CHAPTER THREE

SENTENCING PROCEDURE

I. TIME FOR PRONOUNCEMENT OF SENTENCE

A. THIRTY DAY RULE

1. Criminal Rule 11

Upon entering a conviction, whether the acceptance of a guilty plea or by finding or by verdict, the court shall sentence a defendant convicted in a criminal case within thirty days of the plea or the finding or verdict of guilty, unless an extension for good cause is shown. C.R. 11.

2. Ind. Code § 35-38-1-2

Ind. Code § 35-38-1-2 provides, in part:

Upon entering a conviction, the court shall set a date for sentencing within thirty days, unless for good cause shown an extension is granted. If a presentence report is not required [e.g., misdemeanor convictions], the court may sentence the defendant at the time the judgment of conviction is entered. However, the court may not pronounce sentence at that time without:

(1) inquiring as to whether an adjournment is desired by the defendant; and

(2) informing the victim, if present, of a victim's right to make a statement concerning the crime and the sentence.

B. GOOD CAUSE

Although good cause may be presumed where the record is silent as to the reason for delay and the defendant makes no objection, good cause should be challenged. McElroy v. State, 553 N.E.2d 835, 840 (Ind. 1990). The following reasons have been held to be good cause for delay:

In re Tina T., 579 N.E.2d 48 (Ind. 1991) (time needed to compile and consider presentence report).

Ferguson v. State, 438 N.E.2d 286 (Ind. 1982) (defendant's request for continuance and state's appeal of court's dismissal order on habitual count).

Vandergriff v. State, 653 N.E.2d 1053 (Ind. Ct. App. 1995) (court's desire to facilitate pending divorce proceedings where defendant was being sentenced for battery of his wife).

North v. State, 406 N.E.2d 657 (Ind. Ct. App. 1980) (defendant receiving treatment or alternative to punishment in lieu of sentence).

However, a continuance of sentencing so as to provide for simultaneous sentencing on separate crimes, in an effort to remove the defendant's incentive to withdraw his guilty plea to one crime, did not constitute good cause for delay. Williams v. State, 489 N.E.2d 53, 57-58 (Ind. 1986).

C. WAIVER OF THIRTY DAY RULE

Defendant waives enforcement of thirty day sentencing rule by failing to object to setting of sentencing date beyond thirty days. Dudley v. State, 480 N.E.2d 881, 905 (Ind. 1985); Murphy v. State, 447 N.E.2d 1148, 1149 (Ind.Ct.App 1983).

Crawley v. State, 677 N.E.2d 520 (Ind. 1997) (objection to continuance of sentencing date did not reassert previously waived right to be sentenced within thirty days).

Minnick v. State, 965 N.E.2d 124 (Ind. Ct. App. 2012), *trans. denied* (where D did not object to Tr.Ct.'s failure to sentence him on 2 of his 3 convictions and record is silent as to reason for delay in sentencing, good cause for sentencing delay is presumed; if there was error, it was harmless).

Anderson v. State, 141 N.E.3d 862 (Ind. Ct. App. 2020) (10-year delay in sentencing defendant resulted from the plain terms of his own plea agreement and any error in the delay was invited and not available for appellate review).

D. CONTINUANCE BY DEFENDANT

It is within the trial court's discretion to grant a defendant a continuance prior to sentencing. Harris v. State, 659 N.E.2d 522 (Ind. 1995).

Lucas v. State, 499 N.E.2d 1090 (Ind. 1986) (trial court did not err in refusing to grant defendant's motion to continue sentencing hearing based upon alleged inaccuracies in presentence report where court instead declared he would ignore disputed material in passing sentence).

Koehler v. State, 499 N.E.2d 196 (Ind. 1986) (trial court did not err in refusing to grant continuance of sentencing where any inconvenience or lack of preparation time was occasioned by defendant's escape).

Evans v. State, 855 N.E.2d 378 (Ind. Ct. App. 2006) (no abuse of discretion where trial court denied continuance despite fact that defendant received PSI report day before sentencing and defendant wanted to hire sentencing consultant who might have been able to compile mitigation evidence). See also Eubank v. State, 456 N.E.2d 1012 (Ind. 1983).

E. REMEDIES FOR FAILURE TO TIMELY SENTENCE

1. Motion to pronounce sentence

The most common and appropriate remedy for failure of the trial court to set a date for sentencing within thirty days is imposition of the sentence rather than discharge. Carter v. State, 178 Ind.App.403, 382 N.E.2d 986, 988 (Ind. Ct. App. 1978); see also Taylor v. State, 171 Ind.App. 476, 358 N.E.2d 167 (1976).

Kindred v. State, 524 N.E.2d 279 (Ind. 1988) (fact that defendant's sentencing hearing was set beyond statutory thirty-day limit does not automatically divest trial court of its jurisdiction to impose sentence).

2. Discharge

Only when the court deliberately postpones indefinitely the pronouncement of judgment and sentence, the court loses jurisdiction to sentence and, upon application, the defendant should be discharged. Robison v. State, 172 Ind.App. 205, 359 N.E.2d 924 (1977); see also Warner v. State, 194 Ind. 426, 143 N.E. 288 (1924).

3. Other remedies

The court has discretion to fashion a remedy for failure to timely sentence the defendant, as long as the court has jurisdiction to enter the remedy.

Williams v. State, 489 N.E.2d 53 (Ind. 1986) (where court extended sentencing beyond thirty days without good cause and imposed consecutive sentences, appellate court ordered sentences to be served concurrently).

II. SENTENCING HEARING

A. MANDATORY IN FELONY CASES

Prior to sentencing in a felony case, the court must conduct a hearing to consider the relevant facts and circumstances. Ind. Code § 35-38-1-3.

Gross v. State, 444 N.E.2d 296 (Ind. 1983) (where trial court both held sentencing hearing and considered PSR before actually imposing sentence and had adequate basis to enter judgment of conviction after receiving jury's verdict of guilty, fact that trial court entered judgment for felony instead of alternate misdemeanor sentencing before considering PSR or arguments of counsel did not amount to reversible error). See also Fleenor v. State, 514 N.E.2d 80 (Ind. 1987), *cert. den'd*, 488 U.S. 872, 109 S. Ct. 189 (1988).

Page v. State, 424 N.E.2d 1021 (Ind. 1981) (purpose of sentencing hearing is to give trial court opportunity to consider facts and circumstances relevant to sentencing of individual defendant before it, and court should determine those facts and circumstances by referring to entire record of proceedings, which includes testimony and evidence given at trial).

B. MISDEMEANOR CASES

Ind. Code § 35-38-1-3 requires sentencing hearings only in felony cases. See also Stewart v. State, 754 N.E.2d 608 (Ind. Ct. App. 2001). However, when a court imposes consecutive sentences for misdemeanors when it is not mandatory to do so, at least one aggravating factor must be found and an articulation of a balancing of aggravators and mitigators is necessary; therefore, a hearing is probably required. Cuyler v. State, 798 N.E.2d 243, 246 (Ind. Ct. App. 2003).

C. PRESENCE OF DEFENDANT

The defendant must be personally present at the time that sentencing is pronounced. If the defendant is not present, a warrant may be issued for the defendant's arrest. Ind. Code § 35-38-1-4.

The defendant may appear by video for a sentencing hearing in felony cases only when the defendant has been given a written waiver of his right to be present and the prosecutor consents. Ind. Admin R. 14; Hawkins v. State, 982 N.E.2d 997 (Ind. 2013).

D. PRESENCE OF PROSECUTOR

The prosecuting attorney or a deputy prosecuting attorney shall be present at all misdemeanor or felony sentencing hearings. C.R. 10.1.

E. CONTENTS OF SENTENCING HEARING RECORD

A record of the sentencing hearing must be made. C.R.11; Ind. Code § 35-38-1-3.

1. Transcript of hearing

Pursuant to Ind. Code § 35-38-1-3, the record must include a transcript of the hearing.

An electronic recording of all proceedings relevant to guilty pleas and sentencing hearings on guilty pleas must be made, and if a transcript of the recorded matters has not been made, the electronic recording must be preserved for ten years on misdemeanor guilty pleas and for fifty-five years on felony guilty pleas. C.R. 10 (guilty plea); C.R. 11 (hearing).

State v. Scales, 593 N.E.2d 181 (Ind. 1992) (ten-year limit on misdemeanors under C.R. 10 is not statute of limitations for filing PCR).

Garcia v. State, 271 Ind. 209, 391 N.E.2d 604 (1979) *cert. den'd* S. Ct. (guilty plea transcript devoid of instances during proceeding where stops were made for interpreter to translate judges questions was considered complete and, thus, in compliance with C.R. 10).

PRACTICE POINTER: Martinez Chavez v. State, 534 N.E.2d 731, 738 (Ind. 1989) clarified that Garcia was affirmed in part because an independent witness confirmed that the translation was accurate and that the petitioner knowingly and voluntarily pled guilty. If grave doubt can be shown as to an interpreter's accuracy it may bring the validity of a single-language transcript into question; it can also be argued that the defendant was denied due process. See also United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985).

2. Copy of the presentence report

Pursuant to Ind. Code § 35-38-1-3, the record must include a copy of the presentence report.

