CHAPTER THIRTEEN
Interlocutory Appeals, Habeas and Mandamus Proceedings
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INTERLOCUTORY APPEALS, HABEAS AND MANDAMUS PROCEEDINGS

I. OVERVIEW

There are several ways to have an Indiana appellate court review a trial court's pretrial actions. One method is to take an original action to the Indiana Supreme Court seeking a writ of mandamus or a writ of prohibition. An original action is concerned only with jurisdictional issues, and only appropriate where the lower court has clearly exceeded its jurisdiction or failed to act where it has a clear duty to act. For example, in State ex rel. Bramley v. Tipton Circuit Court, 835 N.E.2d 479 (Ind. 2005), the Indiana Supreme Court granted a writ of mandamus ordering the release of a pretrial detainee where the trial court denied release under Criminal Rule 4(A). Mandamus actions are discussed in IPDC Pretrial Manual, Chapter 13 § II.

A habeas corpus petition is a summary proceeding, brought in a trial court, aimed at obtaining the release of a prisoner who is unlawfully detained. Habeas petitions are discussed in Part III of this chapter.

Some pretrial decisions, such as bail determinations, are final appealable orders. Other pretrial orders may be reviewed on interlocutory appeal if certain requirements are met. Appellate Rule 14(A) defines categories of appealable interlocutory orders. The Indiana Court of Appeals has discretionary authority to consider appeals from non-final orders under Rule 14(B). Huff v. House, 452 N.E.2d 1015, 1016 (Ind. Ct. App. 1983) (former Appellate Rule 4(B)). Actions which might be challenged before trial include illegal detention without bail, a discovery order involving privileged communications, challenges to grand jury proceedings, and the denial of the right to a speedy trial. Appeals and interlocutory appeals are discussed in IPDC Pretrial Manual, Chapter 13 § IV.

Finally, the State has statutory authority to appeal adverse decisions in criminal cases in limited circumstances, as discussed in IPDC Pretrial Manual, Chapter 13 § V.

II. MANDAMUS ACTIONS (ORIGINAL ACTIONS)

A. BASICS

1. Jurisdiction is the Only Issue

Actions commenced in the Supreme Court seeking writs of mandamus or prohibition are concerned solely with the question of jurisdiction. *Orig. Act. R.* 1(B).

A writ of mandamus will issue where an Indiana court has clearly exceeded its jurisdiction, or where there is a failure to perform a clear, absolute, and imperative legal duty. State ex rel. Civil City of South Bend v. Court of Appeals of Indiana, 406 N.E.2d 244 (Ind. 1980); State ex rel. Goldsmith v. Superior Court of Marion County, Criminal Division No. 4, 463 N.E.2d 273 (Ind. 1984).

a. Interpret "Jurisdiction" Broadly

"Lack of jurisdiction" need not be used exclusively to connote the absence of any competence in a court to act at all in a proceeding; it may also signify that some fundamental principle of law disempowers the particular action which the court is taking in a matter otherwise within its competence to adjudicate. Pulliam v. Allen, 466 U.S. 522, 532-36 (1984) (dictum). See also Amsterdam, Anthony, *trial manual 5 for the defense of criminal cases*, §313 (1989).

b. Possible Grounds

When a pretrial order in a criminal matter is: (a) is plainly wrong; or (b) is wrong by force of a constitutional guarantee AND imposes adverse consequences upon the defendant that may be irremediable at a later stage, the case for writ would seem to be strong.

See also Amsterdam, Anthony, *trial manual 5 for the defense of criminal cases*, §313 (1989).

c. What Original Actions Are Not

(1) Writs in Aid of Appellate Jurisdiction

Orig. Act. R. 1(F) provides:

> Petitions for writs in aid of appellate jurisdiction are not original actions governed by these Rules. Those petitions are to be filed in the court having initial appellate jurisdiction of a pending appeal or of an appeal about to be filed. The authority of the Supreme Court to issue writs in aid of its appellate jurisdiction is Appellate Rule 4(B)(4) and Appellate Rule 8. The authority of the Court of Appeals to issue writs in aid of its appellate jurisdiction is Appellate Rule 8.

(2) Writs of Mandamus or Prohibition Against Administrative Agencies

Orig. Act. R. 1(E) provides:

> Complaints filed pursuant to Ind. Code § 34-27-3-1 et seq. for writs of mandamus or prohibition against administrative agencies and the members thereof are not original actions governed by these Rules. Those complaints are to be filed in the trial court having jurisdiction over the action.

(3) Substitute for Missed Appeal

Orig. Act. R. 1(C) provides: Original actions are viewed with disfavor and may not be used as substitutes for appeals.

> State ex rel. Hulse v. Montgomery Circuit Court, 561 N.E.2d 497 (Ind. 1990) (original action cannot be used as substitute for missed appeal).

2. Supreme Court Will Not Adjudicate Rights or Merits of Case

Rights which are at issue in criminal cases where writs of mandate or prohibition are sought (e.g., change of venue, bail, speedy trial), must often be adjudicated. Original actions are not designed to adjudicate a right or establish a duty. State ex rel. Fadell v. Porter Superior Court, 475 N.E.2d 310 (Ind. 1985).

Original actions do not establish the substantive merits of the case before the trial court. State ex rel. Ely v. Allen Circuit Court, 261 Ind. 419, 304 N.E.2d 777 (1973).

3. Timing/Burden of Proof

Rules of Procedure for Original Actions govern these proceedings.

Where relator (party who commences original action) seeks to require judge to take certain actions, that party must show court had a "clear duty" to do so.

> State ex rel. Petry v. Madison County Superior Court, 573 N.E.2d 884 (Ind. 1991) (a request for writ of mandate or prohibition is an appeal to supreme court's supervisory and equitable powers, thus a litigant must seek such relief as soon as he reasonably can).

4. Parties to Original Actions

The "Relator" is the party who commences original action. *Orig. Act. R.* 1(D).

The "Respondent" is the party (or parties) against whom the action is brought. The Respondents are always "another Indiana state court and the judge or judges thereof." In rare instances, a court clerk may be an additional Respondent. Orig. Act. R. 1(D).

5. Supreme Court's Jurisdiction-- Orig.Act.R. 1(A)

Supreme Court has exclusive original authority under Art. 7, § 4 of the Indiana Constitution to supervise "the exercise of jurisdiction by other courts of the State of Indiana." See Ind. Appellate Rule 4(B)(3).

B. PROCEDURE FOR MAKING APPLICATION

The following summary of the Rules of Procedure for Original Actions is not a substitute for reading the rules themselves in their entirety before preparing an Application.

1. Trial Court

a. File Written Petition

Petition must be in writing, and must allege:

(1) trial court's absence of jurisdiction, or
(2) trial court's failure to act when it was under a duty to act.

See *Orig.Act.R.* 2(A) and 3(A). See also *Orig. Act.R.* 3(A) (4).

State ex rel. Riggs v. Vigo Circuit Ct., 236 Ind. 587, 142 N.E.2d 214 (1957) (issue must be presented to trial court in such a manner that allegation of error can be understood, and supreme court can review trial court's ruling on the basis of same facts).

State ex rel. Anderson-Madison County Hosp. Dev. Corp. v. Sup. Ct. of Madison County, 245 Ind. 371, 199 N.E.2d 88 (1964) (even where it seems clear court understands issue and will not correct its own error, supreme court requires written motion be filed with trial court).

b. Denial of Motion, or Failure to Rule

See *Orig.Act.R.* 2(A).

