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After the Appellate Opinion is Issued
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Prompt action is required as soon as you receive an opinion from the Indiana Court of Appeals. You should read the opinion carefully and make a tentative decision about the best course of further action. Whatever the decision, you must promptly advise your client of the decision. Lawyers have been disciplined for failing to notify clients promptly of appellate decisions, especially when it precludes the client from being able to seek further review. In re Roberts, 842 N.E.2d 1293 (Ind. 2006).

There are three primary options after receiving an adverse opinion from the court of appeals:

- Seek rehearing.
- Seek transfer.
- Do not seek further review, while providing the client with timely and appropriate information about his or her options to do so.

While deciding the appropriate course of action in a case involving an unpublished decision from the court of appeals, you should also consider whether to file a motion to publish. Keep in mind the varying deadlines. A motion to publish must be filed within fifteen days; rehearing is due within thirty days; and a petition to transfer is due in forty-five days (unless rehearing was sought, in which case the petition is due in thirty days).

Petitions for Rehearing/Petitions for Transfer

Petitions for Rehearing and Petitions to Transfer are explained separately in the sections that follow. Each has a very different purpose, and careful thought should be given to which should be pursued. As explained in more detail in those sections, rehearing is usually appropriate when the court of appeals' opinion misstates the record in a significant way or when the court of appeals has made a mistake that it is likely to fix. It is not a place to argue trivial points or to rehash an argument that was squarely addressed. Transfer is appropriate to raise issues of broad statewide importance that warrant the Indiana Supreme Court's intervention. Filing a petition to transfer is also necessary to preserve federal constitutional claims that might later be pursued in a petition for habeas corpus.

In cases in which a colorable claim for rehearing or transfer is presented, counsel should file the appropriate petition—even if the county will not reimburse the costs of the filing. Counsel may seek the assistance of the Public Defender Council in researching the claim or may seek its assistance in finding an attorney to pursue transfer or assist in the drafting of the petition. Joel Schumm, who runs the Appellate Clinic at Indiana University Robert H. McKinney School of Law (Indianapolis), may also be able to help.

A petition for rehearing is not a prerequisite to a petition to transfer. Each serves a unique purpose. Therefore, when an opinion offers a partial victory to each side, one side might pursue rehearing while the other pursues transfer. In such situations, the briefing deadlines must be followed for each petition. Ind. Appellate Rule 55. As a practical matter, however, the Indiana Supreme Court will not review the transfer filings until after the court of appeals has resolved the rehearing issues.

No Further Review

Categorically refusing to file transfer or rehearing in all cases is simply not appropriate. See generally ABA Criminal Justice Prosecution Function and Defense Function Standard 4-8.3. Adverse decisions not only affect a client's liberty but also may affect many defendants in the future who could be harmed by the application of the precedent to their cases.

If a case presents no grounds for further review, it is imperative to communicate promptly with your client, advising him or her of their right to seek rehearing and/or transfer (either pro se or by retaining another lawyer) as well as the strict deadlines for seeking further review. In October of 2007, the clerk's office adopted the following policy:

> **Procedure for Processing Pro Se Petitions for Transfer or Rehearing When an Attorney is Listed as Representing the Pro Se Filer**
>
> When a pro se Petition for Transfer or for Rehearing has been filed, and there is an attorney of record listed in the appeal, the Case Managers in the Clerk's Office have been instructed to:
>
> (1) File the pro se Petition as of the post-mark date;
>
> (2) Call the attorney of record, as a courtesy, and let him/her know that a Petition for Transfer or Rehearing has been filed.
>
> **There is no need for the attorney of record to file a Motion to Withdraw Appearance!**
>
> **If the pro se individual files a Petition for Transfer or Rehearing and the attorney of record later files either a timely Petition for Transfer or Petition for Rehearing, the attorney's petition will be filed, and the pro se petition will be "unfiled" and returned to the pro se individual. The Court will not receive a copy of the pro se Petition.

The Clerk of Courts confirmed in August 2019 that this procedure is still correct, although his office does not call counsel of record to let them know when a pro se petition has been filed.

Thus, you should not withdraw your appearance simply because you believe your client may file a petition for rehearing or a petition to transfer pro se. Rather, you should provide your client with early notice of your intention not to pursue transfer or rehearing and the deadlines for filing. It would be helpful to include a copy of the applicable appellate rules and encourage the client to contact you with questions.

Motions to Publish Memorandum Decisions

If the court of appeals decision was an unpublished one, you should consider whether to move to publish the opinion. As explained in the following section, the odds of a grant of transfer are much higher with a published decision. Therefore, you might consider moving to publish a decision in which your client lost and may not want to publish a decision in which your client prevailed.

Certification of Opinions and the Importance of Following Through

Finally, it is important to remember that trial courts are not to take any action in a case until the opinion is certified. Ind. Appellate Rule 65(E). Certification does not occur until rehearing and transfer are concluded—or the time for seeking rehearing and transfer has expired. The appellate clerk will make an entry on its docket when an opinion is certified as final and will send a copy of the opinion with a certification sheet attached to the opinion to the trial court.

In rare cases, you might be able to secure release after a favorable opinion from the Court of Appeals. In Ripps v. State, 968 N.E.2d 323, 326 (Ind. Ct. App. 2012), the Court of Appeals ordered a defendant released immediately after hearing oral argument in a probation revocation appeal that it decided would be reversed: "courts have inherent authority to require immediate compliance with their orders and decrees in order to give effective relief."

Most trial courts will promptly and correctly institute any relief ordered on appeal after receiving a certified opinion. This may require setting a new trial, reducing a sentence, or vacating one or more convictions. If the court does not promptly take action as required by the appellate opinion, you might mention the issue to court staff or may find it necessary to file a motion with the trial court.