3. Advisement of number of days in pretrial confinement

In a sentencing hearing for murder or a Level 1 through Level 5 felony, the court shall advise the person of the number of days of pretrial confinement the person served while awaiting trial and sentencing and whether the days of confinement were served in jail or on home detention. Ind. Code § 35-38-1-1(b).

Henriquez v. State, 58 N.E.3d 942 (Ind. Ct. App. 2016) (defendant failed to show he was harmed by trial court's failure to advise him of specific dates for earliest and latest release dates, as provided by former version of statute); see also Simons v. State, 54 N.E.3d 445 (Ind. Ct. App. 2016).

4. Court's statement of reasons

a. Prior history

In 1977, the Indiana General Assembly adopted a sentencing scheme that included a presumptive sentence, as well as an upper and lower limit, for each class of felonies. See Ind. Code § 35-50-2-3 to -7 (West Supp. 1977). In deciding whether to depart from the presumptive sentence, the trial judge was required to consider five specific factors, and was allowed to consider other aggravating and mitigating factors. Departures either upward or downward required a finding of aggravating or mitigating factors sufficient to support them. Case law developed requiring that, when a trial court deviated from the presumptive sentence, it was required to "(1) identify all significant circumstances; (2) state the specific reason why each circumstance ha[d] been determined to be mitigating or aggravating, and (3) articulate the court's evaluation and balancing of circumstances." Prickett v. State, 856 N.E.2d 1203, 1207 (Ind. 2006), quoted in Anglemyer v. State, 868 N.E.2d 482, 486 (Ind. 2007).

In 2000, the United States Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466 (2000), holding that in order to satisfy the 6th Amendment right to jury trial, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., at 490. Four years later, in Blakely v. Washington, 542 U.S. 296 (2004), the Court held that for Apprendi purposes, the statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id., at 303.

Responding to Blakely, the Indiana Supreme Court determined that in Indiana's statutory sentencing scheme, the presumptive sentence was the statutory maximum. Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded by statute in part as stated in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). The Court recommended two ways to fix Indiana's statutory scheme in order to conform to the Sixth Amendment right to jury trial set out in Blakely – (1) require jury findings of aggravators to support sentences above the presumptive, or (2) eliminate any binding "fixed term," and allow judges to sentence within the entire range without jury fact-finding. Id., at 686.

Within weeks of Smylie, the General Assembly amended Indiana's sentencing statutes to adopt the second alternative Smylie identified, more or less.

b. Statutory Scheme

The "presumptive sentence" became a non-binding "advisory sentence." Ind. Code § 35-50-2-3 to -7

The mandatory sentencing considerations were eliminated so that the statute merely includes a non-exhaustive list of aggravating and mitigating circumstances that the trial court "may consider." Ind. Code § 35-38-1-7.1(a)-(b).

Ind. Code § 35-38-1-7.1(d) now provides, in part:

> A court may impose any sentence that is:
>
> (1) authorized by statute; and
>
> (2) permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating circumstances or mitigating circumstances.

At the same time, the legislature retained the provision at Ind. Code § 35-38-1-3 requiring the trial court to conduct a sentencing hearing to "consider the facts and circumstances relevant to sentencing…" and requiring that the record of the hearing include a transcript of the hearing, a copy of the presentence report, and "if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence it imposes."

Effective July 1, 2007, the legislature adopted Ind. Code § 35-38-1-1.3, which provided:

> After a court has pronounced a sentence for a felony conviction, the court shall issue a statement of the court's reasons for selecting the sentence that it imposes.

In 2014, the legislature amended Ind. Code § 35-38-1-1.3 to provide that a court need not issue a statement of reasons if it imposes the advisory sentence, which superseded Anglemyer (below) with respect to advisory sentences.

c. Case law

In Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), the Indiana Supreme Court first addressed the trial court's statement of reasons and the nature and scope of appellate review of sentences under the new scheme.

(1) Purpose of sentencing statements

(1) Guard against arbitrary and capricious sentencing

(2) Provide an adequate basis for appellate review.

Anglemyer v. State, 868 N.E.2d 482, 489 (Ind. 2007), citing Dumbsky v. State, 508 N.E.2d 1274, 1278 (Ind. 1987).

"The requirement of articulating reasons for each sentence helps ensure rationality and consistency and assists the defendant and the public in understanding and accepting the decision, contributing to the defendant's potential for rehabilitation and to the public's confidence in the criminal justice system." Id., citing Abercrombie v. State, 417 N.E.2d 316, 319 (Ind. 1981).

(2) Required elements

The trial court's sentencing statement must contain the following: (1) a reasonably detailed recitation of reasons for the particular sentence; and (2) if the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007).

Anglemyer v. State, 868 N.E.2d at 490 (There must be "a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course such facts must have support in the record." Quoting Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981)).

Loos v. State, 875 N.E.2d 387 (Ind. 2007) (although trial court did not use the word "aggravating," description of Defendant's criminal history and of the charged act – kicking and kneeing a pregnant woman in the stomach resulting in still-birth – as something "you just don't do," was sufficiently specific to justify the sentence imposed.)

(3) Written statement not required

While better practice would be for the trial court to set out written statements of its reasons for an enhanced sentence in sentencing order, it is sufficient, in noncapital penalty cases, if trial court's reasons for the enhancement are clear from the review of the sentencing transcript. Hill v. State, 499 N.E.2d 1103, 1110 (Ind. 1986); Mundt v. State, 612 N.E.2d 566, 568 (Ind. Ct. App. 1993). A reviewing court looks not just to the written statement but must also consider the record of the sentencing hearing. Hardebeck v. State, 656 N.E.2d 486, 492 (Ind. Ct. App. 1995).

(4) Conflict between written and oral statement

"Rather than presuming the superior accuracy of the oral statement, we examine it alongside the written sentencing statement to assess the conclusions of the trial court. This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing." McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007), *accord,* Dowell v. State, 873 N.E.2d 59 (Ind. 2007).

d. Appellate review

(1) Abuse of discretion

The appellate standard of review of a trial court's sentencing decision is abuse of discretion. Anglemyer, *supr*a, 868 N.E.2d 482, 490.

(a) Failure to enter a sentencing statement is an abuse of discretion. Id.

(b) Stating reasons, including aggravating and mitigating circumstances, which are not supported by the record is an abuse of discretion. Id.

(c) Failing to include reasons, most notably mitigating reasons or circumstances that are clearly supported by the record and advanced for consideration, is an abuse of discretion. Id. at 491. To establish abuse of discretion on this ground, appellant must show that the mitigating reason or circumstance is both significantly mitigating and clearly supported. Id., at 493. Generally speaking, if a defendant did not raise a particular mitigating factor at sentencing, it is presumed to be insignificant and the trial court's failure to include it cannot be an abuse of discretion. Id. at 492. But see Anglemyer rehearing opinion, below, regarding guilty plea.

Anglemyer v. State, 875 N.E.2d 218, 220-21 (Ind. 2007) (Court clarifies on rehearing that because a trial court is inherently aware of a guilty plea, a defendant will not be precluded from raising it as a mitigating factor for the first time on appeal. However, the significance of a guilty plea will vary from case to case, and it may not be significantly mitigating if it does not demonstrate an acceptance of responsibility or if the defendant receives a substantial benefit in return for the plea.)

Forgey v. State, 886 N.E.2d 16 (Ind. Ct. App. 2008) (trial court was within its discretion to conclude that the defendant's military training assisted his commission of instant offenses and to reject defendant's military record as a mitigating sentencing factor).

Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008) (length of co-defendant's sentence is not clearly mitigating. "No authority requires co-participants to receive proportional sentences," citing Lopez v. State, 527 N.E.2d 1119, 1133 (Ind. 1988)).

Smith v. State, 670 N.E.2d 7 (Ind. 1996) (trial court is not required to consider alleged mitigating factors that are highly disputable in nature, weight, or significance, such as a claim of mental impairment not clearly supported by psychiatric evaluation).

(d) Stating reasons that are improper as a matter of law is an abuse of discretion. Anglemyer, *supr*a, 868 N.E.2d at 491.

Anglemyer v. State, 868 N.E.2d 482, 492 (Ind. 2007) (Seriousness of the offense is a valid aggravating circumstance referring to the nature and circumstances of the crime and the manner in which it was committed.)

McDonald v. State, 868 N.E.2d 1111 (Ind. 2007) (The fact of multiple crimes, the fact that a death occurred as the result of a conspiracy to commit murder, and a defendant's juvenile adjudications are all valid aggravating factors that may be used to enhance a sentence.)

Lamar v. State, 915 N.E.2d 193 (Ind. Ct. App. 2009) (While the trial court listed defendant's plea agreement and the substantial resulting benefit as an aggravating factor, these facts were properly considered in determining whether the guilty plea was a significant mitigating factor.)

Because the trial court is no longer required to weigh aggravating and mitigating circumstances against one another when making its sentencing decision, a trial court can no longer be said to have abused its discretion in failing to "properly weigh" such factors. However, a defendant may still challenge an excessive sentence on the grounds outlined by Appellate Rule 7(B). Anglemyer, *supra*, 868 N.E.2d at 491. See discussion below.