PRACTICE POINTER: *Orig. Act. R.* 2(A). If the trial judge delays ruling on the motion, relators may rely on TR 53.4, which provides that repetitive motions or motions to reconsider are deemed denied if not ruled on within five days. ICLEF, *Appellate Practice*, 1991, section on Original Actions by Karl Mulvaney. These may be used where the court attempts to avoid the issue. An Emergency Writ may be used when time is of the essence.

c. Not Applicable in Actions of Change of Venue from Judge or County

Orig. Act. R. 2(A) provides:

> Except in original actions involving a change of venue from the judge or county, no petition for a writ of mandamus or prohibition will be entertained unless the Relator has raised the jurisdictional question by written motion which the trial court has denied or not ruled upon timely. The motion shall allege the absence of jurisdiction of the respondent court or the failure of the respondent court to act when it was under a duty to act.

2. Seek Supreme Court Relief as Soon as Possible

Orig. Act R. 3(A) (2) requires that the petition be made "expeditiously after the jurisdiction of the respondent court became an issue." The petition shall also include a concise, verbatim statement of the precise relief sought. Orig. Act R. 3(A) (6)

State ex rel. Petry v. Madison County Superior Ct., Div. No. 3, 573 N.E.2d 884 (Ind. 1991) (defendant's request for writ of mandate directing trial court to discharge him would be denied on basis of laches, where defendant waited 22 months after trial court denied his first motion for discharge before seeking writ in supreme court).

State ex rel. Kaufman v. Lake Circuit Ct., 768 N.E.2d 431 (Ind. 2002) (relator complained that court allowed one of its employees to enter an appearance and procure a change of judge long after the deadline for the client's automatic right to change of judge expired; although a court employee's appearance in a case before that court is improper, writ denied because the relator delayed several months before seeking it).

3. Bring Petition on Relation of the State

Petition is brought on the relation of the State.

TR 17(A) requires that "[e]very action shall be prosecuted in the name of the real party in interest." Older case law indicates that failure to bring proceeding in name of State is grounds for dismissal. Krusen v. Sheriff of Wayne County, 240 Ind. 710, 168 N.E.2d 71 (1960).

However, failure to name State may be justified by a real party in interest under TR 17(A)(2), which provides:

> ...No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced initially in the name of the real party in interest.

To be safe, it is recommended that original actions be brought on the relation of the State.

4. Application Papers - Requirements

Application papers for writ shall include:

(a) the Petition for Writ of Mandamus or Prohibition, *Orig. Act. R.* 3(A);
(b) the Brief, *Orig. Act. R.* 3(B);
(c) the Record of Respondent court proceedings, *Orig. Act. R.* 3(C);
(d) the filing fee or Affidavit of Indigency, *Orig. Act. R.* 3(D); and
(e) Writ forms, *Orig. Act. R.* 3(E).

a. Verified Petition for Writ

Verification of accuracy of original action record usually by relator's attorney. Relator with personal knowledge of pertinent facts may verify. The following is an acceptable verification: "I verify under penalties of perjury that the documents included in this record of proceedings are accurate copies of documents filed, tendered for filing, or entered in the respondent court." *Orig. Act. R.* 3(C).

NOTE: Petition which establishes right to relief sought must be as free of factual dispute as possible and supplemented with affidavits to establish facts not otherwise shown on the record.

b. Supporting Brief

Relator shall submit a separate supporting brief with the relator's petition, setting forth verbatim the relevant parts of all cases, statutes, and other authorities relied upon, but need not otherwise conform to rules applicable to appellate briefs. The brief need not be bound. Neither a petition nor a brief shall exceed ten (10) pages or 4,200 words. Orig. Act. R. 3(B).

c. Certification of Records, Exhibits, Transcripts

At the time the relator submits the original action petition, the relator shall submit a record of the respondent court proceedings. The record shall include current copy of chronological case summary. Any transcript of evidence shall be submitted and certified

by the appropriate court reporter. Record need not be bound like an appellate appendix but shall contain a table of contents at the beginning and shall be paginated to allow citation to the record. No single volume of an electronically submitted record of proceedings may exceed 250 pages or fifty megabytes (50 MB). *Orig. Act. R.* 3(C).

(a) Only exhibits necessary to support alleged jurisdictional issue. ICLEF, *Appellate Practice*, 1991, section on Original Actions by Karl Mulvaney. Some degree of over-inclusiveness is the safer course if there is doubt.
(b) Clerk of trial court must certify record.
(c) If transcripts are included, they must be certified by court reporter and filed in trial court clerk's office, as evidenced by a clerk's certificate. *Orig.Act.R.* 3(C).

d. Filing Fee

Filing fee must be tendered with the original action petition. No fee is required in original action prosecuted as a pauper cause or on behalf of a governmental unit. A relator seeking pauper status shall submit an affidavit of indigency detailing Relator's assets and financial condition and seeking waiver of filing fee. *Orig. Act. R.* 3(D).

e. Proposed Form for Alternative and Permanent Writs

Both an Alternative and Permanent Writ form may be filed with petition. See *Orig. Act. R.* 3(E). Rule 3(A) requires a precise request.

5. Emergency Writ

Where trial court action which causes irreparable injury is imminent, relator may apply for an emergency writ. An emergency writ will have effect of temporarily staying lower court from acting until the Supreme Court can hear and resolve the jurisdictional issue. *Orig. Act. R.* 3(E) (1).

State ex rel. Raines v. Madison Superior Court, Room 3, 268 Ind. 623, 377 N.E.2d 1343 (1978) (following grant of writ of habeas corpus the State, in an original action, sought an emergency writ of mandate in prohibition; held, where habeas corpus petitioner challenged action of parole board in revoking his parole, trial court properly assumed jurisdiction and was under no duty to transfer cause to court of conviction; temporary writ of mandate and prohibition made permanent).

Applications requesting an emergency writ will be submitted to the Chief Justice, if available, or to the Acting Chief Justice for a determination as to whether a sufficient emergency exists to require a stay.

6. Submission, Filing and Service of Application Papers

Application papers may be submitted conventionally or electronically. Requirements for conventional submission are specified in Orig. Act. R. 2(B)(1). For electronic submission, see Orig. Act. R. 2(B)(2).

The Clerk shall not file any application papers until they are reviewed by Supreme Court Services. Any documents submitted after 4:30 p.m. or on a weekend or holiday will not be reviewed until the next business day.

a. Prosecutor, Trial Court, Attorney General

In criminal cases, service must be made on the trial court, on the prosecuting attorney and on the Attorney General. *Orig. Act. R.* 2(D)(3). State ex rel. Banks v. Hamilton Superior Court, 261 Ind. 426, 304 N.E.2d 776 (1973).

b. Service on Respondents

Relator shall serve Respondents, and all interested parties contemporaneously with the relator's writ submission. *Orig. Act. R.* 2(B)(1).

c. Manner of Service

Except for petitions for emergency writs, all petitions for writs of mandamus or prohibition may be made in person, by mail, or electronically. If emergency relief is requested, relator must submit the application papers to Supreme Court Services in person after personal service on respondents and all interested parties. Otherwise, service on respondents and interested parties shall be made in the same fashion as service on Supreme Court Services.

(1) Personal Service or Service by Mail

When personal service or service by mail is made, relator shall submit the original and one copy of application papers, including the record. All application papers shall by typewritten on 8 ½ x 11-inch white, opaque, unglazed paper of a weight normally used in legal typing and printing, and shall be reproduced by a copying or duplicating process that produces a clear, black image.