If the trial court refuses to take action as required by the appellate opinion, the proper remedy is a motion in aid of appellate jurisdiction. See generally Tyson v. State, 593 N.E.2d 175, 179 (Ind. 1992) (observing writs are sometimes necessary "to enforce a decision"). Moreover, if the trial court orders the improper relief on remand, a writ may also be appropriate but "only in those comparatively few instances where it would serve the interest of judicial economy or serve to prevent an irreparable harm." KeyBank N.A. v. Michael, 770 N.E.2d 369, 374 (Ind. Ct. App. 2002), trans. denied. Finally, judges who fail to take action ordered by the appellate court may also be subject to disciplinary action. See In re Newman, 858 N.E.2d 632 (Ind. 2006).

A. PETITIONS FOR REHEARING

I. The Rule

Rule 54. Rehearings

A. Decisions From Which Rehearing May be Sought. A party may seek Rehearing from the following:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) an order dismissing an appeal; and

(4) an order declining to authorize the filing of a successive petition for post-conviction relief.

A party may not seek rehearing of an order denying transfer.

B. Time for Filing Petition. A Petition for Rehearing shall be filed no later than thirty (30) days after the decision. Rule 25(C), which grants a three-day extension of time for service by mail or third-party commercial carrier, does not extend the due date, and no extension of time shall be granted.

C. Brief in Response. No brief in response to a Petition for Rehearing is required unless requested by the Court, except that the Attorney General shall be required to file a brief in response to the Petition in a criminal case where the sentence is death. A brief in response to the Petition shall be filed no later than fifteen (15) days after the Petition is served or fifteen (15) days after the Court issues its order requesting a response. Rule 25 (C), which provides a three- day extension for service by mail or third-party carrier, may extend the due date, however, no other extension of time shall be granted.

D. Reply Brief Prohibited. Reply briefs on Rehearing are prohibited.

E. Content and Length. The Rehearing Petition shall state concisely the reasons the party believes rehearing is necessary. The Petition for Rehearing and any brief in response are governed by Rule 44.

F. Form and Arrangement. The form and arrangement of the Petition for Rehearing and any brief in response shall conform generally to Rule 43 and shall include a table of contents, table of authorities, statement of issues, argument, conclusion, word count certificate, if needed, and certificate of service.

The focus of Appellate Rule 54 is primarily technical and procedural. It tells us when rehearing can be sought, the deadlines, and the technical requirements of the petition. Decisional law sheds some additional light on petitions for rehearing, and the practical experience of appellate lawyers provides some clues on how best to use this tool.

II. Technical Requirements: Deadlines and Content

A. Deadlines

Petitions for rehearing must be filed within thirty (30) days of an adverse decision. Thirty days means thirty days; there are no extra three days for service by mail. Extensions of time are not allowed. Ind. Appellate Rule 35(C).

B. Form and Content

A petition for rehearing must include the following sections: table of contents, table of authorities, statement of issues, argument, conclusion, and certificate of service. If the petition exceeds ten pages, it must also include a word count certificate. Ind. Appellate Rule 44(D) & (E).

III. Substantive and Practical Considerations

In Griffin v. State, 763 N.E.2d 450 (Ind. 2002), the Indiana Supreme Court summarized some key points regarding petitions for rehearing.

- A petition for rehearing gives an appellate court the "opportunity to correct its own omissions or errors."
- It is limited only to "points raised in the original brief."
- It should not "ask the court generally to re-examine all the questions in the record, or all the questions decided against the party filing it."
- Errors "must be articulated with precision."

More recently, the court took a broader view in granting rehearing essentially to overrule a previous 3-2 opinion after a change in membership. Hopper v. State, 957 N.E.2d 613 (Ind. 2011). The dissent aptly noted that "although declaring a rehearing petition must . . . go beyond a mere assertion that the original ruling was erroneous, the majority nonetheless entertains and effectively grants the State's petition even though the State's claim is that this Court's original opinion was wrongly decided." Id. at 624 (Rucker, J., dissenting).

A. Petitions for Rehearing in the Court of Appeals

After receiving a decision that is less than total victory, appellate counsel has three basic options: (1) do nothing and let the court of appeals' opinion be the final word (unless the State seeks further review); (2) file a petition for rehearing with the court of appeals; or (3) file a petition to transfer with the Indiana Supreme Court.

A petition for rehearing is not a prerequisite for transfer. The types of issues raised on rehearing are generally different from those raised on transfer. See Part B., infra.

1. Reasons to file a petition for rehearing

Although most petitions for rehearing are denied, the appellate courts have granted petitions in some cases and either reversed their earlier decision or offered important clarification of a point. See, e.g., J.J. v. State, 858 N.E.2d 244 (Ind. Ct. App. 2006) (reversing juvenile adjudications in a published

decision on rehearing after earlier affirming them in an unpublished memorandum decision); Branum v. State, 829 N.E.2d 622, 623 (Ind. Ct. App. 2005) (holding that "on remand, the trial court must determine whether Branum has the financial ability to comply with the support order before any contempt finding is made"). Moreover, a claim may be better received on transfer if the Indiana Supreme Court sees that the error was first brought to the attention of the Indiana Court of Appeals on rehearing.

Rehearing is most appropriate in the following four instances.

a. The court of appeals failed to address an issue that was raised and argued in the briefs.

The court may inadvertently skip over an issue or may explicitly note that it is not addressing it. For example, if the court remands the case for resentencing, it will probably not address a claim of inappropriateness under Appellate Rule 7(B). This is not grounds for rehearing, as the 7(B) claim may be obviated by the remand. If, however, an issue was fully briefed, not addressed, and not appropriately addressed only on remand, rehearing is appropriate to provide the court an opportunity to address the issue. See, e.g., Brown v. State, 856 N.E.2d 739 (Ind. Ct. App. 2006), vacated on transfer (granting rehearing to address a proportionality claim that was "fully raised before the trial court as well as this Court" when it would "serve the interests of judicial economy"). By unpublished order, the Indiana Supreme Court recently granted transfer in Ervin v. State, 49A02-1002-CR-000123, a case in which the Appellant raised three issues, but the court of appeals addressed only two. Rehearing had been sought and denied in that case, but another panel could address the issue differently. In any event, the court of appeals should be given an opportunity to fix an overlooked issue before you seek transfer.

b. A significant new legal issue arose after briefing was completed in your appeal.