Where the appellate court finds that the trial court has abused its discretion in its sentencing determination, remand for resentencing may be the appropriate remedy if the appellate court "cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id.

(2) Appellate Rule 7(B) appropriateness review

Irrespective of the trial court's having acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution gives the Indiana Supreme Court authority to independently review and revise sentences, and the Court has implemented this authority and extended it to the Court of Appeals through Appellate Rule 7(B). Id.

This rule provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This review is separate from the review for abuse of discretion. King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

Review under Appellate Rule 7(B) is unlike typical appellate review and is very similar to the trial court's function considering and weighing aggravators and mitigators. Cardwell v. State, 895 N.E.2d 1219, 1223 (Ind. 2008). This review is intended to "address perceived unfairness in different sentences imposed for similar offenses," Id.; Pruitt v. State, 834 N.E.2d 90, 121 (Ind. 2005).

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

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

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

(3) Appellate Rule 7(B) review waived

There is a split among Court of Appeals panels on whether the defendant must demonstrate the sentence is inappropriate in light of **both** the nature of the offense and the character of the offender under Appellate Rule 7(B) review. The panels that find the defendant must demonstrate both hold that 7(B) review is waived if the defendant fails to make an argument as to each prong. The Indiana Supreme Court has not yet weighed in on the issue.

Landske v. State, 147 N.E.3d 387 (Ind. Ct. App. 2020) (construing the word "and" in the 7(B) Rule and in caselaw to mean that a successful defendant must identify compelling positive attributes of both nature of the offense and character).

See also: Davis v. State, --- N.E.3d --- (Ind. Ct. App. July 15, 2021) (noting the split among authority and finding that defendant failed to make a cogent argument on appeal by only arguing the nature of offense prong), *but see* Tavitas, J., concurring in result (finding Supreme Court has made "abundantly clear" that reviewing court's role is to consider both without any requirement the defendant prove both).

Connor v. State, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016) (finding defendant not required to independently show revision warranted under each prong because role of appellate court is to "ultimately balance" what is known about each prong).

See also: Turkette v. State, 151 N.E.3d 782 (Ind. Ct. App. 2020) (Rule 7(B) requires court to consider both nature of the offense and character of the offender, but defendant is not required to prove that each independently renders sentence inappropriate)

(4) Sentence increased under Appellate Rule 7(B)

In McCullough v. State, 900 N.E.2d 745 (Ind. 2009), the Indiana Supreme court held that when an appellant requests review of his sentence under App. Rule 7(b), "the reviewing court is presented with the issue of whether to affirm, reduce or increase the sentence." Id., 900 N.E.2d at 750. (We should forthrightly state that although we have that power, we have never exercised it and do not expect to exercise it in the future except in the most unusual case. Id., at 751, (Boehm, J., concurring).

However, in 2010, the Indiana Court of Appeals did exercise their ability to increase the defendant's sentence from 93 years to 118 years in Ackard v. State, 928 N.E.2d 623 (Ind. Ct. App. 2010). The Supreme Court vacated this holding and re-entered the sentence of 94 years (the trial court had made a mathematical error in imposing 93 years). Ackard v. State, 937 N.E.2d 811 (Ind. 2010).

Since the holding in McCullough, the Court of Appeals has continued to consider increasing a defendant's sentence under Appellate Rule 7(B).

Kunberger v. State, 46 N.E.3d 966 (Ind. Ct. App. 2015) (Pyle, J., dissenting to express his belief that a fully executed sentence as opposed to a suspended sentence is appropriate considering defendant's behavior);

Holt v. State, 62 N.E.3d 462 (Ind. Ct. App. 2016) (Bradford, J., dissenting, would have invoked the court's authority to increase the sentence up to eight years for each conviction);

Murray v. State, 74 N.E.3d 242 (Ind. Ct. App. 2017) (Crone, J., concurring, noting the State did not request a harsher sentence. Though that does not preclude the court from considering an increase, it is a significant factor. Had the State requested an increase, he would have been inclined to grant that request).

The State may not by appeal or cross-appeal seek appellate review and revision of a defendant's sentence under Appellate Rule 7(B). McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009). The increase of a sentence is only available where the defendant initiates a review and revision of his sentence. Atwood v. State, 905 N.E.2d 479 (Ind. Ct. App. 2009); Whitener v. State, 982 N.E.2d 439 (Ind. Ct. App. 2013).

The defendant cannot isolate the sentences on a particular count under Appellate Rule 7(B) to avoid a possible increase of the aggregate sentence. Webb v. State, 941 N.E.2d 1082 (Ind. Ct. App. 2011) (defendant was not permitted to challenge his sentence on the armed robbery count only in order to avoid an increased aggregate sentence).

F. NON-RECIDIVISM FINDINGS RESULTING IN ADDITIONAL PUNISHMENTS AND SENTENCES

1. Sexually violent predator finding

a. Definition

A sexually violent predator is a person who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly commit a sex offense (as defined in Ind. Code § 11-8-8-5.2), which includes rape, criminal deviate conduct (before its repeal), incest, sexual battery, and various offenses against children and minors. The term includes a person convicted in another jurisdiction who is identified as a sexually violent predator under Ind. Code § 11-8-8-20. Ind. Code § 35-38-1-7.5(a).

Further, Ind. Code § 35-38-1-7.5(b) provides that a person at least 18 years of age who commits, attempts or conspires to commit rape; criminal deviate conduct (before its repeal); class A or B felony child molesting (for a crime committed before July 1, 2014) or a Level 1-4 felony if committed after June 30, 2014; class A, B or C felony vicarious sexual gratification (for a crime committed before July 1, 2014) or a Level 3 felony if committed after June 30, 2014); class C felony vicarious sexual gratification under Ind. Code § 35-42-4-5(a)(1)(child under age 14) (if committed before July 1, 2014 or a Level 4 felony of committed after June 30 2014); or commits a sex offense (as defined in Ind.

Code § 11-8-8-5.2) while having a previous unrelated conviction/juvenile adjudication for a sex offense for which the person is required to register as a sex or violent offender under IC 11-8-8 is a sexually violent predator.

b. 2007 Amendment to Ind. Code § 35-38-1-7.5 Requires Doctor to Testify

Edwards v. State, 952 N.E.2d 862 (Ind. Ct. App. 2011) (SVP statute does not specify manner in which doctors will conduct evaluation of D and does not require separate evaluations).

Baugh v. State, 933 N.E.2d 1277 (Ind. 2010) (invited error doctrine precluded review of D's claims based on absence of doctors' live testimony at hearing and the alleged insufficient expertise in criminal behavioral disorders, where counsel affirmatively invited trial court to make its SVP determination based on the convictions and the doctors' reports).

PRACTICE POINTER: Argue that Ind. Code § 35-38-1-7.5 should only apply when the court sentences a person for sex offenses listed in Ind. Code § 11-8-8-4.5. It should exclude convictions for kidnapping or criminal confinement of a minor (5(a)(11)-(12)). See Chapter 9, Subsection IV, Proportionality and Cruel and Unusual Punishment.

c. Sentencing hearing

Whenever a court sentences a person for a sex offense listed in Ind. Code § 11-8-8-4.5 for which the person is required to register with a local law enforcement agency under Inc. Code § 11-8-8, at the sentencing hearing, the court shall indicate on the record whether the person has been convicted of an offense that makes the person a sexually violent predator under Ind. Code § 35-38-1-7.5(d).

If a person is not a sexually violent predator under subsection (b), the prosecuting attorney may request the court to conduct a hearing to determine whether the person (including a child adjudicated to be a delinquent child) is a sexually violent predator under subsection (a). If the court grants the motion, the court shall appoint two (2) board certified psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After conducting the hearing and considering the testimony of the two psychologists or psychiatrists, the court shall determine whether the person is a sexually violent predator under subsection (a).

Marlett v. State, 878 N.E.2d 860 (Ind. 2007) (It is not sufficient that the trial court read reports from the two court-appointed experts. The trial court must hear testimony from the experts and make its determination after considering this testimony. The evidence must support a finding that the defendant suffers from a mental abnormality or personality disorder which makes it likely that he will repeatedly commit a sex offense listed in Ind. Code § 11-8-8-4.5(a)).

Phelps v. State, 914 N.E.2d 283 (Ind. Ct. App. 2009) (Trial court erred in finding defendant to be a sexually violent predator because he had no prior sex crime convictions, the court-appointed experts concluded that he was not an SVP, and the State presented no evidence that he had any personality disorder making him likely to re-offend.)

Scott v. State, 895 N.E.2d 369 (Ind. Ct. App. 2008) (Court of Appeals declines to apply a "more likely than not" or a mathematically precise standard into the statute's required finding that a defendant is "likely" to repeatedly commit an enumerated sex offense. Here, defendant's lack of remorse and multiple sex-related convictions, together with expert report that defendant suffered from antisocial personality disorder and was significantly more likely than the average individual to engage in the listed offenses was sufficient to support a finding that he is an SVP).