(2) Electronic Submission

Petitions may be submitted through the Indiana Electronic Filing System (IEFS). Relators who submit electronically must also provide advance or immediate notice to Supreme Court Services by calling (317) 232-2540 and by email, with all application papers attached to original.actions@courts.in.gov. When an emergency writ is sought, the Relator must serve a copy of each application paper as set out in Rule 2(D)(2) via IEFS, email, or personal services.

C. APPLICATION DENIED

Orig. Act. R. 5(B) provides:

If the petition is denied, an order of denial shall be entered expeditiously. The denial of the petition will end the proceedings, regardless of whether the Court has conducted a hearing.

Orig. Act. R. 5(C) provides:

No petitions for rehearing or motions to reconsider shall be filed after final disposition of the original action.

Original Action petitions that do not include the six enumerated items and a statement for precise relief shall be rejected by the Chief Justice or Acting Chief Justice. *Orig. Act. R.* 3(A).

D. HEARING AND SUBSEQUENT PROCEEDINGS

1. Hearing on Petitions

The Supreme Court may set a petition or emergency writ petition for hearing. *Orig. Act. R.* 4(A).

No testimonial or documentary evidence shall be offered or received at hearing. *Orig. Act. R.* 4(B). See also State ex rel. Wall v. Cass Circuit Court, 233 Ind. 192, 117 N.E.2d 126 (1954).

State ex rel. Rooney v. Lake Circuit Court, 236 Ind. 345, 140 N.E.2d 217 (1957) (record must be made in trial court, and/or by affidavit).

2. Proceedings After Issuance of Writ

a. Trial Court has 20 Days to Respond

Following issuance of an Alternative Writ, the trial court has twenty (20) days to file a return. *Orig. Act. R.* 3(E) (2); *Orig. Act. R.* 5(A). The return must either show compliance with the writ or state reasons why writ should not be made permanent. *Orig. Act. R.* 3(E)(2).

(1) Compliance Renders Original Action Moot

If the return shows trial court's compliance with the writ, the Supreme Court will dismiss the original action as moot. *Orig. Act. R.* 5(A).

(2) Noncompliance - Relator May File Brief Within 5 Days

If the return contests the writ, the Relator may file a brief in opposition to the return within five (5) days after service of the return. The Supreme Court will then issue a written order or opinion to dispose of the original action. *Orig. Act. R.* 5(A). The Court may alter, by order, any time limit established by this Rule.

b. No Petitions for Rehearing or to Reconsider

Orig. Act. R. 5(C) provides:

> No petitions for rehearing or motions to reconsider shall be filed after final disposition of the original action.

E. EXAMPLES OF MANDATABLE ISSUES

Original actions are appropriate wherever the trial court has a clear duty to act, and has not acted, or has no jurisdiction to act as it purported to act but has acted. *Orig. Act. R.* 2(A).

Issues such as speedy trial, double jeopardy, discovery, change of venue, and the right to state-paid expert consultants and investigative services seem particularly suited to interlocutory review by mandamus and prohibition.

1. Speedy Trial Violations - CR 4

State ex rel. O'Donnell v. Cass Superior Ct., 468 N.E.2d 209 (Ind. 1984); State ex rel. Cox v. Superior Ct. of Madison County, Div. III, 445 N.E.2d 1367 (Ind. 1983); State ex rel. Hirt v. Marion Superior Ct., 451 N.E.2d 308 (Ind. 1983); State ex rel. Garvin v. Dearborn Circuit Ct., 257 Ind. 631, 277 N.E.2d 370 (1972); and State ex rel. Logan v. Elkhart Sup. Ct., 969 N.E.2d 590 (Ind. 2012).

State ex rel. Henson v. Washington Circuit Ct., 514 N.E.2d 838 (Ind. 1987) (although defendant's failure to object to initial date of trial, which was nine days beyond one-year deadline, waived his speedy trial rights as of first trial date, he did not waive the right to have trial on that date; failure to try defendant as of first date outside one-year limit, without demonstration of why cause was not tried, required discharge of defendant).

State ex rel. Bramley v. Tipton Circuit Ct., 835 N.E.2d 479 (Ind. 2005) (acquiescence in scheduling of trial date outside the six-month period provided in Criminal Rule 4(A) does not automatically waive the right to release from pretrial confinement on the defendant's own recognizance once the six months pass).

2. Right to Counsel

Trial courts have the authority and duty to appoint counsel to represent indigent defendants and to require money be appropriated for that purpose. Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940).

State ex rel. Grecco v. Allen Circuit Ct., 238 Ind. 571, 153 N.E.2d 914 (1958) (trial counsel refused to prosecute appeal because defendant could not pay fee, defendant sought to have counsel appointed. State must supply counsel to indigent defendants, and judge may be mandated to do so in connection with a direct appeal).

State ex rel. White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941) (trial counsel withdrew his appearance because not experienced in appeals; trial court ordered to appoint appellate counsel).

Counsel appointment may be conditioned upon a showing that the funds requested are "reasonably necessary for the operation of the court," and that no "specific fiscal or other governmental interests are adversely affected by the order [mandating appropriation of funds] to such a degree as to require that such orders be set aside or modified." In re Appropriation of Funds for the Cass Superior Ct. for 1982, 436 N.E.2d 1131 (Ind. 1982); In the Matter of the Mandate of the Shelby Superior Ct., 275 Ind. 316, 416 N.E.2d 1260 (1981).

On a court's overriding authority over matters relating to its operations, see Carlson v. State ex rel. Stodola, 220 N.E.2d 532 (Ind. 1966).

3. Special Judge

State ex rel. Kindred v. Morgan Circuit Ct., 455 N.E.2d 328 (Ind. 1983) (denied writ of prohibition to prevent judge from continuing to preside in proceedings and writ of mandamus requiring resubmission of panel of special judge candidates, relator argued court without jurisdiction to amend panel after one party had struck but before other party had such opportunity; relator failed to demonstrate clear and obvious emergency, which would result in substantial injustice, existed because his trial was not to be conducted by a judge he struck nor by a judge he had no opportunity to strike, but by a judge whose name was on every panel offered to the relator).

State ex rel. Neal v. Hamilton Circuit Ct., 230 N.E.2d 775 (Ind. 1967) (relator filed verified motion for a change of judge with affidavits establishing an undisputed case of prejudice; no counter affidavit filed. Regardless of a statute or rule, court stated relator entitled to change of judge).

See IPDC Pretrial Manual, Chapter 5 for a discussion of the right to a change of judge.

4. Jurisdictional Conflicts in Trial Courts

With jurisdictional conflicts in trial courts, the Supreme Court's review of original action is appropriate. State ex rel. Peak v. Marion Crim. Ct. Div. I, 246 Ind. 118, 203 N.E.2d 301 (1965).

State ex rel. Smith v. Marion Circuit Ct., 230 Ind. 21, 101 N.E.2d 272 (1951) (although Circuit and Superior Court have concurrent jurisdiction over bail, the Circuit Court could not be used to collaterally attack a bail determination made in Superior Court, where the action was then pending).

Teagarden v. Criminal Ct. of Marion County, Division II, 242 Ind. 33, 173 N.E.2d 308 (1961) (recognizing "well settled" principle that court in which an indictment pending has exclusive jurisdiction over proceedings, and that challenges to that jurisdiction using writ of habeas corpus cannot be brought to any other court).