As noted in Griffin, petitions for rehearing are generally limited to "points raised in the original brief." If a new legal development surfaces after a brief is filed, counsel should consider filing an amended brief under Appellate Rule 47. If, however, an important decision is issued near the time of the court of appeals' decision, a petition for rehearing may be appropriate to bring that issue to the court's attention. For example, in the wake of the confusion regarding sentencing claims immediately after Blakely v. Washington, 542 U.S. 296 (2004), many lawyers filed petitions for rehearing, and the court of appeals seemed willing to grant the petitions to address these issues. See, e.g., Wickliff v. State, 816 N.E.2d 1165 (Ind. Ct. App. 2004), trans. denied. The court may even grant rehearing to address a recent Seventh Circuit case, even though it is not binding. See, e.g., Jackson v. State, 830 N.E.2d 920 (Ind. 2005).

c. The court's opinion is likely to cause future confusion.

A published opinion from the court of appeals will likely be cited in the future. Therefore, if it is written in a way that is likely to cause future confusion, a petition for rehearing may be appropriate to allow the court an opportunity to "clarify" its decision. See, e.g., Williams v. State, 840 N.E.2d 433, 440-41 (Ind. Ct. App. 2006) (granting State's petition for rehearing to strike words "significant" and "due to" and replace them with "combined" and "of" to make clear that maximum sentence in a case was inappropriate in light of "the combined mitigating weight of Williams' guilty plea and documented mental illness"); Schumm v. State, 868 N.E.2d 1202, 1204 (Ind. Ct. App. 2007) (correcting earlier statement that a tendered instruction was not a pattern instruction and thanking counsel for bringing the matter to the court's attention). As explained below, it may be better in some cases to raise such a claim on transfer.

d. The court of appeals has misstated the facts in a material way.

Judges at the court of appeals rely on law clerks, who often write drafts of the facts and verify the record citations. It is unlikely that the judge who authors an opinion will review the transcript or appendix; it is extremely unlikely that the two panel judges who vote on the opinion will consult the record. Therefore, a misstatement of the record will go unnoticed if not disclosed to the judges through a petition for rehearing. If the factual misstatement is not material, the court may deny the petition or grant it for the limited purpose of addressing the "slight inaccuracy," which "has no impact on our analysis of the case." Wells v. State, 853 N.E.2d 143 (Ind. Ct. App. 2006). This basis for rehearing may be the least likely to lead to relief, although such petitions may be particularly important to clients depending on the nature of factual inaccuracy.

2. Reasons not to file a petition for rehearing

Appellate counsel may find several faults with the court of appeals' opinion, but some of these complaints are likely better not raised at all or raised in a petition to transfer.

a. The court of appeals ignored an important case that was cited in the brief.

If a brief cites and discusses an important case, the court of appeals will likely address it in some fashion in its opinion. If the case is on point and conflicts with other authority (either from the court of appeals or supreme court), this is grounds for a petition for transfer. If the court ignored the case the first time around and ruled adversely, giving the court another opportunity to address the case is probably not worthwhile. The issue is set up well for transfer.

b. The decision breaks new ground and will cause chaos.

If the court of appeals issues an opinion that seems likely to wreak havoc on trial courts or otherwise in the criminal justice system, a petition for rehearing may be appropriate. However, this will give the panel a chance to mitigate the damage. If it is truly an atrocious decision (and is published), skipping right to transfer is probably the better route.

c. This panel really did not like the defendant.

Sometimes disdain for a client is oozing off the pages of an appellate decision. If the three judges who issued a decision seem particularly hostile to a client or the claims raised, rehearing is unlikely to bear any fruit. If rehearing is granted, the court will at best acknowledge an error but still find it is not one of consequence.

B. Petition for Rehearing to the Indiana Supreme Court

Many of the same considerations outlined above apply in filing petitions for rehearing to the Indiana Supreme Court. The primary difference is that the Supreme Court's decision is probably the last word. Although seeking certiorari to the United States Supreme Court is an option, the odds of the Court granting a petition are a fraction of one percent.

1. On transfer, the court did not address an issue raised in the court of appeals.

When the Indiana Supreme Court grants transfer, it "shall have jurisdiction over the appeal and all issues as if originally filed in the Supreme Court." Ind. Appellate Rule 58(A). Although the court will sometimes summarily affirm or adopt part of the court of appeals' decision, Ind. Appellate Rule 58(A), it

must address in some fashion every issue raised in the brief to the court of appeals. When it fails to do so, a petition for rehearing is appropriate and will likely be granted. See, e.g., Kellems v. State, 849 N.E.2d 1110, 1112 (Ind. 2006) (noting failure to address issues raised in court of appeals and granting rehearing to address one dispositive issue leading to reversal); Trimble v. State, 848 N.E.2d 278 (Ind. 2006) (addressing two issues raised in court of appeals and not addressed in supreme court's original opinion).

2. The court misstated a material fact or legal requirement.

If the Indiana Supreme Court rendered a decision that misstates a material fact or legal requirement, a petition for rehearing may be in order. See, e.g., Corcoran v. State, 827 N.E.2d 542, 544 (Ind. 2005) (observing defendant "accurately points out that this statement misstates the requirements of Indiana Criminal Rule 24(H)" but concluding that "mistake does not affect our analysis or conclusion").

3. The decision creates a conflict or is likely to cause future confusion.

If the court issues a decision that creates a conflict with other decisions or decides a new question in a way that is likely to cause future problems, a petition for rehearing is appropriate to give the court an opportunity to address the issue. The petition in Anglemyer v. State, 868 N.E.2d 482 (Ind.), on reh'g, 875 N.E.2d 218 (Ind. 2007), provides an example of this.