Williams v. State, 895 N.E.2d 377 (Ind. Ct. App. 2008) (Court of Appeals rejects defendant's claim that the burden of proof for an SVP determination should be "clear and convincing evidence," which is the standard applied in juvenile SVP determinations pursuant to Ind. Code § 5-2-12-4(b). Evidence here was sufficient despite one psychologist's opinion that defendant presented a low risk of re-offending.)

A hearing under this subsection may be combined with the person's sentencing hearing. Ind. Code § 35-38-1-7.5(e).

Jones v. State, 885 N.E.2d 1286 (Ind. 2008) (Ind. Code § 35-38-1-7.5 does not authorize the trial court to initiate a sexually violent predator determination for the first time during a probation revocation proceeding; the sexually violent predator hearing must occur with the original sentencing).

If a person is a sexually violent predator: (1) the person is required to register with the local law enforcement agency as provided in IC 11-8-8; and (2) the court shall send notice to the department of correction. Ind. Code § 35-38-1-7.5(f).

d. Ex Post Facto Concerns

Where a defendant, at his sentencing hearing, was determined to be a sexually violent predator and required to register as such for ten years after being released from prison, has no *ex post facto* claim regarding the legislature's increasing the ten-year period to a requirement of lifetime registration. Jensen v. State, 905 N.E.2d 384 (Ind. 2009). Merely extending the length of time during which a sexually violent predator was required to register was not punitive, particularly in light of the provision allowing an SVP to petition to be found no longer be an SVP after ten years. Id., at 394; Tyson v. State, 51 N.E.3d 88 (Ind. 2016).

However, legislation that applied the SVP provisions to individuals whose crime, conviction, sentencing and release from prison all pre-dated the 1994 enactment of the original sex offender registry law, was punitive in nature and runs afoul of *ex post facto* prohibitions. Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009). But see State v. Zerbe, 50 N.E.3d 368 (Ind. 2016) (where defendant committed his sex crime in 1988 in Michigan and Michigan retroactively applied their registration requirement, defendant's requirement to register in Indiana does not run afoul of the Ex Post Facto Clause).

See also

Cowan v. Carter, 130 N.E.3d 1165 (Ind. Ct. App. 2019) (classification as a sexually violent predator did not violate ex post facto protections because before defendant's

Indiana conviction, he already had an unrelated conviction in another state for which he was required to register).

Healey v. State, 986 N.E.2d 825 (Ind. Ct. App. 2013) (where sex offender has no statutory right to challenge increase in number of years he must register, the increase constitutes punishment and violates Indiana's prohibition on ex post facto laws).

Gonzales v. State, 980 N.E.2d 312 (Ind. 2013) (denial of defendant's petition to be removed from sex offender registry on basis of 2006 amendment to Ind. Code § 5-2-12-15 (1996), which increased time for defendant to stay in registry from 10 years to life, was ex post facto violation because defendant was placed on the registry 7 years before the 2006 amendment went into effect, barring defendant from ever petitioning to be removed from list).

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

Lemmon v. Harris, 949 N.E.2d 803 (Ind. 2011) (retroactive application of 2007 amendment to Ind. Code § 35-38-1-7.5 (b), which made D a sexually violent predator by operation of law, did not violate Indiana's prohibition on ex post facto laws because D failed to cite any evidence that the intent of the amendment was punitive and because at least four of the seven factors considered to decide whether the effects of a regulatory scheme are punitive or non-punitive weigh in favor of finding the 2007 amendment to Ind. Code § 35-38-1-7.5(b) as non-punitive).

Vickery v. State, 932 N.E.2d 678 (Ind. Ct. App. 2010) (rejecting argument that lifetime registration statute is punitive because it "imposes an additional punishment of shaming").

Gardner v. State, 923 N.E.2d 959 (Ind. Ct. App. 2010) (claim that violent registration requirement violates ex post facto is not ripe for appellate review because Gardner has not yet been ordered to register).

Herron v. State, 918 N.E.2d 682 (Ind. Ct. App. 2009) (D who was required by Arizona to register as a sex offender for life when he committed his offense in 1983, is a "sex offender" who is required to register for life under Indiana's Sex Offender Registration Act).

Cf. United States v. Comstock, 130 S. Ct. 1949 (2010) (Congress's enactment of Title 18 U.S.C. § 4248, which permits civil commitment of mentally ill "sexually dangerous" federal prisoners beyond their scheduled release dates, was a proper exercise of its authority to make laws "necessary and proper" to execute the enumerated powers the Constitution vests in the federal government).

e. Due process concerns

State v. Dykes, 728 S.E.2d 455 (S.C. 2012) (requiring sex offender who was under no probationary or similar restrictions to submit to satellite monitoring for the rest of her life if she posed a low risk of reoffending violated her substantive due process rights under U.S. Const. amend. XIV; also, travel policy infringed on the offender's fundamental right to travel without any consideration of whether such a restriction was warranted).

f. Exclusion by operation of law

A person is not a sexually violent predator by operation of law under Ind. Code § 35-38-1-7.5(b)(1) if all of the following conditions are met:

(1) The victim was not less than twelve (12) years of age at the time the offense was committed.

(2) The person is not more than four (4) years older than the victim.

(3) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship, which does not include a family relationship.

(4) The offense committed by the person was not any of the following:

(a) Rape
(b) Criminal deviate conduct (before its repeal)
(c) An offense committed by using or threatening the use of deadly force while armed with a deadly weapon
(d) An offense that results in serious bodily injury
(e) An offense that is facilitated by furnishing the victim, without the victim's knowledge, with a drug or a controlled substance or knowing that the victim was furnished with a drug or controlled substance without the victim's knowledge

(5) The person has not committed another sex offense (as defined in IC 11-8-8-5.2) (including a delinquent act that would be a sex offense if committed by an adult) against any other person.

(6) The person did not have a position of authority or substantial influence over the victim.

(7) The court find that the person should not be considered a sexually violent predator.

Ind. Code § 35-38-1-7.5 (h).

g. Petition to remove finding

A person who is a sexually violent predator may petition the court to consider whether the person should no longer be considered a sexually violent predator, unless the person has two or more unrelated convictions for an offense described in Ind. Code § 11-8-8-4.5 for which the person is required to register under Ind. Code § 11-8-8.

The person may file a petition not earlier than ten years after the sentencing court or juvenile court makes its determination or the person is released from incarceration or secure detention. The person may file a petition with the court not more than one time per year. A court may dismiss a petition filed under this subsection or conduct a hearing to determine if the person should no longer be considered a sexually violent predator. If the court conducts a hearing, it shall appoint two (2) psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After conducting the hearing and considering the testimony, the court shall determine whether the person should no longer be considered a sexually violent predator under subsection (a). If the court finds that the person should no longer be considered a sexually violent predator, the court shall send notice to the department of correction.

Notwithstanding any other law, a condition imposed on a person due to the person's status as a sexually violent predator, including lifetime parole or GPS monitoring, does not apply to a person no longer considered a sexually violent predator. Ind. Code § 35-38-1-7.5(g).

See Chapter 13, Parole, for a discussion on conditions of parole for persons found to be sexually violent predators.

2. Repeat sexual offender finding

a. Notice

Adcock v. State, 933 N.E.2d 21 (Ind. Ct. App. 2010) (trial court did not err in allowing State to amend RSO Notice after opening arguments in RSO phase of trial to reflect that D's prior conviction for child molesting was entered on May 16, 1986, not December 18, 1990, as the original Notice stated).

3. Commission of crime of domestic violence finding

a. Definition

Pursuant to Ind. Code § 35-31.5-2-78, "crime of domestic violence" for purposes of IC 5-2-6.1, IC 35-38-9, and IC 35-47-4-7, means an offense or the attempt to commit an offense that:

(1) has as an element the:

(a) use of physical force; or

(b) threatened use of a deadly weapon; and

(2) is committed against a family or household member, as defined in section 128 [IC 35-31.5-2-128] of this chapter.

b. Sentencing hearing

At the sentencing hearing, the trial court must determine whether a person has committed a crime of domestic violence, as defined by Ind. Code § 35-31.5-2-78, and the determination must be based upon evidence introduced at trial or a factual basis provided as part of a guilty plea. Ind. Code § 35-38-1-7.7. Upon determining that a defendant has committed a crime of domestic violence, a court shall advise the defendant of the

consequences of this finding. A judge shall record a determination that a defendant has committed a crime of domestic violence on a form prepared by the office of judicial administration.

The domestic violence determination is non-punitive, and thus does not implicate the defendant's Sixth Amendment right to a jury trial. Hitch v. State, 51 N.E.3d 216 (Ind. 2016).

(1) Evidence Sufficient for Domestic Violence Finding

Staples v. State, 959 N.E.2d 323 (Ind. Ct. App. 2011) (domestic battery conviction not necessary for finding that defendant committed crime of domestic violence, see Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005), thus making it illegal for defendant to possess a firearm, where defendant pled guilty to battery and pointing a firearm; circumstantial evidence showed that defendant and complaining witness were members of the same household and were, or had been, in a dating relationship).

(2) Evidence Insufficient for Domestic Violence Finding

Johnson v. State, 903 N.E.2d 472 (Ind. Ct. App. 2009) (where factual basis revealed only that defendant and victim had been living together for two to three months as a convenience after victim "lost" her apartment, and that they maintained separate finances, trial court erred in determining that the victim was cohabitating with defendant as a spouse and that defendant had been convicted of a crime of domestic violence.)