5. Change of Venue Motions

Ruling on venue motions is discretionary with the trial judge, so there is no clear duty that will provide grounds for a mandate order. State ex rel. Robinson v. Grant Superior Ct., 471 N.E.2d 302 (Ind. 1984). However, transfer of a venued case back to the original county could be an appropriate issue for mandamus. State ex rel. Schaaf et al. v. Rose, 222 Ind. 96, 51 N.E.2d 856, 858 (1943).

6. Discovery Orders Affecting Evidentiary Privileges

Discovery orders which violate evidentiary privileges, such as the work product privilege, or which may impact work product privileges, have been reviewed in original actions. State ex rel. Keaton v. Circuit Ct. of Rush County, 475 N.E.2d 1146 (Ind. 1985); State ex rel. Keller v. Crim. Ct. of Marion County, 262 Ind. 420, 317 N.E.2d 433 (1974).

7. Denial of Bail

Right to bail in a murder case when no hearing is held and conditions on money posted. State ex rel. Pearcy v. Circuit Ct. of Allen County, 262 Ind. 411, 317 N.E.2d 181 (1974).

III. HABEAS CORPUS PETITIONS

A. INDIANA

A writ of habeas corpus has a limited purpose -- to determine the lawfulness of the defendant's detention. It cannot be used as a substitute for appeal or to attack a conviction or sentence. Willet v. State, 151 N.E.3d 1274 (Ind. Ct. App. 2020). Release from restraint is the relief available. The issue is whether the petitioner is entitled to immediate discharge. See Ind. Code § 34-25.5-1-1. Hendrix v. Duckworth, 442 N.E.2d 1058 (Ind. 1982); and Hendrixson v. Lash, 258 Ind. 550, 282 N.E.2d 792 (1972). A claim that a sentence has expired or been fully served is cognizable in an action for petition for post-conviction relief in the trial court. Mills v. State, 840 N.E.2d 354, 357 (Ind. Ct. App. 2006) (*citing* Ind. Post-Conviction Rule 1(1)(a)(5)).

Pierson v. Phend, 379 N.E.2d 442 (Ind. 1978) (only issue for review in habeas corpus proceeding is whether person seeking writ is entitled to immediate release from unlawful custody).

Harrison v. Knight, 127 N.E.3d 1269 (Ind. Ct. App. 2019) (remanding for trial court to conduct hearing on a rule to show cause directed to the Indiana Attorney General to show why Harrison is not entitled to immediate release subject to conditions of parole).

Habeas corpus is summary proceeding. ("The court or judge shall proceed in a summary way to hear and determine the cause). Ind. Code § 34-25.5-4-3.

1. Procedure

Gist of habeas application is that the defendant is entitled to immediate release. Unlawful arrest may also be a viable basis for a state habeas proceeding.

Matter of Smith, 740 N.E.2d 849 (Ind. 2000) (while his client remained incarcerated by order of one court, Respondent improperly obtained from another court an order releasing his client; Respondent's failure to notify State of his filing of application for writ of habeas corpus was prejudicial to administration of justice in violation of Ind. Professional Conduct Rule 8.4(d)).

a. Application for Writ

Ind. Code § 34-25.5-2-1 requires application be made by complaint and verified by the applicant, or by some person in his behalf. Complaint must specify:

(a) who is restraining the applicant's liberty, the place where the applicant is being held, and the names of all the parties, if known, or descriptions of them if they are not known,
(b) the cause of the restraint,
(c) if alleged to be illegal, why restraint is thought to be illegal.

b. Summary Proceeding

In certain instances, no inquiry will be made into legality of habeas petitioner's restraint or process by which the party is in custody or discharge the party when the term of commitment has not expired. Ind. Code § 34-25.5-5-1.

Questioning the legality of a judgment or process is limited in habeas corpus. The determination of the jurisdiction of the court in a criminal prosecution, and of the validity of the conviction, is limited to the court's record; matters outside the record may not be examined. De Hart v. Blande, 233 Ind. 659, 122 N.E.2d 90 (1954).

Detrich v. Dowd, 223 Ind. 106, 58 N.E.2d 108 (1944) (courts of coordinate jurisdiction do not have power to review or correct errors of each other in habeas corpus proceedings).

Outlaw v. Lane, 244 Ind. 650, 195 N.E.2d 459 (1964) (writ will lie only where there is affirmative showing on face of judgment record that convicting court did not have jurisdiction and judgment is absolutely void).

c. No Automatic Right to Counsel

There is no per se right to court-appointed representation on a petition for habeas corpus. In re Brooks, 247 Ind. 249, 214 N.E.2d 653 (1966).

2. Where to File Writ

a. Court Where Defendant Convicted or Sentenced

A petition for the issuance of a writ of habeas corpus must be filed in the court where the defendant was convicted or sentenced. If a petition is improperly filed in a court in the county where the defendant is incarcerated, that court must send the petition to the proper court. Miller v. Lowance, 629 N.E.2d 846 (Ind. 1994).

Mills v. State, 840 N.E.2d 354 (Ind. Ct. App. 2006) (jurisdiction over writs of habeas corpus is traditionally with the court in the county where the petitioner is incarcerated, whereas petitions for post-conviction relief must be filed in the conviction court ; but when a petitioner files what is captioned a petition for writ of habeas corpus with the court in the county of incarceration but the trial court deems it to be a post-conviction relief petition and the petitioner is attacking the validity of a conviction, the court where it was filed must transfer the petition to the conviction court; if the petitioner erroneously files a writ of habeas corpus that should be a post-conviction relief petition because it does not allege that the petitioner's remedy is immediate discharge and it does not attack the validity of the conviction, such a petition may remain in the court in the county of incarceration).

b. Subject Matter Jurisdiction

Although writ is independent of legislative enactment, legislature may regulate it. Circuit, superior and criminal courts have power to issue writs. Municipal court judges apparently do not. Ind. Code § 34-25.5-2-2 and Ind. Code § 34-25.5-2-3.

c. Exclusive Jurisdiction in Court Where Action Is Pending

Generally, court where information or indictment pending has primary jurisdiction over habeas corpus proceedings. Teagarden v. Criminal Ct. of Marion County, Division II, 242 Ind. 33, 173 N.E.2d 308 (1961).

State ex rel. Smith v. Marion Circuit Ct., 230 Ind. 21, 101 N.E.2d 272 (1951) (application to be let to bail).

(1) Challenging Parole Revocation

When the application for writ challenges the actions of the parole board revoking parole, any competent court has jurisdiction over that matter. State ex rel. Raines v. Madison County Superior Ct., 268 Ind. 623, 377 N.E.2d 1343 (1978).

(2) Validity of Conviction or Sentence

A petitioner may not file a writ of habeas corpus to attack his conviction or sentence. Manley v. Butts, 71 N.E.3d 1153 (Ind. Ct. App. 2017). A habeas application challenging the validity of a conviction or sentence should be transferred to the county of conviction and treated as a petition for post-conviction relief under Ind. Post-Conviction Rule 1, §1. Id.; see also Miller v. Lowrance, 629 N.E.2d 846 (Ind. 1994); and Miller v. Heironimus, 639 N.E.2d 660 (Ind. Ct. App.1994).