4. The membership of the court has changed.

Although much less likely, it is possible that a 3-2 opinion of the Indiana Supreme Court could be undone with a change in membership. Hopper v. State, 957 N.E.2d 613 (Ind. 2011), which is discussed above, is one example of such a change, albeit to the benefit of the State.

C. Response to Rehearing

If the State files a Petition for Rehearing, a response may be appropriate. A response is never required, but one court of appeals' opinion noted that the State had failed to respond to a defendant's petition and therefore applied a *prima facie* standard of review, just as it does when a party fails to file an appellee's brief. Aguilar v. State, 820 N.E.2d 762, 763-64 (Ind. Ct. App. 2005), vacated on other grounds by 827 N.E.2d 31 (Ind. 2005). This decision appears to be in direct conflict to the language of Appellate Rule 56(C), which does not require a response. Nevertheless, it is possible a future panel of the court of appeals may take the same approach in the future.

The same technical requirements apply to a response to rehearing. However, it must be filed within fifteen days of the filing of the petition for rehearing. Ind. Appellate Rule 54(C). It should include the same sections as the petition for rehearing: table of contents, table of authorities, statement of issues, argument, conclusion, certificate of service, and a word count, if needed. Ind. Appellate Rule 54(F).

Even though not required, filing a response to a State's petition for rehearing will usually prove useful to the court in deciding that the petition should be denied. Moreover, an effective response may deter the State from filing a petition to transfer once rehearing is denied.

D. Effect of rehearing being granted

An appellate court may grant a general rehearing or rehearing on a particular point. Appellate lawyers should be specific in their request to the court. If a general rehearing is granted, "the case stands before the court as if it had never been decided." Griffin, 763 N.E.2d at 450. If rehearing is granted only on a particular point, "the original opinion will be modified as to that point only." Id.

B. PETITIONS TO TRANSFER

I. The Rules

Rule 57. Petitions to Transfer and Briefs

A. Applicability. This Rule applies to Petitions to Transfer an appeal from the Court of Appeals to Supreme Court after an adverse decision by the Court of Appeals.

B. Decisions From Which Transfer May be Sought. Transfer may be sought from adverse decisions issued by the Court of Appeals in the following form:

(1) a published opinion;

(2) a not-for-publication memorandum decision;

(3) any amendment or modification of a published opinion or a not-for-publication memorandum decision; and

(4) an order dismissing an appeal.

Any other order by the Court of Appeals, including an order denying a motion for interlocutory appeal under Rule 14(B) and an order declining to authorize the filing of a successive petition for post conviction relief, shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.

C. Time for Filing Petition. A Petition to Transfer shall be filed:

(1) no later than forty-five (45) days after the adverse decision if rehearing was not sought; or

(2) if rehearing was sought, no later than thirty (30) days after the Court of Appeals' disposition of the Petition for Rehearing.

Rule 25(C), which provides a three day extension for service by mail or third-party commercial carrier, does not extend the due date, and no extension of time shall be granted.

D. Brief in Response. A party may file a brief in response to the Petition no later than twenty (20) days after the Petition is served. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, may extend the due date; however, no other extension of time shall be granted.

E. Reply Brief. The petitioning party may file a reply brief no later than ten (10) days after a brief in response is served. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, may extend the due date; however, no other extension of time shall be granted.

F. Form and Length Limits. A Petition to Transfer, brief in response, and any reply brief are governed by Rules 43 and 44. No separate brief in support of the Petition to Transfer shall be filed.

G. Content and Arrangement of Petition to Transfer. The Petition to Transfer shall concisely set forth:

(1) *Question Presented on Transfer.* A brief statement identifying the issue, question, or precedent warranting Transfer. The statement must not be argumentative or repetitive. The statement shall be set out by itself on the first page after the cover.

(2) *Table of Contents*. A table of contents containing the items specified in Rule 46(A)(1).

(3) *Background and Prior Treatment of Issues on Transfer.* A brief statement of the procedural and substantive facts necessary for consideration of the Petition to Transfer, including a statement of how the issues relevant to transfer were raised and resolved by any Administrative Agency, the trial court, and the Court of Appeals. To the extent extensive procedural or factual background is necessary, reference may be made to the appellate briefs.

(4) *Argument.* An argument section explaining the reasons why transfer should be granted.

(5) *Conclusion.* A short and plain statement of the relief requested.

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

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

H. Considerations Governing the Grant of Transfer. The grant of transfer is a matter of judicial discretion. The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer.

(1) *Conflict in Court of Appeals' Decisions.* The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.

(2) *Conflict with Supreme Court Decision.* The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important issue.

(3) *Conflict with Federal Appellate Decision.* The Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals.

(4) *Undecided Question of Law.* The Court of Appeals has decided an important question of law or a case of great public importance that has not been, but should be, decided by the Supreme Court.

(5) *Precedent in Need of Reconsideration.* The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) *Significant Departure from Law or Practice.* The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.

Rule 58. Effect of Supreme Court Ruling on Petition to Transfer

A. Effect of Grant of Transfer. The opinion or not-for-publication memorandum decision of the Court of Appeals shall be final except where a Petition to Transfer has been granted by the Supreme Court. If transfer is granted, the opinion or not-for-publication memorandum decision of the Court of Appeals shall be automatically vacated except for:

(1) those opinions or portions thereof which are expressly adopted and incorporated by reference by the Supreme Court; or

(2) those opinions or portions thereof that are summarily affirmed by the Supreme Court, which shall be considered as Court of Appeals' authority.

Upon the grant of transfer, the Supreme Court shall have jurisdiction over the appeal and all issues as if originally filed in the Supreme Court.

B. Effect of the Denial of Transfer. The denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court. No Petition for Rehearing may be filed from an order denying a Petition to Transfer.

C. Supreme Court Evenly Divided. When the Supreme Court is evenly divided upon the question of accepting or denying transfer, transfer shall be deemed denied. When the Supreme Court is evenly divided after transfer has been granted, the decision of the Court of Appeals shall be reinstated.