(3) No Separate Hearing Needed to Disqualify Firearm Possession

Staples v. State, 959 N.E.2d 323 (Ind. Ct. App. 2011) (a separate hearing with notice prior to disqualifying defendant from future possession or ownership of firearms is not required under Ind. Code § 35-38-1-7.7 as the factual basis of a guilty plea provides trial court with evidence from which to make that determination).

c. Consequences of finding

A defendant who is found to have committed a crime of domestic violence may not possess a firearm upon the person's release from imprisonment or lawful detention. Ind. Code § 35-47-4-7(a).

d. Restoration of rights

A person has not been convicted of a crime of domestic violence if the conviction has been expunged or the person has been pardoned. Ind. Code § 35-47-4-7(e). The person's right to possess a firearm shall be restored if a conviction is reversed on appeal or post-conviction review ninety days after the final disposition of the appeal or when the prosecuting attorney states on the record that the charges will not be re-filed, if earlier. Ind. Code § 35-47-4-7(f).

The person may petition the court for restoration of this right not earlier than five years after the date of conviction. In determining whether to restore the person's right to possess a firearm, the court shall consider the following factors:

(1) whether the person has been subject to a protective order, no contact order, workplace violence restraining order, or any other court order that prohibits possession of a firearm;

(2) whether the person has successfully completed a substance abuse program, if applicable;

(3) whether the person has successfully completed a parenting class, if applicable;

(4) whether the person still presents a threat to the victim of the crime; and

(5) whether there is any other reason why the person should not possess a firearm, including whether the person failed to complete a specified condition ordered by the court or whether the person has committed a subsequent offense.

Ind. Code § 35-47-4-7(b).

If the court denies such a petition, the person may not file a subsequent petition until one year has elapsed.

4. Criminal organization (gang) sentencing enhancement

a. Additional term of imprisonment

Pursuant to Ind. Code § 35-50-2-15(b) (effective July 1, 2006), the state may seek on a page separate from the rest of the charging instrument, to have a person who allegedly committed a felony offense sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally:

(1) was a member of a criminal organization while committing the offense; and

(2) committed the felony offense at the direction of or in affiliation with a criminal organization or with the intent to benefit, promote, or further the interests of a criminal organization, or for the purposes of increasing the person's own standing or position with a criminal organization.

If after a sentencing hearing the jury or court finds that the state has met its burden, the court shall:

(1) sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony; or

(2) sentence the person to an additional fixed term of imprisonment equal to the longest sentence imposed for the underlying felonies, if the person is being sentenced for more than one (1) felony.

Ind. Code § 35-50-2-15(d).

b. Jury or bench trial

If the person is convicted of the felony offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing. Ind. Code § 35-50-2-15(c).

PRACTICE POINTER: The defendant must knowingly and voluntarily waive his right to a jury trial on the sentencing gang enhancement. A waiver of his right to a jury trial in the guilt phase may not constitute a voluntary waiver of his separate Sixth Amendment right to a jury trial on the gang finding leading to an increased punishment. See, e.g., Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (failure to confirm defendant's personal waiver of jury trial before proceeding to bench trial on second phase of D-felony domestic battery charge based on a prior conviction was fundamental error); (O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003) (defendant cannot waive right to jury trial on HO enhancement simply by waiving jury trial on guilt phase prior to HO enhancement even being filed).

c. Non-suspendible/consecutive sentence

A sentence imposed under this section shall run consecutively to the underlying sentence. Ind. Code § 35-50-2-15(e). A term of imprisonment imposed under this section may not be suspended. Ind. Code § 35-50-2-15(f).

d. Definitions/exclusion

This section does not apply to an individual who is convicted of criminal gang activity, Ind. Code 35-45-9-3. Ind. Code § 35-50-2-15(a). "Criminal organization" means a group with at least three (3) members that specifically:

(1) either:

(a) promotes, sponsors, or assists in; or

(b) participates in; or

(c) has as one (1) of its goals; or

(2) requires as a condition of membership or continued membership; the commission of a felony, an act that would be a felony if committed by an adult, or the offense of battery (Ind. Code § 35-42-2-1).

Ind. Code § 35-45-9-1.

e. Evidence of gang activity at enhancement hearing

Evidence that a person was a member of a criminal organization or committed a felony at the direction of or in affiliation with a criminal organization may include the following:

(1) An admission of criminal organization membership by the person.

(2) A statement by:

(a) a member of the person's family;

(b) the person's guardian; or

(c) a reliable member of the criminal organization;
stating that the person is a member of a criminal organization.

(3) The person having tattoos identifying the person as a member of a criminal organization.

(4) The person having a style of dress that is particular to members of a criminal organization.

(5) The person associating with one (1) or more members of a criminal organization.

(6) Physical evidence indicating the person is a member of a criminal organization.

(7) An observation of the person in the company of a known criminal organization member on at least three occasions.

(8) Communications authored by the person indicating criminal organization membership indicating criminal organization membership, promotion of the membership in a criminal organization, or responsibility for an offense committed by a criminal organization

(9) The person's use of the hand signs of a criminal organization.

(10) The person's involvement in recruiting criminal organization members.

Ind. Code § 35-50-2-15(g).

PRACTICE POINTER: If a statute's substantive requirements for admissibility conflict with the Indiana Rules of Evidence, the statute is a nullity on that point, because the statute and the rule would both address the admissibility of evidence, thereby creating two different standards. McEwen v. State, 695 N.E.2d 79, 89 (Ind. 1998) (*citing* Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996) and Indiana Rule of Evidence 101(a)). Ind. Code § 35-50-2-15(g) may conflict with Indiana Rule of Evidence 402 (relevance), 403 (unfair prejudice) and 702 (expert testimony)). Thus, at least subsection (g) of the statute may be a nullity.

G. FINGERPRINTING OF DEFENDANT

Immediately after sentencing a defendant for an offense, the court shall order the defendant to be fingerprinted by an individual qualified to take fingerprints. The court is not required to order the defendant to be fingerprinted if the defendant was previously arrested and processed at the county jail. The fingerprints may be recorded in any reliable manner, including by the use of a digital fingerprinting device. Ind. Code § 35-38-1-28(a), (c).

The court shall order a law enforcement officer to provide the fingerprints to the prosecuting attorney and the state police department, in hard copy or in electronic format approved by the security and privacy council established by Ind. Code § 10-13-3-34. Ind. Code § 35-38-1-28(b).

H. RIGHTS OF THE DEFENDANT

1. Right to be present

The defendant has a right to be present at the time sentence is pronounced; however, this right is provided by Indiana statutory law and common law, rather than by state or federal constitutional provisions. Ind. Code § 35-38-1-4(a); Cleff v. State, 565 N.E.2d 1089, 1090 (Ind. Ct. App. 1991).

Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982) (lack of presence of defendant at sentence modification cannot be remedied by subsequent signing by defendant of terms of probation).

However, a trial court may conduct a sentencing hearing where the defendant appears by video, but only if: a) the defendant waives, in writing, his right to be present at the hearing, and b) the prosecutor consents to the defendant appearing by video. Hawkins v. State, 982 N.E.2d 997 (Ind. 2013).

Gary v. State, 116 N.E.3d 455 (Ind. 2019) (David, J., joined by Rush, C.J., dissenting from the denial of transfer of Court of Appeals opinion at 113 N.E.3d 237, argued that defendants have a constitutional right to be physically present when a judge imposes a sentence for a crime).

a. Harmless error

Burr v. State, 492 N.E.2d 306 (Ind. 1986) (because defendant was present at sentencing hearing where he presented mitigation evidence and was also present at habeas hearing where counsel argued that sentence was incorrect and did not object to court taking issue under advisement, fact that defendant was not present when court later imposed sentence was harmless).

Royal v. State, 272 Ind. 151, 396 N.E.2d 390 (1979) (error was harmless where court had no discretion as to sentence imposed).

b. Waiver of right to be present

The defendant may knowingly and voluntarily waive his right to be present, and the court may sentence the defendant in absentia. Williams v State, 526 N.E.2d 1179, 1180 (Ind. 1988). The following are ways in which a defendant waived his right to be present:

Fennell v. State, 492 N.E.2d 297 (Ind. 1986) (defendant failed to appear for sentencing and there was evidence that defendant knew scheduled day of his trial; best evidence of this knowledge is defendant's presence in court day matter is set for trial). See also Williams v State, 526 N.E.2d 1179 (Ind. 1988); but see Diaz v. State, 775 N.E.2d 1212 (Ind. Ct. App. 2002) (explained below).

Gillespie v. State, 634 N.E.2d 862 (Ind. Ct. App. 1994) (defendant knowingly and voluntarily waived his right to be present at trial; his continuing absence was considered as knowing and voluntary waiver of his right to be present at sentencing).

Cleff v. State, 565 N.E.2d 1089 (Ind. Ct. App. 1991) (defendant failed to appear at sentencing although he was present throughout trial and was aware of date and time of his sentencing hearing).