3. Procedural Issues

a. "Writ" is Issued to Bring Defendant Before the Court, Not the Order Issued After the Petition is Heard

Upon receiving a defendant's petition for writ of habeas corpus, the trial court erred by bringing defendant before the court without formally issuing a writ of habeas corpus, even though the error was harmless as the trial court took steps that properly brought Defendant before the court. See Hale v. State, 992 N.E.2d 848 (Ind. Ct. App. 2013). Understood correctly, a writ is what a trial court issues to bring a person before the court, not the order a trial court issues after having heard a person's petition. Id.

b. Ripeness

(1) Defendant Entitled to Immediate Release

Detainees do not have ripe claim for relief until entitled to immediate release. Until then, applications may be summarily denied. Hendrix v. Duckworth, 442 N.E.2d 1058 (Ind. 1982).

(2) Make Sure Defendant Has Exhausted Appellate Remedies

Indiana courts will not entertain a habeas petition while a direct appeal from the conviction is pending.

Van Meter v. Heath, 602 N.E.2d 143 (Ind. 1992) (habeas corpus was not available where the conviction was not invalid on its face, and the issues raised could be asserted in his pending appeal).

c. Class Action Relief

Indiana courts have not said whether habeas applications may be sought by class action.

Dunn v. Jenkins, 268 Ind. 478, 377 N.E.2d 868 (1978) (allowed class action challenge brought as habeas action to continue as an application for post-conviction relief; court used language applicable to habeas proceedings).

TR 23 does not foreclose habeas class actions. Under federal law, multiple challenges to detention may be brought in one petition. See, e.g., U.S. ex. rel. Morgan v. Sielaff, 546 F.2d 218 (7th Cir. 1976). Federal Rule 23 is, however, inapplicable to habeas proceedings.

4. Appeal to Court of Appeals

The Indiana Court of Appeals has jurisdiction over appeals from denial of application for writ of habeas corpus. Ind. App. R. 14(A)(7).

5. Examples of Habeas Issues

A writ of habeas corpus will only be legally supportable where the face of the judgment record shows affirmatively that the convicting court did not have jurisdiction and that the judgment is absolutely void. Outlaw v. Lane, 244 Ind. 650, 195 N.E.2d 459 (1964).

a. Extradition

Challenging legality of extradition, see IPDC Pretrial Manual, Chapter 3, "Bail and Extradition."

b. Bail

Ind. Code § 34-25.5-5-2 limits the trial court's authority to discharge a petitioner.

(a) A person shall not be discharged from an order of commitment issued by any judicial or peace officer:

(1) for want of bail, or in cases not bailable, on account of a defect in the charge or process; or
(2) for alleged want of probable cause.

(b) In cases described in subsection (a), the court or judge shall:

(1) summon the prosecuting witnesses;
(2) investigate the criminal charge;
(3) discharge, let to bail, or recommit the prisoner, as may be just and legal; and
(4) recognize witnesses when proper.

Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959) (habeas relief is available when bail is excessive).

6. Examples of Non-habeas Issues

a. Challenge to Administrative Punishment

Many constitutional violations cannot be challenged using the habeas writ in Indiana as they may be in federal court. Conditions of confinement or administrative punishment imposed without due process are not proper subjects in Indiana habeas corpus proceedings.

Pruitt v. Joiner, 182 Ind. App. 218, 395 N.E.2d 276 (1980) (habeas corpus may not be used to challenge disciplinary or administrative procedures of penal institution).

Jefferson v. State, 399 N.E.2d 816 (Ind. Ct. App. 1980) (direct appeal opinion *citing* Pruitt v. Joiner, 395 N.E.2d 276 (Ind. Ct. App. 1980)).

Proper actions are writs of mandate or prohibition, or a federal civil rights complaint under 42 U.S.C. §1983. Jefferson v. State, 399 N.E.2d 816 (Ind. Ct. App. 1980) and Pruitt v. Joiner, 395 N.E.2d 276 (Ind. Ct. App. 1980)

Stader v. State, 453 N.E.2d 1032 (Ind. Ct. App. 1983) (imprisonment of person found guilty but mentally ill without providing psychiatric services cannot be addressed, except in a mandamus action or a civil rights action under 18 U.S.C. §1983).

b. Challenge to Validity of Conviction or Sentence

When an application for writ challenges validity of the conviction or sentence, the petition should be treated as petition for post-conviction relief and court where application pending should transfer the cause to the county of conviction. Miller v. Lowrance, 629 N.E.2d 846 (Ind. 1994); Miller v. Heironimus, 639 N.E.2d 660 (Ind. Ct. App. 1994); Ind. Post-Conviction Rule 1, §1; and Manley v. Butts, 71 N.E.3d 1153 (Ind. Ct. App. 2017).

c. Double Jeopardy

The defense of former jeopardy must be raised at the trial and in the court in which the issues were tried, and generally is not available as a ground for habeas corpus. Reynolds v. Dowd, 232 Ind. 593, 114 N.E.2d 640 (1953).

d. Denial of Right to Counsel

Harris v. Duckworth, 507 N.E.2d 1382 (Ind. 1987) (prisoner, whose conviction for attempted murder was affirmed, was not entitled to writ of habeas corpus on ground that he had attempted to receive services of public defender but had been unsuccessful in obtaining service of that office to file post-conviction relief petition for him).

Engle v. State, 467 N.E.2d 712 (Ind. 1984) (allowing a defendant to represent himself at trial with the option of requesting research material and other assistance from stand-by

counsel did not undermine his right to self-representation; denying his habeas petition for direct access to legal materials was not error).

e. Transfer within Institution

Pierson v. Phend, 269 Ind. 190, 379 N.E.2d 442 (1978) (intra-institutional transfer of prisoner was outside scope of habeas corpus; trial court had no jurisdiction to grant such relief).

IV. INTERLOCUTORY APPEALS

For a more detailed discussion of the procedure for taking an interlocutory appeal, see IPDC's Appellate Practice Manual, Section II, Interlocutory and DCS Appeals.

A. JURISDICTION

1. Generally, With the Court of Appeals

In appeals taken from interlocutory orders not otherwise subject to the Supreme Court's jurisdiction, the Court of Appeals has jurisdiction. Ind. Appellate Rule 5(B).

B. PROCEDURE

1. Petition for Trial Court Certification of the Order

Ind. Appellate Rule 14(A) lists interlocutory orders from which an appeal may be taken as a matter of right, including appeals from the denial of habeas corpus. Ind. Appellate Rule 14(A)(7).

For discretionary interlocutory appeals under Ind. Appellate Rule 14(B), the trial court must certify the order to be appealed. Appellant must obtain trial court certification as to the existence of one of the circumstances listed in Ind. Appellate Rule 14(B)(1)(c) in order to proceed to the next step. Certification is a matter of grace by the trial court and if denied, the interlocutory appeal is precluded. Petition for Certification must be filed within thirty days of the Order which the defendant would like to appeal.

Morgan v. State, 445 N.E.2d 585 (Ind. Ct. App. 1983) (trial court's refusal to certify hypnosis issue for interlocutory appeal was not error; defendant was able to present issue on direct appeal from conviction and was not "noticeably harmed").

Make sure trial court certifies its interlocutory order and certifies that one of the three factors listed in Ind. Appellate Rule 14(B)(1)(c) is applicable. See Ind. Appellate Rule 14(B)(1)(b). Do not ask trial court to certify the "issue" or "question." Ind. Appellate Rule 14(B) requires trial court to certify its interlocutory "order."

Dingman v. State, 602 N.E.2d 184 (Ind. Ct. App. 1992) (Court of Appeals denied permission to bring the interlocutory appeal because the trial court "certified the issue" to be considered for interlocutory appeal).