The focus of Rules 57 and 58 is primarily technical and procedural. It gives the deadlines and technical requirements of the petition and effect of transfer being granted or denied. Unlike Rule 54 for rehearing, however, Rule 57(H) provides six "principal considerations" in granting transfer. Counsel should remain ever mindful of these considerations in the drafting of a petition to transfer, response, or reply.

II. Technical Requirements: Deadlines and Content

A. Deadlines

Petitions for transfer must be filed within forty-five (45) days of an adverse decision. This deadline was previously thirty days; it was extended effective January 1, 2019. However, if rehearing was sought and granted or denied, the deadline is thirty (30) days from the ruling on rehearing. The other side seeking rehearing does not toll or affect the deadline to seek transfer. Extensions of time are not allowed according to Appellate Rule 35(C). However, the supreme court has allowed extensions or late filings in rare circumstances (weather, severe illness—or an acknowledgement that counsel blew a deadline). An especially unusual belated request was granted in Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015) (petition filed 8 months late).

B. Form and Content

A petition for transfer must include the following sections: questions presented on transfer, table of contents, background and prior treatment of issues on transfer, argument, conclusion, and certificate of service. Ind. Appellate Rule 57(G). If the petition exceeds ten pages, it must also include a word count

certificate that it contains no more than 4,200 words. Ind. Appellate Rule 44(D) & (E). After the cover page, the second page should include the "Question(s) Presented on Transfer" and nothing else. The third page will be the table of contents. No table of authorities is required, although the court may find one helpful if the petition cites a significant number of cases or other authorities. The rules allow requests for additional words, although you should only ask in unusual cases and make a compelling case. There is a motion on the IPDC website where the State Public Defender was granted additional words.

C. Decisions Reviewable on Transfer

Rule 57(B) is explicit about the types of decisions from which transfer may be sought. Transfer may be sought from published or unpublished decisions, including amendments or modifications of those decisions (i.e., opinions on rehearing), as well as orders dismissing an appeal. Transfer may *not* be sought from orders denying interlocutory appeals or orders denying permission to file a successive post-conviction relief petition. Transfer may *not* be sought from any other decision from the court of appeals, such as a ruling on a stay or appeal bond. However, the Indiana Supreme Court has signaled a slight degree of flexibility in its rules for exceptional cases:

> This Court can still consider a Petition to Transfer which does not fall within the categories established in [the predecessor rule.] However, consideration of such a petition should be a rare occurrence, and should be done only where a special need has been demonstrated. The grounds for transfer are relatively inclusive and permit consideration of most any important question which might arise. Parties seeking transfer should make a concerted effort to frame their arguments in terms of these established categories. If a party finds it impossible to urge its point within these categories, he should so state, explaining why it is impossible to do so and why the Supreme Court should still consider his Petition to Transfer.

Tyson v. State, 593 N.E.2d 175, 180 (Ind. 1992) (quoting Baker v. Fisher, 260 Ind. 513, 515, 296 N.E.2d 882, 883 (1973)). In Tyson, the court accepted the case for "the limited purpose of outlining the standards and procedures applicable to requests for bond pending completion of a criminal appeal." Id. at 176. More recently, however, the court has made it clear that transfer may not be sought in cases in which appeal bonds have been granted by the court of appeals. See, e.g., Laughner v. State, 82A01-0104-CR-141 (order dated May 7, 2001, dismissing the State's petition to transfer).

In A.A. v. Eskenazi Health/Midtown CMHC, 97 N.E.3d 606, 610 (Ind. 2018), the supreme court exercised its "broad discretion" to allow a party that had prevailed in the court of appeals to seek transfer.

> Our appellate rules authorize parties aggrieved by an "adverse decision" from the Court of Appeals to seek transfer to our Court. Ind. Appellate Rule 56(B). . . . Our rule of appellate standing from a trial court is clear. "A party cannot appeal from a judgment favorable to him."
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> Of course, Appellate Rule 56(B) does not limit the Court's jurisdiction to entertain Eskenazi's petition. We have "broad constitutional authority to exercise appellate review and oversight," Tyson v. State, 593 N.E.2d 175, 180 (Ind. 1992), in discharging our inherent "duty to act as the final and ultimate authority" in pronouncing Indiana law. Transfer is merely the process by which the Court fulfills its law-giving function, and the Court may choose to exercise that function even in cases that do not comply strictly with the letter of the appellate rules for seeking transfer. See Tyson, 593 N.E.2d at 180. Compare Ind. Const. art. 7, § 4 ("The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules ...."), with App. R. 1 ("The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.").

Id. (internal citations omitted)

Counsel would be well-advised to seek transfer only in cases included in the rule, unless making an extraordinary showing for a deviation from the rule. Routine motions do not meet this showing.

III. Substantive and Practical Considerations

There are three important considerations when filing a petition to transfer: (A) crafting a petition likely to secure the court's review, (B) arguing claims that will be forfeited if not raised on direct appeal, and (C) preserving federal constitutional issues for federal habeas review.

A. Securing the Indiana Supreme Court's Review

Approximately fifteen to thirty petitions to transfer are read and discussed by the justices at the Indiana Supreme Court's weekly conference. Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4 (Spring 2007). In recent years, less than 10% have been granted. Therefore, it is essential that a petition include a "wow" factor, i.e., a compelling reason why the particular issue has a reach beyond the particular case. Id. Rule 57(H) list the six grounds that often help meet that standard. These include conflicts in decisions (between the Indiana Court of Appeals and Supreme Court or federal courts), undecided questions of law, precedent in need of reconsideration, or significant departures from law or practice.