Crank v. State, 502 N.E.2d 1355 (Ind. Ct. App. 1987) (defendant failed to appear at sentencing due to his desire to avoid court proceedings).

But see:

James v. State, 541 N.E.2d 264, 264 (Ind. 1989) (a defendant does not waive his right to appeal solely by waiving his right to be present at the time the sentence is pronounced).

Diaz v. State, 775 N.E.2d 1212 (Ind. Ct. App. 2002) (where the record indicated that defendant did not speak English and is silent as to if he was assisted by an interpreter at the pretrial conference or otherwise understood the proceedings, it cannot be said that defendant voluntarily, knowingly, and intelligently waived his right to be present at trial and sentencing).

c. Exception: license suspension

Dixon v. State, 685 N.E.2d 715 (Ind. Ct. App. 1997) (because Ind. Code § 9-30-5-10 only requires that trial court review evidence before recommending license suspension, trial court did not err in entering mandatory recommendation of license suspension without presence of defendant after previously conducting full sentencing hearing).

2. Right to allocution

Ind. Code § 35-38-1-5 provides that prior to sentencing, the court shall ask the defendant whether he wishes to make a statement.

Vicory v. State, 802 N.E.2d 426 (Ind. 2004) (right of allocution applies to probation revocation hearings; even though the court does not "pronounce a sentence" at a probation revocation hearing, and therefore is not required to *ask* the defendant whether he wants to make a statement, when a defendant specifically *requests* the court to make a statement, the request shall be granted because the hearing is relevant to defendant's sentencing).

Baird v. State, 604 N.E.2d 1170 (Ind. 1992), *cert. den'd*S. Ct. (Ind. Code § 35-38-1-5 does not provide defendant right to speak to jury since trial court is sentencer).

Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (in capital case, trial court did not err in requiring defendant to exercise his right to allocution before State's closing argument instead of allowing him to speak to jury at close of all evidence).

Hull v. State, 868 N.E.2d 901 (Ind. Ct. App. 2007) (if defendant asks to make a statement at a hearing to revoke a suspended sentence, his request should be granted).

a. Purpose

In Indiana, the purpose of the right to allocution is to give the trial court the opportunity to consider the facts and circumstances relevant to the sentencing of the defendant in the case before it. This goal is accomplished where the defendant is given the opportunity to explain his view of the facts and circumstances surrounding the crime.

Vicory v. State, 802 N.E.2d 426 (Ind. 2004) (right of allocution allows defendant to tell his side of the story; as long as defendant has an opportunity to explain his view at probation revocation hearing, it is not error for the court to deny a specific request to make a statement unless the appellant identifies additional statements or arguments he would have made had the court permitted him to read a statement).

Ross v. State, 676 N.E.2d 339 (Ind. 1996) (while trial judge should be cautious about restricting defendant's statements and should generally allow defendant to speak, trial court may act to curtail abuse of right of allocution; where court limited defendant's oral statement to facts and circumstances surrounding his case but allowed defendant to enter his prepared statement dealing with his family and personal history into record, defendant's right to allocution was not violated).

b. Court's duty to inquire

Trial judge should unambiguously address the defendant personally and leave no question that the defendant was given the opportunity to speak on her own behalf. Ross v. State, 676 N.E.2d 339, 344 (Ind. 1996). But see Angleton v. State, 714 N.E.2d 156, 159 (Ind. 1999). Failure to ask defendant directly whether he or she wishes to make a statement constitutes fundamental error. Jones v. State, 79 N.E.3d 911 (Ind. Ct. App. 2017); see also Owens v State, 69 N.E.3d 531 (Ind. Ct. App. 2017) (failure to allow counsel to make a meaningful sentencing argument, advise defendant of his right to speak, or provide defendant an opportunity to make a statement was clear denial of due process and an abdication of the trial court's statutory obligations).

Biddinger v. State, 868 N.E.2d 407 (Ind. 2007) (because guilty plea is not based on "the verdict of the jury or the finding of the court," trial judge is not required to ask defendant whether he or she wants to make a statement in allocution, however when a defendant specifically requests to make a statement the request should be granted).

Fields v. State, 676 N.E.2d 27 (Ind. Ct. App. 1997) (court asking defendant whether he agreed with information contained in presentence report did not afford defendant his right to make statement).

Shanholt v. State, 448 N.E.2d 308 (Ind. Ct. App. 1983) (there was no error where defendant was given opportunity to and did explain her view of facts and circumstances, even though court failed to explicitly inquire whether she wished to make personal statement on her own behalf).

c. Statement is not subject to cross examination

A statement in allocution is not evidence and is not subject to cross-examination. Biddinger v. State, 868 N.E.2d 407 (Ind. 2007). The purpose of allocution is undermined when the defendant is cross examined, thus it should not be allowed. Phelps v. State, 914 N.E.2d 283 (Ind. Ct. App. 2009).

d. Waiver of right

A defendant may waive her right to allocution by failing to object.

Samaniego v. State, 553 N.E.2d 120 (Ind. 1990) (defendant was not improperly intimidated into declining to make statement prior to sentencing when trial judge made lengthy sentencing statement that had been prepared prior to sentencing hearing).

Locke v. State, 461 N.E.2d 1090 (Ind. 1984) (failure to contemporaneously object to sentencing where defendant was not asked by trial court if defendant had anything to say constituted waiver of right to allocution). See also Angleton v. State, 714 N.E.2d 156 (Ind. 1999); Robles v. State, 705 N.E.2d 183 (Ind. Ct. App. 1999).

Woods v. State, 98 N.E.3d 656 (Ind. Ct. App. 2017) (declining to follow Jones, below; trial court offered an opportunity to give a statement and defendant chose not to speak); see also Abd v. State, 120 N.E.3d 1126 (Ind. Ct. App. 2019).

But see:

Jones v. State, 79 N.E.3d 911 (Ind. Ct. App. 2017) (trial court's failure to personally ask defendant whether he wished to make a statement at sentencing constituted fundamental error).

Owens v. State, 69 N.E.3d 531 (Ind. Ct. App. 2017) (appellate court expressed dismay at trial court's disregard of the statutory mandate that it advise of the defendant of his right to make a statement and allow him to speak if he wishes).

Vicory v. State, 802 N.E.2d 426 (Ind. 2004) (although defendant did not enter formal objection of denial of right to allocution, his right to appeal was properly preserved when the trial court denied his request to read a statement).

3. Right to counsel

a. Sentencing

(1) Constitutional right

The defendant has a constitutional right to counsel at sentencing, which the defendant may knowingly and voluntarily waive. U.S. Const., amend. VI; Ind. Const., art. I, § 13; Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 1204 (1977). Therefore, there are ineffective assistance of counsel claims at the sentencing phase. Kellet v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999).

Boyle v. State, 564 N.E.2d 346 (Ind. Ct. App. 1990) (defendant knowingly and voluntarily waived his right to have counsel present at sentencing hearing, although court's warnings about self-representation were not that detailed or extensive).

Puckett v. State, 843 N.E.2d 959 (Ind. Ct. App. 2006) (trial court violated defendant's rights under Sixth Amendment when it sentenced him when he was not represented by legal counsel; record was devoid of any evidence that defendant knowingly and voluntarily waived his right to be represented by counsel at his sentencing hearing).

Alabama v. Shelton, 122 S. Ct.. 1764 (2002) (a suspended sentence that may result in the deprivation of defendant's liberty may not be imposed unless defendant is offered the assistance of counsel; where State provides no counsel to

an indigent defendant, Sixth Amendment does not permit activation of a suspended sentence upon defendant's violation of the terms of probation).

(a) Harmless error

Lack of counsel at sentencing hearing was harmless beyond reasonable doubt because lack of counsel could not have contributed to Defendant's conviction and Defendant's sentence was established by plea agreement. Armstrong v. State, 932 N.E.2d 1263 (Ind. Ct. App. 2010)

(2) Statutory right

The defendant has a statutory right to have counsel address the court at sentencing. Ind. Code § 35-38-1-5.

Koehler v. State, 499 N.E.2d 196 (Ind. 1986) (defendant was not deprived of his right to have counsel address court when counsel was unaware of sentencing hearing date and unprepared because of inconvenience or lack of preparation time caused by defendant's escape).

Ford v. State, 179 Ind. Ct. App. 535, 386 N.E.2d 709 (1979) (defendant was not entitled to relief where he was not prejudiced by failure of his counsel to address court on his behalf at time of sentencing because sentence imposed was mandatory and could not be affected by anything said by counsel).

Mingle v. State, 182 Ind.App. 653, 396 N.E.2d 399 (1979) (judge asking counsel whether there was any reason why sentence should not be pronounced was sufficient to afford defendant right to have counsel address court).

b. Resentencing

The defendant has the right to representation of counsel at a resentencing hearing. Stevenson v. State, 164 Ind.App. 199, 327 N.E.2d. 621, 624 (1975).

c. Modification / Correction

The defendant and his counsel must be present when the corrected sentence is ordered. Ind. Code § 35-38-1-15.

4. Right to be sentenced by an impartial magistrate

Included in a defendant's due process rights is the right to be sentenced by an impartial magistrate.