2. Petition to Court of Appeals

If the trial court certifies the order to be appealed, the petitioner must seek permission from the Court of Appeals to file an interlocutory appeal. The petition should contain the same facts and arguments as in the petition to certify the order filed in and granted by trial court. The petition should also include a certified copy of the petition requesting the order be certified and the order granting certification. The Court of Appeals will review the petition under the criteria set forth in Ind. Appellate Rule 14.

In appeals taken under Ind. Appellate Rule 14(B), petition for court of appeals to entertain jurisdiction must be filed within thirty (30) days of certification of the order by the trial court. Ind. Appellate Rule 14(B)(2)(a).

3. Deadlines

a. Notice of Appeal

If the Court of Appeals accepts jurisdiction, the appellant shall file a Notice of Appeal within 15 days of the Court of Appeals' order accepting jurisdiction, and either pay the filing fee or proceed *in forma pauperis* under Ind. Appellate Rule 40. Ind. Appellate Rule 14(B)(3).

b. Clerk's Record and Transcript

Within 30 days after the filing of the Notice of Appeal, the trial court clerk shall assemble the Clerk's Record. Ind. Appellate Rule 10(B). If the trial court clerk fails to issue, file, and serve a timely Notice of Completion of Clerk's Record, the appellant shall seek an order from the Court on Appeal compelling the trial court clerk to complete the Clerk's record. Failure to seek such an order within 15 days after the Clerk's Record is due subjects the appeal to dismissal. Ind. Appellate Rule 10 (F).

Similar time limits apply to the transcript, if requested, under Ind. Appellate Rule 10(A), (D), and (G). Extensions of time to prepare the transcript in interlocutory appeals are disfavored. Ind. Appellate Rule 14(G)(1).

c. Filing Briefs - Appellate Rule 45

Appellant's brief shall be filed no later than 30 days after the date the trial court clerk serves its Notice of Completion of Clerk's Record on the parties, if the Transcript is complete or has not been requested, or no later than 30 days after the date the trial court clerk serves its Notice of Transcript. Ind. Appellate Rule 45(B)(1).

The Appellee's brief is due to be filed no later than 30 days after service of the appellant's brief. Ind. Appellate Rule 45(B)(2). The Appellant's Reply Brief is due to be filed no later than 15 days after service of the Appellee's brief. Ind. Appellate Rule 45(B)(3).

d. Shortening of Timelines

The Court of Appeals, upon motion by a party and for good cause, may shorten any time period. A motion to shorten time shall be filed within ten (10) days of the filing of either

the notice of Appeal with the Clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal. Ind. Appellate Rule 14(G)(2).

4. Obtaining a Stay Pending Appeal

An interlocutory appeal does not stay proceedings in the trial court, unless the trial court or a judge of the Court of Appeals orders a stay. Ind. Appellate Rule 14(H).

Stay may be conditioned on appellant posting bond. Ind. Appellate Rule 14(H).

C. CATEGORIES OF INTERLOCUTORY ORDERS

Indiana Appellate Rule 14 defines several categories of interlocutory orders that are appealable.

1. Pre-Trial Order on Motions to Suppress

Generally, orders on motions to suppress are not appealable pretrial because the defendant (or the State) must object to the evidence or attempt to introduce the evidence at trial. Smith v. State, 506 N.E.2d 31 (Ind. 1987); Engle v. State, 467 N.E.2d 712 (Ind. 1984). A defendant may bring an interlocutory appeal if the trial court properly certifies the order denying a motion. Dingman v. State, 602 N.E.2d 184 (Ind. Ct. App. 1992).

Some examples of cases in which an interlocutory appeal of a denial of a motion to suppress include Stabenow v. State, 495 N.E.2d 197 (Ind. Ct. App. 1986); Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994); Clarke v. State, 868 N.E.2d 1114 (Ind. 2007); Grier v. State, 868 N.E.2d 443 (Ind. 2007); and Greeno v. State, 861 N.E.2d 1232 (Ind. Ct. App. 2007).

A ruling in an interlocutory appeal does not necessarily preclude relitigating the same issue at trial.

> Parker v. State, 697 N.E.2d 1265 (Ind. Ct. App. 1998) (reversing the denial of a motion to suppress made at trial, after the defendant's pretrial motion to suppress was denied and the denial affirmed on interlocutory appeal (Parker v. State, 662 N.E.2d 994 (Ind. Ct. App. 1996)), because the testimony in evidence at trial differed from the testimony at the pretrial suppression hearing).

2. Order on Motion *in Limine*

An order *in limine* is ordinarily a preliminary ruling subject to change by the trial court. The party against whom an erroneous order *in limine* is entered must generally seek relief from the order at trial. Ordinarily, an order *in limine* is not appealable on an interlocutory or direct appeal. Green v. State, 469 N.E.2d 1169 (Ind. 1984).

> McClain v. State, 678 N.E.2d 104 (Ind. 1997) (in interlocutory appeal, reviewing grant of State's motion *in limine* excluding expert testimony about sleep disorders).
>
> Black v. State, 829 N.E.2d 607 (Ind. Ct. App. 2005) (order *in limine* preventing defendant from questioning prospective jurors about self-defense was fundamental error, requiring reversal).

3. Motions to Dismiss

a. Double Jeopardy Grounds

Interlocutory appeal is available to challenge the denial of motion to dismiss on double jeopardy grounds. Martakis v. State, 450 N.E.2d 128 (Ind. Ct. App. 1983); Whitehead v. State, 444 N.E.2d 1253 (Ind. Ct. App. 1983); and Swenson v. State, 868 N.E.2d 540 (Ind. Ct. App. 2007).

b. Indictment

Denial or grant of motion to dismiss indictment. Smith v. State, 867 N.E.2d 1286 (Ind. 2007) and Moran v. State, 477 N.E.2d 100 (Ind. Ct. App. 1985).

State v. Peters, 637 N.E.2d 145 (Ind. Ct. App. 1994) (State's interlocutory appeal of dismissal of indictment).

c. Speedy Trial

Denial of motion for discharge on speedy trial grounds. Pruett v. State, 617 N.E.2d 980 (Ind. Ct. App. 1993); Biggs v. State, 546 N.E.2d 1271 (Ind. Ct. App. 1989); and Alter v. State, 860 N.E.2d 874 (Ind. Ct. App. 2007).

Harrell v. State, 614 N.E.2d 959 (Ind. Ct. App. 1993) (acknowledging that delay occasioned by interlocutory appeal increases delay of speedy trial; interlocutory appeals of denials of pretrial motions are not generally permitted and this is especially true of motion to dismiss information on speedy trial grounds because interlocutory appeal necessarily interrupts pretrial proceedings so that speedy trial is even further delayed).

4. Rulings on Evidentiary Privileges and Discovery

Sewell v. State, 592 N.E.2d 705 (Ind. Ct. App. 1992) (post-conviction petitioner took interlocutory appeal from denial of a discovery motion requesting rape kit and lab records for DNA testing).

Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) (interlocutory appeal holding that the appellant was prejudiced by the State's failure to comply with discovery order which warranted suppression of evidence).1

Whitewater Valley Canoe Rental, Inc., v. Bd. of Franklin County Commissioners, 507 N.E.2d 1001 (Ind. Ct. App. 1987) (trial court did not err in denying petition to certify for interlocutory appeal question whether Fifth Amendment privilege applied; privilege could be protected by reversal on appeal and exclusion at subsequent trial).