In focusing on these considerations, the primary function of a petition to transfer is not to "cover again the same ground briefed to the Court of Appeals" but rather is to convince the Indiana Supreme Court why your case is worthy of the discretionary review afforded a small percentage of cases that come before the court. Frank Sullivan, Jr. Petitions to Transfer: New Rules, New Procedures, Res Gestae 8-9 (Feb. 1996). Justices have lamented that many transfer petitions merely regurgitate the arguments and pleas for error correction that were raised in the court of appeals rather than taking the broader view of why the issues presented are ones of wide impact worthy of the court's attention. Counsel should be mindful of their audience and purpose in drafting each of the sections of the petition.

1. Question(s) Presented on Transfer

The first page after the cover of a petition to transfer is a prominent place and should be used to your client's advantage. This "brief statement identifying the issue, question, or precedent warranting Transfer . . . must not be argumentative or repetitive." App. 57(G)(1). This does not mean that it should be bland. Rather, the question presented should "succinctly and persuasively convey the heart of the case and highlight its 'wow' points, not merely state a general legal issue or parrot the language of Rule 57(H)." Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4, 5 (Spring 2007). The question should capture the reader's attention while stating the specific legal issue and the deleterious future impact on Indiana law if not addressed. For example, here are a few questions from successful petitions to transfer:

- In the wake of the 2005 amendments to Indiana's sentencing statutes, must trial courts continue the venerable requirement of a sentencing statement, including the articulation and weighing of aggravating and mitigating circumstances?

- May a police officer who believes a suspect has drugs in his mouth apply a chokehold to the suspect's throat when such a procedure poses significant health risks, safer alternatives are available to recover the evidence, and the officer has received no training on chokeholds?

- Does Indiana value the contributions that a loving, involved, sober, non-abusive Father makes to the life of his son? Or is it appropriate to terminate a Father's parental rights because of a few missed court appearances, services, or scheduled visits, even though the trial court made specific findings that the child loves his father, that the two share a bond, and that it "would be best for [the child] to be able to keep visiting his father," while living with his maternal grandmother?

2. Background and Prior Treatment of Issues on Transfer

The next section of the petition must briefly set forth "the procedural and substantive facts necessary for consideration of the Petition to Transfer," including how the issue was resolved by the trial court and court of appeals. App. R. 57(G)(3). Reference may be made to the appellate briefs. Id.

Do not assume the justices will read your briefs to the court of appeals; most will begin with the transfer petition and may never go back to look at the earlier briefing. Therefore, make sure the petition stands on its own—explaining the relevant facts in a persuasive way. Although you may copy and paste some parts of the brief from the court of appeals, keep in mind the limited goal and likely fewer/different issues on transfer in crafting this section.

Although the court is primarily concerned about the legal issue presented in your petition and its statewide impact, the particular facts of the case may make the case more appealing to the court. This section is your opportunity to present the relevant facts in a persuasive light. It is not an opportunity to be deceptive by misstating facts or leaving out relevant facts that bear negatively on your case. Finally, the section should end by telling the court how the issue(s) were resolved in the courts below. This entire section can usually be written in one or two pages, as shown in the sample petitions available on the IPDC website.

3. Argument

The argument section will be the most detailed one and must explain "the reasons why transfer should be granted." App. R. 57(G)(4). Although there may be a good deal of useful material in your brief to the court of appeals, resist the temptation to routinely copy large parts of it here. The purpose of a petition to transfer is different; your focus "should primarily be an argument as to why the Supreme Court should grant transfer," although it is appropriate to "cross-reference the analysis of the merits of the underlying legal argument" from the briefs to the court of appeals. Lockridge v. State, 809 N.E.2d 843, 843 (Ind. 2004). A mere reference to arguments or authorities from the court of appeals' briefs is not sufficient without an explanation of the reasons why transfer should be granted. Id. Rather, "the most helpful transfer briefs combine argument as to why the court should . . . grant transfer and argument on the merits." Id.

In making this argument, it is important to remember your audience. The justices will be reviewing many petitions in a short period of time. A clear organization with effective point headings will make your argument more understandable. Including irrelevant information or making several claims that have little merit will be a distraction and reduce the possibility of transfer being granted. Moreover, no matter how wrong the court of appeals or State may have been, "hyperbolic contentions and snide, vitriolic comments simply annoy the Justices . . . ." Kevin S. Smith, Written Advocacy Tips for Supreme Court Practice, The Appellate Advocate 4, 6 (Spring 2007).

Finally, write with the "generalist," and not the "specialist," in mind. Id. Some of the justices have limited experience with criminal law, and those who have been in or near the trenches may not have been there for several years. Although your petition should not speak down to them, it should seize the opportunity to persuade someone unfamiliar with your specific issue to want to read about it and want to

write an opinion for all in the state to read. It is useful to have a lawyer without special knowledge of your issue read your petition to see if it assumes too much or is confusing. Id.

4. Conclusion

The conclusion should be simple and straightforward: a "short and plain statement of the relief requested." App. R. 57(G)(5). Rather than rehashing the argument section, it should simply "respectfully request" the court do something specific, such as "grant transfer and reverse the convictions" or "grant transfer and reduce the sentence to ten years."

B. Last Chance for Review on Direct Appeal

Petitions to Transfer should generally be limited to claims that were vetted in the trial court and in the briefs to the court of appeals. See, e.g., Wurster v. State, 715 N.E.2d 341, 348 (Ind. 1999) ("The new grounds advanced in the petition for transfer do not warrant reversal at this stage."). However, even if a claim was not squarely raised below, it may be appropriate to raise it in a petition to transfer. Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015), is an example of an issue that was not raised earlier in the proceedings, but the supreme court granted a belated petition to transfer because it could not "find any reason to treat" the defendant differently than her two co-defendants who prevailed on appeal. More recently, the majority granted transfer to address a different claim than the ones squarely raised, over a dissent justice's reference to the "Court's impulse to do justice in this case." Bedolla v. State, 123 N.E.3d 661, 670 (Ind. 2019).