Hollins v. State, 679 N.E.2d 1305 (Ind. 1997) (judge's comments at sentencing regarding coldness of defendant, his lack of remorse and his proclivity to kill again did not reflect disqualifying personal bias or prejudice against defendant, and therefore, did not deny defendant right to be sentenced by impartial magistrate).

5. Due process and Sixth Amendment: Right to jury and proof beyond a reasonable doubt

The U.S. Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000); see also Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999). Similarly, a jury, not a trial judge, must find a fact that increases the mandatory minimum of a sentence. Alleyne v. United States, 133 S. Ct. 2151 (2013). The rule also applies for a criminal fine. Southern Union Co. v. United States, 132 S. Ct. 2344 (2012). Enhancement may be based on a judicial finding of the fact of a prior criminal conviction. Almendarez-Torres v. United States, 523 U.S. 224 (1998).

See also United States v. O'Brien, 130 S. Ct. 2169 (2010) (machine gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a thirty-year mandatory minimum sentence when the firearm used in certain crimes is a machine gun, is an element of the offense that must be proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be proved to the judge at sentencing).

The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in a jury verdict or admitted by the defendant without any additional findings, *i.e.*, the presumptive or standard sentence. Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004).

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

As a new rule of constitutional procedure, the courts will apply Blakely retroactively to all cases on direct review at the time Blakely was announced and would be "rather liberal" in approaching whether an appellant and her lawyer have adequately preserved and raised a Blakely issue. Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded by statute in part as stated in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007).

a. Pre-April 25, 2005, statutory scheme -- aggravating factors- Smylie

Indiana's system prior to April 25, 2005, for enhanced sentences contravenes Blakely, *supra.* Indiana's scheme was not a "range" system but provided for a "fixed term" presumptive sentence as a mandatory starting point for each class of felonies. Ind. Code § 35-50- 2-3 to 7. Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded by statute in part as stated in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). The statutes also created upper and lower boundaries for each felony sentence, requiring the judge to engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed. It is this type of judicial fact-finding that concerned the Court in Blakely and renders Indiana's sentencing system unconstitutional. Id.

Thus, under the sentencing scheme prior to April 25, 2005, any aggravator used to enhance a sentence beyond the presumptive and which is not based on a prior conviction, or an admission of a defendant must be proven to a jury beyond a reasonable doubt.

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded by statute in part as stated in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007) (imposition of consecutive sentences based on aggravators not found by a jury does not violate Blakely*, supra)*.

(1) Specific aggravators

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

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

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

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

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

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

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

(2) Judicial statements about aggravators

Statements which are "derivative" of criminal history are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under Blakely, but they cannot serve as separate aggravating circumstances. The Sixth Amendment is not implicated or endangered when language of an aggravator is meant to describe factual circumstances, not to serve as a fact itself. Thus, the precise language of an aggravator need not be submitted to a jury nor admitted by a defendant in order to pass Sixth Amendment requirements established in Blakely. Morgan v. State, 829 N.E.2.d 12 (Ind. 2005).

Haas v. State, 849 N.E.2d 550 (Ind. 2006) (judicial statements that the defendant was at risk to commit future crimes and the nature and circumstance of the crime was heinous were not properly supported by facts proven to a jury and thus could

not be used as aggravators; further, these judicial statements and the underlying facts upon which they are based could not both serve as aggravators).

Garland v. State, 855 N.E.2d 703 (Ind. Ct. App. 2006) (trial court's comment that victim was "of tender age" was a moral-penal observation supported by verdict, not a separate aggravator; to qualify as a moral-penal observation, statement must be: 1) supported by facts found by jury or otherwise admitted, and 2) meant as a concise description of what the underlying facts demonstrate).

(3) April 25, 2005, amendment - advisory sentencing scheme

The legislature amended Indiana's statutory sentencing scheme on April 25, 2005, to an advisory sentencing scheme. Ind. Code § 35-39-1-7.1 (d) ("A court may impose any sentence that is: (a) authorized by statute; and (2) permissible under the Constitution of the State of Indiana; regardless of the presence of absence of aggravating circumstances or mitigating circumstances").

The new statutory changes cannot be applied retroactively to crimes committed before April 25, 2005. Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007), Boyle v. State, 868 N.E.2d 435 (Ind. 2007).

b. Non-recidivism findings resulting in additional punishments

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

Kazmier v. State, 863 N.E.2d 912 (Ind. Ct. App. 2007) (because the court in Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005) found that the legislature intended to punish the defendant by prohibiting him from owning firearms due to a domestic violence determination, the domestic violation determination must be made by a jury and found beyond a reasonable doubt in order to be constitutional).

c. LWOP and death penalty

In Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), the U.S. Supreme Court held that Apprendi applies to capital sentencing schemes, because an additional fact – a statutorily prescribed aggravating circumstance – must be found before a defendant becomes eligible for death. Because Indiana's sentences of death and life without parole follow the same statutory scheme, Ring applies to life without parole cases, as well, in Indiana. Before a sentence of death or life without parole can be imposed, at least one charged aggravating circumstance must be found beyond a reasonable doubt by a jury. Bostick v. State, 773 N.E.2d 266 (Ind. 2002).

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

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

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

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

d. Blakely Does Not Apply Retroactively to Belated Appeals

As a new rule of constitutional procedure, the courts will apply Blakely retroactively to all cases on direct review at the time Blakely was announced and would be "rather liberal" in approaching whether an appellant and her lawyer have adequately preserved and raised a Blakely issue. Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (superseded by statute in part as stated in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). Smylie and Blakely do not apply retroactively to belated appeals. Gutermuth v. State, 868 N.E.2d 427 (Ind. 2007).

Kline v. State, 875 N.E.2d 435 (Ind. Ct. App. 2007) (where defendant's re-sentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the re-sentencing); see also Ben-Yisrayl v. State, 908 N.E.2d 1223 (Ind. Ct. App. 2009);

Marbley-El v. State, 929 N.E.2d 194 (Ind. 2010) (because defendant committed his crime after legislature enacted advisory sentencing statutes, Blakely does not apply and trial court correctly did not advise him that he was entitled to a jury determination of factors that led to his six-year sentence);

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

Rogers v. State, 878 N.E.2d 269 (Ind. Ct. App. 2007), *trans. denied* (Blakely is not retroactive for Post-Conviction Rule 2 belated appeals; this case involved Indiana Post-Conviction Rule 2(3) & a belated appeal of a sentence entered after Blakely. Even if Blakely applies to belated appeal of re-sentence entered after Blakely was decided, Tr.Ct. in this case would have imposed same sentence).

I. EVIDENCE

1. Indiana Rules of Evidence not applicable

Ind.R.Evid. 101(c)(2) provides that Rules of Evidence do not apply at sentencing hearings. Lasley v. State, 510 N.E.2d 1340, 1342 (Ind. 1987). However, Rule 101(c)(2) does not affect the defendant's constitutional right not to be sentenced based on unreliable and inaccurate information, including unreliable hearsay. For a detailed analysis of evidence that can be introduced under Rule 101(c)(2), see Chapter 12, *Probation*, Subsection V.B.4, *Revocation of probation; Final/Revocation hearing*.

Lasely v. State, 510 N.E.2d 1340 (Ind. 1987) (evidence of prior crimes is admissible). See also Letica v. State, 569 N.E.2d 952 (Ind. 1991).

But see:

Dumas v. State, 803 N.E.2d 1113 (Ind. 2004) (rules of evidence are applicable in the penalty phase of a death penalty or life without parole trial, because it is tried before a jury. However, rules of evidence cannot infringe defendant's due process right to present reliable evidence that is highly relevant to a critical issue at sentencing. See Green v. Georgia, 442 U.S. 95, 97 (1979)).

2. Burden of proof

There is no particular burden of persuasion on the prosecutor to prove facts at a non-capital sentencing hearing. Gardner v. State, 270 Ind. 627, 388 N.E.2d 513, 519 (1979).

Fox v. State, 457 N.E.2d 1088 (Ind. 1982) (sentencing hearing, occurring after guilt has been determined, does not impose upon state same heavy burden that it must discharge to establish guilt of accused).

However, in the penalty phase of a death penalty or life without parole trial, the state bears the burden of proving alleged statutory aggravating circumstances beyond a reasonable doubt. Ind. Code § 35-50-2-9(d).

3. Constitutional limitations on evidence

a. Due Process: reliable information

Due process requires that sentences be based upon accurate and reliable information. Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977); Gardner v. State, 270 Ind. 627, 388 N.E.2d 513 (1979). Evidence considered by sentencing court need not be admissible at trial, but rather merely be reasonably reliable. United States v. Morris, 76 F.3d 171, 174 (7th Cir. 1996).

United States v. Hanna, 49 F.3d 572 (9th Cir. 1995) (sentence vacated where information used by judge to make his decision was unsupported and uncorroborated; judge allowed co-defendant, over objections from both government and defendant, to be examined by his own attorney while severely restricting cross examination by government and defendant; judge also allowed co-defendant to plead Fifth Amendment thirty-eight times despite having previously pled guilty to all counts charged by government; and co-defendant's sentence was lower than defendant's despite government's charge that co-defendant was more culpable).