Stage v. Hogan, 582 N.E.2d 824 (Ind. 1991) (order to produce documents during discovery appealable by right, former Ind. Appellate Rule 4(B)(1) [see now Ind. Appellate Rule 14(A)(3)]).

Schierenberg v. Howell-Baldwin, 571 N.E.2d 335 (Ind. Ct. App. 1991) (former Appellate Rule 4(B)(1) [now Ind. Appellate Rule 14(A)(3)] permits appeal by right from an order for

delivery of documents containing alleged work product. Rule may not be applicable to appeals concerning discovery order involving documents which are not subject to an asserted work product privilege).

5. Habeas Corpus Orders

Trial court interlocutory orders and judgments upon petitions for writs of habeas corpus, not otherwise authorized to be appealed directly to Supreme Court, are within Ind. Appellate Rule 14(A)(7).

6. Change of Venue\Change of Judge

a. Venue

A trial court order transferring or refusing to transfer a cause to a preferred venue pursuant to Trial Rule 75 is an appealable interlocutory order. Ind. Appellate Rule 14(A)(8).

Parkinson v. TLC Lines, Inc., 506 N.E.2d 1105 (Ind. Ct. App. 1987) (improper venue warranted reversal on interlocutory appeal, showing of prejudice not required).

b. Judge

Denial of change of judge. Mahrdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994) and Gray v. State, 450 N.E.2d 125 (Ind. Ct. App. 1983).

7. Waiver of Juvenile to Adult Court

Soward v. State, 606 N.E.2d 885 (Ind. Ct. App. 1993) (interlocutory appeal of juvenile waiver decision allowed, although not mandatory).

8. Denial of Withdrawal of Guilty Plea

Watson v. State, 526 N.E.2d 701 (Ind. 1988) (interlocutory until sentence imposed).

9. Bail Decisions

Bail decisions are not interlocutory orders. "A trial court's determination of an issue concerning bail is a final judgment which is subject to an immediate appeal." Kerr, 16A *Indiana Practice - Criminal Procedure* p.147 (1998 West Group) and Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995).

V. APPEALS BY STATE

The prosecuting attorney may not unilaterally pursue an appeal in a criminal case but may appeal with the consent or in conjunction with Attorney General. State v. Crecelius, 531 N.E.2d 540 (Ind. Ct. App. 1988).

A. STATUTORY BASIS

Ind. Code § 35-38-4-2 provides:

(a) Appeals to the supreme court or to the court of appeals, as provided by court rules, may be taken by the state as of right in the following cases:

(1) From an order granting a motion to dismiss one (1) or more counts of an indictment or information.
(2) From an order granting a motion to discharge a defendant before trial for any reason, including delay commencing trial or after the defendant's plea of former jeopardy.
(3) From an order granting a motion to correct errors.
(4) Upon a question reserved by the state if the defendant is acquitted.
(5) From an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution of one (1) or more counts of an information or indictment.

(b) The state may appeal an interlocutory order to the supreme court or to the court of appeals, as provided by court rules, if the trial court certifies the appeal and the court on appeal finds that:

(1) the state will suffer substantial expense, damage, or injury if the order is erroneous, and the determination thereof is withheld until after judgment;
(2) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or
(3) the remedy by appeal after judgment is otherwise inadequate.

(c) An interlocutory order that may be appealed by the state under subsection (b) includes but is not limited to:

(1) any order granting a motion to suppress evidence that is substantially important to the prosecution and does not have the ultimate effect of precluding further prosecution; and
(2) any discovery order claimed to violate a court rule, statute, or case law.

1. State Need Not Dismiss Charges When Appealing Granting of Motion to Suppress

See State v. Parrott, 69 N.E.3d 535 (Ind. Ct. App. 2017).

2. Appeal Taken by State Does Not Stay Defendant's Judgment

Ind. Code § 35-38-4-4 provides:

> An appeal taken by the state does not stay, or affect the operation of, the judgment in favor of the defendant until the judgment is reversed. However, if an appeal is taken by the state from an order or judgment by which the defendant is discharged before trial, the order or judgment does not constitute a bar to further prosecution of the defendant.

State v. Brown, 324 N.E.2d 266 (Ind. 1975) (where determination of issues sought to be presented by State's appeal were dependent upon record of original trial proceedings and such record was not introduced into evidence or otherwise made part of record in post-conviction proceeding, State did not have meritorious appeal and injustice would be worked by grant of State's petition to stay enforcement of order appealed from).

3. Certification by Clerk of Court

Ind. Code § 35-38-4-3 provides:

> In case of an appeal from a question reserved on the part of the state, it is not necessary for the clerk of the court to certify in the transcript any part of the proceedings and record except the pleadings, the motion to correct errors, and the judgment of acquittal. When the question reserved is defectively stated, the Supreme Court or the court of appeals may direct any part of the proceedings and record to be certified to such court.

B. DEADLINES

1. State's Cross Appeal Untimely at Time of Defendant's Belated Appeal

Court dismissed State's cross-appeal as untimely because the State waited two years, until defendant initiated his belated appeal, to challenge the trial court's denial of the State's motion to correct error, which had challenged the trial court's finding that two of defendant's convictions violated the double jeopardy prohibition. Whitener v. State, 982 N.E.2d 439 (Ind. Ct. App. 2013).

C. EXAMPLES

1. Dismissing or Setting Aside of Indictment or Information

State v. Holland, 273 Ind. 284, 403 N.E.2d 832 (1980) (in a habitual offender proceeding, where the trial court sustained defendant's objection to a state exhibit so that the state was only able to show evidence of one prior felony conviction, and the court then dismissed the habitual offender count with prejudice, the court's actions did not constitute a finding that the charging document was insufficient; therefore, the state could not appeal under Ind. Code § 35-38-4-2). See also State v. Coleman, 971 N.E.2d 209 (Ind. Ct. App. 2012).

State v. Bartlett, 9 Ind. 540 (1857) (because State's appeal from a judgment quashing or setting aside an information or indictment is an unusual proceeding, and in contravention of common-law principles, it will be held to great strictness).

2. Discharge of Defendant

State v. Huebner, 233 Ind. 566, 122 N.E.2d 88 (1954) (statute did not authorize State to appeal trial court's judgments discharging perjury suspects on grounds that State delayed the trials beyond the statutory limit).

State v. Sierp, 260 Ind. 57, 292 N.E.2d 245 (1973) (court's discharge of defendant with prejudice, due to prosecutorial misconduct, was not an "acquittal" within the meaning of the statute allowing the State to appeal a reserved question of law upon acquittal).

3. Interlocutory Appeals

State v. McMillan, 274 Ind. 167, 409 N.E.2d 612 (1980) (appellate rule providing for appeals from interlocutory orders does not authorize State to appeal from interlocutory orders in criminal proceedings).

4. Suppression of Evidence

State may appeal from order granting motion to suppress evidence if the ultimate effect of the order is to preclude further prosecution of one or more counts of an information or indictment. Ind. Code § 35-38-4-2(a)(5); State v. Owings, 622 N.E.2d 948 (Ind. 1993).

NOTE: Indiana Code § 35-38-4-2(a)(5) previously allowed the State to appeal from the grant of a motion to suppress when its ultimate effect was to preclude further prosecution altogether. In 2015, the legislature broadened the State's right to appeal if suppression precludes further prosecution of any charge or the evidence suppressed is "substantially important to the prosecution." Ind. Code § 35-38-4-2(c)(1).

