notice of Additional Authority simply supplements an argument with an additional case or other authority that supports an argument already briefed. Do ***not*** attempt to raise a new issue through a Notice of Additional Authority.

In Chupp v. State, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005), the Court of Appeals made clear that Rule 48 cannot be used to

> allow a party who failed to present an issue in his appellant's brief to bypass the general rule that un-raised issues may not be presented for the first time in a reply brief by filing a citation to additional authority. Instead, as we read the Rule, where a party has properly presented an issue, he may supplement his brief by providing citations to additional authority to support the argument previously raised.

B. Timing

Rule 48 places no limitation on the timing of additional authority. Common sense, professional courtesy, and effective advocacy do. Ideally, counsel should file additional authority shortly after the new authority is issued by the court or discovered by counsel. Diligent appellate counsel will check the websites of the Indiana Supreme Court and Court of Appeals daily (or at least weekly) for new published opinions that may be relevant to pending cases.

1. Before Oral Argument

After a case is set for oral argument, counsel will often discover one or more cases that are relevant to the issue(s) to be discussed at oral argument. Counsel should alert the court to these authorities before the argument by filing a Notice of Additional Authority. This should be done at least a week in advance to give the judges plenty of time to consider the new authorities as they prepare for oral argument.

A Notice of Additional Authority filed the day before an oral argument or, worse yet, the morning of oral argument may not reach the judges before the argument. If it does, they may not have the time or

inclination to review the authorities and may be understandably frustrated with counsel for such a late filing.

At the January 30, 2009, oral argument in A.B. v. State, 49A02-0806-JV-490, a Deputy Attorney General served Appellant's counsel immediately before the argument. According to the clerk's docket, the notice had been Rotunda filed the previous evening. Judge Bradford, a member of that panel, chastised counsel because Indiana courts do not practice law by ambush. Although an old case may not come to counsel's attention until after the brief is filed, there is seldom an excuse for bringing it to the court's (and opposing counsel's) attention any less than one week before oral argument.

2. After Oral Argument

Counsel should be cautious in filing additional authority after oral argument has been held. If a significant new case was issued or statute amended after oral argument, filing additional authority is entirely appropriate. However, the court of appeals has granted a motion to strike when counsel attempted to use Rule 48 as a surrebuttal to arguments raised at oral argument, citing cases that were issued well before the brief was filed and could have been included in the brief. Raess v. Doescher, 857 N.E.2d 439 (Ind. Ct. App. 2006) (published order).

C. Limited to One-Sentence

A Notice of Additional Authority cannot drone on and on about the importance of a case or other cited authority. Rather, after citing the authority, Rule 48 specifically limits the notice to "a parenthetical or single sentence explaining the authority." There are certainly creative ways to use punctuation and other devices to craft a lengthy sentence, but it should still be ***one*** sentence.

D. Explain Where it Fits

A Notice of Additional Authority must include "a reference either to the page of the brief or to a point argued orally to which the citations pertain." Your brief might be twenty pages or longer. It is important to let the court know precisely where and how the additional authority fits.

E. Supplemental Brief

Indiana used to allow advocates to file "Notes on Oral Argument" for the limited purpose of answering questions from oral argument. Kent Zepick, Notes on Oral Argument (citing Wiltrout, *Indiana Practice*, Sec. 2738 (1967)). In 2012, the Indiana Supreme Court made clear such a filing "without leave of court" is no longer allowed. Reed v. Reid, 969 N.E.2d 589 (Ind. 2012). More recently, after lengthy filings under a number of different captions, the Indiana Supreme Court issued an order to "amplify *Reed*'s admonition: After transfer briefing is closed, further arguments on the merits—by any name—may be filed only by leave of this Court or in the limited form Rule 48 authorizes for notices of additional authority." Care Grp. Heart Hosp., LLC v. Sawyer, 93 N.E.3d 743, 745 (Ind. 2018).

In a rare case where a truly unexpected or significant issue arises during oral argument, counsel may request permission of the court to file a post-argument submission. If the court appears amenable during the oral argument, counsel should promptly file a Motion for Leave to File Post-Argument Submission and tender the proposed submission with the request for leave. Examples from Purvi Patel v. State, 71A04-1504-CR-166 are available on the IPDC website.