If the United States Supreme Court or Indiana Supreme Court decide an important new case that might entitle your client to relief, it is imperative to raise that issue on direct appeal. A petition to transfer or petition is the last viable stage of direct appeal.[1] Claims known and available on direct appeal may not be raised in a petition for post-conviction relief. See, e.g., Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006). Therefore, if the significant case was decided after you received an opinion from the court of appeals, you should raise the issue in a Petition for Rehearing. If that fails, it should be raised in a petition for transfer, as some defendants did successfully with claims under Blakely v. Washington, 542 U.S. 296 (2004). See, e.g., Smylie v. State, 823 N.E.2d 679, 690 (Ind. 2005) (observing that defendants must have "added a Blakely claim by amendment or on petition to transfer" to have preserved it from being barred by retroactivity rules).

C. Preserving Federal Constitutional Claims for Habeas Review

A final, but important, consideration in seeking transfer is the preservation of federal constitutional claims that might later be brought on federal habeas corpus review. Although appeals of state court convictions must be brought through the state appellate system, claims of federal constitutional error may later be brought in federal court through a writ of habeas corpus. Known as the "Great Writ" for centuries, more recently habeas procedures have become statutory. See 28 U.S.C. §§ 2241-2266. In the Habeas Act of 1867, Congress extended the writ to "cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States."

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[1] A petition for certiorari to the United States Supreme Court may also be part of a direct appeal, but such petitions are rarely granted. Counsel should not expect an issue raised for the first time in a petition for certiorari to be granted relief by the Supreme Court. Odds are much better with the Indiana Supreme Court.

As explained in Section IV, it imperative to include the constitutional basis for any claim that is grounded in the constitution in your brief to the court of appeals. If one or more claim is grounded in a provision of the federal constitution, it may later be pursued in federal habeas proceedings as long as the state courts were given a "full and fair opportunity" to litigate the claim. Wright v. West, 505 U.S. 277 (1992). At a minimum this requires counsel to have cited the specific constitutional provision and made a cogent argument that included citation to relevant authority on the issue.

Defendants must also exhaust their state court remedies before pursuing relief in federal court. In O'Sullivan v. Boerckel, 526 U.S. 838 (1999), the Court held that exhaustion requires seeking discretionary review from the state's highest court. Thus, it is imperative to raise any federal claim that might later be pursued in a habeas proceeding in a timely petition to transfer. Failing to do so will foreclose your client's ability to pursue habeas relief.

D. Brief in Response to Transfer

If your client prevailed in the court of appeals, the Attorney General may seek transfer. You have an opportunity to respond in ten pages or 4,200 words. The response is due in twenty days; extensions will not be granted unless you make an extraordinary showing and cite Appellate Rule 1. The rules do not prescribe a format, App. R. 57(D), but you should include at least an argument section and conclusion, although a summary and questions presented section might also be useful. There is no reason to repeat factual information argued in the State's petition to transfer. If something is incorrect or misleading, however, this would the opportunity to make that point.

Filing a response to transfer is almost always a good idea. It offers an opportunity to explain why the case does not present issues worthy of a grant of transfer. Indeed, at least one former justice chastised counsel (both from the State and for the defense) when not filing a response to transfer. The response should not merely contend that the court of appeals reached the correct result. If the opinion is published, the result is of limited importance if the court's reasoning conflicts with other precedent or is likely to cause problems in future cases. Your response must look beyond the result to the court's reasoning and its future impact.

Normally, a response will urge the court to deny transfer because the issues raised do not involve a conflict in decisions or present a significant issue. However, some cases do present significant conflicts or important new issues of statewide importance. In such cases, it may be effective strategy to acknowledge that transfer may be appropriate but then present a detailed argument explaining how the conflict or new issue should be resolved in a way favorable to your client. This will be your only opportunity to file a written response. Even if oral argument is granted, you will not be given another opportunity to file a written response.

E. Reply Brief in Support of Transfer

If the State files a response to your petition to transfer, you have the final opportunity to file a very short reply. The reply cannot exceed three pages or 1,000 words. It is due in only ten days, and the Rules prohibit requests for extensions.

The rules do not prescribe a format or require specific sections. Most replies will include only an argument section, although it may be effective to begin with a short summary or catchy introduction. This is your final opportunity to "wow" the justices into taking the case. This is best done by responding to points raised by the State instead of simply repeating points already made in your petition. Finally, if the State agrees that transfer is appropriate or possibly appropriate, this is the final opportunity to respond to the merits of the issues in writing.

MOTIONS TO PUBLISH

IV. The Rule

Rule 65. Opinions and Memorandum Decisions

A. Criteria for Publication. All Supreme Court opinions shall be published in the official reporter. A Court of Appeals opinion shall be published in the official reporter and be citable if the case:

(1) establishes, modifies, or clarifies a rule of law;

(2) criticizes existing law; or

(3) involves a legal or factual issue of unique interest or substantial public importance.

Other Court of Appeals cases shall be decided by memorandum decision that are not published in the official report and are not citable except as provided in (D). A judge who dissents from a memorandum decision may designate the dissent for publication in the official reporter if one (1) of the criteria above is met.

B. Time to File Motion to Publish. Within fifteen (15) days of the entry of the decision, a party may move the Court to publish in the official reporter any memorandum decision which meets the criteria for publication in the official reporter.

C. Official Reporter. West's Northeastern Reporter shall be the official reporter of the Supreme Court and the Court of Appeals.

D. Precedential Value of Memorandum Decision. Unless later designated for publication in the official reporter, a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.

V. Technical Requirements a Motion to Publish

The Rule provides little guidance about the form of motions to publish. The motion must adhere to the general requirements explained in Appellate Rule 34 and Section III(A) of this manual.

A. Length

Motions cannot exceed ten (10) pages or 4,200 words. Ideally, a motion to publish will not exceed two or three pages, as shown in the samples posted on the IPDC website.

B. Content

The motion should expressly inform the court which of the three criteria for publication apply. The two most common are "(1) the decision establishes, modifies, or clarifies a rule of law" or "(3) the decision involves an issue of unique interest or substantial public importance." Many decisions in some way clarify or modify existing case law. Issues that arise frequently in criminal cases, such as the contours of an appropriate traffic stop, are arguably issues of substantial public importance when clear law on the specific point does not exist. It is imperative in the motion to publish that counsel argue

precisely and specifically how the new case changes or clarifies the existing law in a significant way that warrants the case being published.