State v. Brown, 70 N.E.3d 331 (Ind. 2017) (although defendant did not file motion to suppress and instead objected to evidence introduced at trial, trial court's suppression order precluded further prosecution; thus, State could bring this appeal pursuant to Ind. Code § 35-38-4-2(5)).

State v. Parrott, 69 N.E.3d 535 (Ind. Ct. App. 2017) (State need not dismiss charges when appealing granting of motion to suppress).

State v. Coleman, 971 N.E.2d 209 (Ind. Ct. App. 2012) (an evidentiary ruling excluding evidence the State wants to introduce during trial, and which effectively precludes further prosecution is not a motion to suppress and thus is not appealable).

State v. McLaughlin, 471 N.E.2d 1125 (Ind. Ct. App. 1984) (order suppressing defendant's breathalyzer test results and all other evidence obtained after initial stop of his automobile was "tantamount to dismissal," since nothing in manner in which defendant was driving prior to detention indicated that he was driving while intoxicated, and thus, order was appealable), *overruled in part on other grounds by* State v. Garcia, 500 N.E.2d 158 (Ind. 1986)

State v. I.T., 4 N.E.3d 1139 (Ind. 2014) (although a juvenile court's discretionary decision to disapprove a delinquency petition is not within any of the statutory grounds for the State to appeal under I.C.§ 35-38-4-2, State may appeal a juvenile court order that suppresses evidence, if doing so terminates the proceeding).

State v. Holtsclaw, 977 N.E.2d 348 (Ind. 2012) (State's filing of motion to correct errors from trial court's order granting a motion to suppress tolled the time period in which the State had to file a notice of appeal under Appellate Rule 9; thus, State's notice of appeal filed a few days after the motion to correct error was denied was timely).

State v. Williams, 445 N.E.2d 582 (Ind. Ct. App. 1983) (Court denied appellee-defendant's motion to dismiss State's appeal, even if the trial court's granting of motion to suppress did not technically preclude further prosecution, because suppression order effectively prevented State from connecting defendant to stolen items and other persons, thus precluding proof of allegations in charging information).

There is a split in authority as to whether the prosecutor's thirty days in which to file the notice of appeal begin from the date of the order granting the motion to suppress or the date of the State's motion to dismiss.

Price v. State, 724 N.E.2d 670 (Ind. Ct. App. 2000) (if State elects to appeal from an order granting a motion to suppress evidence which effectively terminates prosecution in the case, it may do so within 30 days of the final order dismissing the case).

But see Hunter v. State, 904 N.E.2d 371 (Ind. Ct. App. 2009) (thirty-day limitations period governing State's appeal from granting defendant's motion to suppress begins to run from date of order, not from date State determines that order was fatal to prosecution of case).

PRACTICE POINTER: If defending against the State's appeal from a suppression ruling, take advantage of the fact the State is subject to a harsher standard of review when it appeals from a grant of a motion to suppress. Unlike when the defendant appeals from the denial of suppression, the State is appealing from a negative judgment. A negative judgment is the denial of relief to a party on a claim for which that party had the burden of proof. State v. E.R., 123 N.E.3d 675, 678 (Ind. 2019). Therefore, the State must show that granting the suppression was **contrary to law**—meaning that the evidence was without conflict and all reasonable inferences led to a conclusion opposite that of the trial court. Id. at 679. "The State cannot make this showing if there is substantial, probative evidence supporting the suppression ruling." Id. But the standard may be different if the defendant is challenging a search warrant rather than a warrantless search. State v. Tungate, 899 N.E.2d 60, 64 (Ind. Ct. App. 2008) (finding "substantial basis" review, rather than contrary to law standard, applied to review of search warrant allegedly lacking in probable cause because State did not have burden to prove validity of warrant). But see State v. Davis, 770 N.E.2d 338, 340 (Ind. Ct. App. 2002) (applying contrary to law standard to State's appeal of grant of suppression of evidence obtained from search warrant).

5. Post-verdict Motions

Hicks v. Duckworth, 922 F.2d 409 (7th Cir. 1991) (State's appeal of dismissal of habitual offender count after defendant pleaded guilty and began serving his sentence did not place defendant in double jeopardy; prosecutor stated in court at the time of the plea that habitual offender allegation would be added to pending charges, and the appeal was permitted by state law).

State v. Monticello Developers, Inc., 527 N.E.2d 1111 (Ind. 1988) (remand for reinstatement of jury's guilty verdict and for sentencing after trial court granted defendant's post-verdict motion for judgment on evidence did not violate double jeopardy).

6. Acquittal of Defendant

When the State appeals a reserved question of law after acquittal, appellate court only reviews questions of law. Ind. Code § 35-38-4-2(4); State v. Goodrich, 504 N.E.2d 1023 (Ind. 1987).

State v. Smith, 562 N.E.2d 1308 (Ind. Ct. App. 1990) (question whether State effected valid warrantless arrest was matter of fact, not law, and thus, State was not authorized to appeal issue as reserved question of law after defendant's acquittal).

State v. Daily, 6 Ind. 8 (1854) (an appeal lies on behalf of the State to correct errors committed against her in all criminal trials, unless the defendant has had a verdict and judgment of acquittal, or at least has been put on trial before the court or jury).

7. Return of Property Seized

State v. Poxon, 514 N.E.2d 652 (Ind. Ct. App. 1987) (State was entitled to appeal superior court's order granting arrestee's motion for return of personal property that had been taken from him at time of arrest).

Sinn v. State, 693 N.E.2d 78 (Ind. Ct. App. 1998) (where trial court had ordered defendant's property returned to him, but the State failed to comply, the remedy was not an appeal but to seek enforcement of the order. One cannot appeal an order unless he is in some manner aggrieved thereby).

8. Sentencing

In the exercise of appellate authority to review and revise criminal sentences, the Court may decrease or increase a sentence. The State may not initiate a challenge to a sentence imposed by a trial court, but if a defendant seeks appellate review and revision of a sentence, the State may respond and urge the imposition of a greater sentence without necessity of proceeding by cross-appeal. McCullough v. State, 900 N.E.2d 745 (Ind. 2009). However, the trial court's failure to sentence defendant in accordance with statutory requirements is fundamental error and may be presented by the State for the first time on appeal. Abron v. State, 591 N.E.2d 634 (Ind. Ct. App. 1992).

Hardley v. State, 905 N.E.2d 399, 402-03 (Ind. 2009) (finding that I.C. § 35-38-1-15 provides the legislative authorization for the State to challenge and appeal sentences that violate statutory authority). See also Lotaki v. State, 4 N.E.3d 656 (Ind. 2014).

9. State May Not Appeal from Granting Defendant New Trial

State v. Buckley, 372 N.E.2d 1241 (Ind. Ct. App. 1978) (State could not appeal from trial court's action in granting defendant new trial).

D. EXCEPTIONS

The Indiana Supreme Court can carve out minor exceptions allowing the State to take an appeal despite the fact it is not legislatively authorized. State v. Brunner, 947 N.E.2d 411 (Ind. 2011) (*citing* Hardley v. State, 905 N.E.2d 399 (Ind. 2009)).

State v. Brunner, 947 N.E.2d 411 (Ind. 2011) (although there is no statutory authority for the State to appeal a modification of conviction, the legislature did not provide the trial court the statutory authority to make the modification in the first place; thus, because trial court lacked authority to modify and because this is a pure question of law that does not require evidence outside the record, the State has the limited availability to appeal a modification of conviction under these particular circumstances).