C. Deadline

Rule 65(B) requires filing the motion to publish within fifteen days after the not-for-publication decision was issued. This deadline changed effective January 1, 2015; the deadline was previously thirty days. Motions are presented to the same three judges who decided the case and are usually ruled upon within a couple of weeks. Although there is no deadline for a ruling, the judges usually rule well in advance of the deadline for a petition to transfer. As explained below, transfer is granted far more often in published opinions than in unpublished ones.

VI. Practical Considerations

All decisions of the Indiana Supreme Court are published in the Northeastern Reporter and become binding precedent for all courts in the state. Approximately one-quarter of the decisions of the Indiana Court of Appeals are published. The remaining are designated "not-for-publication" memorandum decisions. The unpublished decisions cannot be relied upon as precedent, an only those issued on or after January 1, 2023 may be cited for persuasive value.

As explained in an article by the Indiana Supreme Court administrator that was reprinted in the November 2005 issue of the Indiana Defender, there is a much higher likelihood that transfer will be granted when the court of appeals' opinion is published than with unpublished decisions. More recent statistics show that transfer is sometimes thirty times more likely in published decisions compared to memorandum/unpublished ones. The Defender article suggests that lawyers who win in the court of appeals in an unpublished decision should "think twice" about seeking publication of the decision because it may "snatch defeat from the jaws of victory." This is certainly sound advice—to an extent.

A. Criteria for Publication Must Be Met

Ideally, decisions that meet any of the three grounds for publication will be ordered published by the court of appeals when the opinion is issued. The criteria, however, are fairly broad, and reasonable minds may differ. Before filing a motion to publish, counsel should be sure to have a respectable argument that at least one of the three grounds exists.

B. Publication of Wins and Partial Wins

If a court of appeals' decision breaks new legal ground, publication can serve an important purpose for the criminal defense bar. If the decision is unpublished, it cannot be relied upon by anyone, anywhere in the future. Moreover, if it is an issue that is likely to arise in the future, such as a mistake that the same judge makes repeatedly, publication also serves an important purpose.

These reasons to file a motion must be balanced against the increased risk of the case becoming a transfer target. You know the case better than anyone, and if the court of appeals did a good job of addressing the claims in an opinion that is consistent with precedent and policy-related concerns, the Indiana Supreme Court is unlikely to grant transfer—regardless of whether the court of appeals' opinion is published. See generally Ind. Appellate Rule 57(H) (grounds for transfer) & Part V.B. of this manual. If the opinion is flawed in one or more of these ways—or involves a new or controversial issue likely to be of interest to some members of the court—you may serve your client best by ***not*** filing a motion to publish. If the State seeks transfer, your response can accurately inform the court that the issue presented is not of much state-wide significance because the court of appeals' opinion is in no way binding.

C. Publication of Losses

In light of the increased likelihood of transfer being granted of a published decision, lawyers who lose in the court of appeals should consider the possibility of moving to publish a decision. As explained above, the Indiana Supreme Court is much more likely to grant transfer of a published decision. An unpublished decision is not precedent, and there is little reason for the court to be concerned about it having the sort of significant, state-wide impact that underlies the considerations for transfer.

A fundamental question in making this decision is: Just how bad is the court of appeals' decision? If it is especially poorly reasoned or inconsistent with the precedent, the Indiana Supreme Court will probably not want it to stand as precedent for trial courts around the state to rely upon in the future. Although the denial of transfer does not technically enhance the pedigree of a court of appeals' opinion, Ind. Appellate Rule 58(B), at least some of the justices have spoken proudly in public about how seriously they take their review on transfer.

C. PETITIONS FOR WRIT OF CERTIORARI (TO THE UNITED STATES SUPREME COURT)

The United States Supreme Court has discretionary jurisdiction to review issues of federal constitutional law from state courts. The Court receives more than 8,000 petitions for writs of certiorari each year, and it issues formal written opinions in about eighty or ninety cases. The chances of the Court taking any given case are about one percent.

A. Grounds for Certiorari

The first question you should ask yourself before pursuing a petition for certiorari is whether you have an issue likely to get the Court's very limited attention. Your issue must be one of significant nationwide impact. According to Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

B. Secure Admission

Before filing any documents in the Supreme Court, an attorney must be admitted to practice before the Court. This requires an attorney to have been admitted to a state bar for at least three years and be sponsored for admission by two members of the Supreme Court bar. The application and instructions are available on the Court's website: https://www.supremecourt.gov/filingandrules/supremecourtbar.aspx.

C. Deadline for Petition for Certiorari

A petition for writ of certiorari must be filed within ninety days of the final Indiana appellate opinion. Supreme Court Rule 13(1). Counsel may request an extension of no more than sixty days. Supreme Court Rule 13(5).

D. Read the Rules

Counsel should carefully consult the Court's rules and other helpful information on the Court's website: http://www.supremecourtus.gov/ Beyond the website, Stern and Gressman's Supreme Court Practice, now in its ninth edition, is widely regarded as the bible in the field.

E. Review Successful Petitions

In preparing a petition for certiorari, it is often helpful to review petitions from similar cases. Ideally, counsel will review a successful petition, but any petition written by an experienced advocate will be helpful. Petitions are available through Westlaw and Lexis, and some may be accessed for free through Findlaw or by searching legal blogs.

F. Talk to an Experienced SCOTUS Practitioner

If you have a strong issue, you should consider enlisting the help of an experienced Supreme Court practitioner. The staff attorneys at the Indiana Public Defender Council may be able to help locate someone to assist you.

Some Indiana appellate defenders have also enlisted the help of prominent law professors or Supreme Court advocates through law school Supreme Court Clinics, who have then served as lead counsel in cases from Indiana.