United States v. Miele, 989 F.2d 659 (3rd Cir. 1993) (memory-impaired addict-informant's estimate of quantity of drug involved in offense was insufficiently reliable for due process purposes).

(1) Criminal record

A defendant cannot be sentenced on the basis of assumptions concerning his criminal record which are materially untrue. United States v. Harris, 558 F.2d 366, 373 (7th Cir. 1977).

White v. State, 756 N.E.2d 1057 (Ind. Ct. App. 2001) (even if court incorrectly believed defendant had five felony convictions rather than four felony convictions, prior criminal history was still proper aggravator, and the defendant was not sentenced on materially untrue information).

Brooks v. State, 555 N.E.2d 1348 (Ind. Ct. App. 1990) (where at sentencing, judge ignored parole officer's affidavit stating that defendant was discharged from parole on date arrested for instant crime and State failed to present evidence contradicting affidavit, defendant was sentenced on basis of materially untrue record).

(a) Previous charges resulting in acquittals

A sentencing court's consideration of a defendant's previous charge which resulted in an acquittal does not violate the defendant's federal right to due process if the State proves by the preponderance of the evidence that the defendant committed those crimes. United States v. Watts, 519 U.S. 148, 117 S. Ct. 633, 638 (1997).

However, where the court assumes, without considering any evidence, that the defendant committed the crime or that the defendant was convicted of the crime, the defendant's due process right to be sentenced based on materially true assumptions is violated.

Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948) (overruled in part on other grounds by Sentencing Reform Act of 1984) (defendant may not be sentenced based on court's belief that defendant had three previous convictions when, in fact, some of charges had been dismissed and defendant had been acquitted on others).

Fugate v. State, 516 N.E.2d 75 (Ind. Ct. App. 1987) (trial court's express reliance on pre-sentence report which contained statement of damage to

victim in crime of which defendant was acquitted denied defendant his right to be sentenced on basis of materially true assumptions).

PRACTICE POINTER: It is unresolved whether the court considering a defendant's prior charge for which she was acquitted violates the Indiana Constitution, specifically Article I, Section 12, affording due course of law, and Article I, Section 14, prohibiting double jeopardy.

(b) Contemporaneous charges resulting in acquittal

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001) (victim's mother's testimony about crime for which defendant was acquitted was irrelevant to sentence for crimes for which defendant was convicted in same trial).

(c) Prior convictions without counsel

Previous convictions of the defendant which were obtained without the assistance of counsel in violation of Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963), may not be considered in sentencing the defendant. United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589 (1972) (superseded in part on other grounds by Sentencing Reform Act of 1984 guidelines promulgated by the United States Sentencing Commission).

Brown v. State, 683 N.E.2d 600 (Ind. Ct. App. 1997) (quoting Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921 (1994)) (because uncounseled misdemeanor convictions are valid if no imprisonment is imposed, they may be considered in determining sentence for later conviction; however, they may not be used if defendant proves, by preponderance of evidence, that there was actual lack of representation without waiver of counsel in earlier proceeding).

It is unclear as to whether a court may consider an uncounseled juvenile conviction in determining the defendant's sentence.

PRACTICE POINTER: Counsel may argue that the court cannot rely on a misdemeanor conviction regardless of whether imprisonment was imposed because, unlike the U.S. Constitution, the Indiana Constitution guarantees the right to counsel for all persons charged with a misdemeanor, regardless of whether the charge ultimately results in imprisonment. Ind.Const. art. 1, § 13; Brunson v. State, 182 Ind.App. 146, 394 N.E.2d 229 (1979).

Berry v. State, 561 N.E.2d 832 (Ind. Ct. App. 1990) (juvenile conviction that was allegedly uncounseled could be considered in sentencing where juvenile conviction was used to enhance sentence but not offense and trial court had knowledge of fact that juvenile conviction was uncounseled).

But see:

Angleton v. State, 686 N.E.2d 803, 814, n.7 (Ind. 1997) (citing Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987) (because it is violation of due process to sentence defendant on basis of "misinformation of constitutional magnitude" such as convictions where defendant was unrepresented in

violation of Sixth Amendment, trial court may not consider uncounseled juvenile delinquent adjudication).

The 2015 enactment of Criminal Rule 25, requiring a mandatory appointment of counsel in all stages of a juvenile proceeding that may result in confinement or waiver, shows a likelihood that uncounseled juvenile convictions will not be permitted to enhance a sentence because the right to counsel was not provided.

(2) Hearsay

Because reliance on hearsay which lacks indicia of reliability may result in reliance on improper or inaccurate information in making the sentencing determination, such reliance violates the defendant's right to due process and requires remand for a new sentencing hearing. However, reliable hearsay is permitted in the sentencing context, so long as the defendant is afforded the opportunity to rebut the evidence. United States v. Barnes, 117 F.3d 328, 337 (7th Cir. 1997); United States v. Corbin, 998 F.2d 1377, 1385 (7th Cir. 1993).

Powell v. State, 644 N.E.2d 82 (Ind. 1994) (sworn statement given to police by defendant's friend, relating telephone conversation with defendant in which he told friend she should have reason to be afraid of defendant, was admissible at sentencing hearing because it carried some indicia of reliability and defendant had opportunity to inform court of any inaccuracies in statement).

Thomas v. State, 562 N.E.2d 43 (Ind. Ct. App. 1990) (trial court properly excluded codefendant's hearsay statement at defendant's sentencing due to questionable reliability of codefendant's pretrial statements).

One Indiana Court has held that the prohibition against testimonial hearsay of an unavailable witness does not apply in sentencing hearings. Davis v. State, 892 N.E.2d 156 (Ind. Ct. App. 2008).

(3) Prejudice: actual reliance on inaccurate information

Although incorrect or unreliable information may be presented to sentencing court, as long as sentencing court does not rely on information in making its sentencing decision, the sentence will not be vacated.

Malone v. State, 660 N.E.2d 619 (Ind. Ct. App. 1996) (where pre-sentence report included felonies which were actually misdemeanors, court was not required to vacate sentence because it was clear from record that judge did not rely on inaccurate convictions; defendant had numerous convictions to support imposition of enhanced sentence).

b. Cannot consider matters outside record

The trial court should look only to evidence properly placed in the record when making sentencing determinations. Looking outside the record for evidence in a sentencing hearing deprives the defendant of opportunity to review information and refute its accuracy and creates risk that sentencing will be based on inaccurate or irrelevant information. Hulfachor v. State, 813 N.E.2d 1204 (Ind. Ct. App. 2004).

c. Exclusionary rule

The issue of whether the exclusionary rule applies in sentencing hearings is unresolved in Indiana. All twelve federal circuit courts have ruled that in most circumstances the Fourth Amendment exclusionary rule does not bar the introduction of suppressed evidence during sentencing. See United States v. Acosta, 303 F.3d 78 (1st Cir. 2002). The Seventh Circuit has ruled that the exclusionary rule does not apply, but left open the possibility of its application when police intentionally act illegally to enhance the defendant's sentence. United States v. Brimah, 214 F.3d 854, 857-59 & n.4 (7th Cir. 2000).

In Indiana, the exclusionary rule has been applied in other proceedings, including habitual offender proceedings and the penalty phase of capital cases.

Foster v. State, 484 N.E.2d 965 (Ind. 1985) (in habitual offender proceeding, defendant had right to exclude evidence obtained in violation of Miranda based on holding in Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981) that procedural safeguards regarding advisements and exclusionary rule are as applicable in sentencing phase as they are in guilt phase of capital case).

J.E.G. v. C.J.E., 172 Ind.App. 515, 360 N.E.2d 1030 (1977) (exclusionary rule was applied to paternity hearing; in order to ensure fundamental fairness, paternity could not be established based on alleged father's admission given after illegal arrest and during illegal detention).

Polk v. State, 739 N.E.2d 666 (Ind. Ct. App. 2000) (disagreeing with Plue v. State, 721 N.E.2d 308 (Ind. Ct. App. 1999), which held that exclusionary rule does not apply in probation revocation hearings, Polk court implicitly held that exclusionary rule does apply in probation revocation hearings).

But see:

Ind. Dept. of Revenue v. Adams, 762 N.E.2d 728 (Ind. 2002) (exclusionary rule does not apply to tax assessment proceedings).

Grubb v. State, 734 N.E.2d 589 (Ind. Ct. App. 2000) (exclusionary rule does not apply to introduction of statement taken in violation of Fifth Amendment in a probation revocation proceeding).

Dulin v. State, 169 Ind.App. 211, 346 N.E.2d 746 (1976) (refusing to extend rule to probation revocation proceedings absent showing of continued plan of police harassment or particularly offensive violations of fundamental rights).

However, illegally obtained evidence may be admitted into evidence at a sentencing hearing when the defendant has plead guilty to the crime. Claims that evidence has been unlawfully obtained are waived by the admission of guilt. Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608 (1973).

Naked City, Inc. v. State, 460 N.E.2d 151 (Ind. Ct. App. 1984) (trial court properly admitted allegedly illegally seized videotape because defendant waived this argument by pleading guilty).

d. Right of confrontation

A defendant must be afforded the opportunity to rebut evidence produced at the sentencing hearing; however, a defendant may waive his right to cross-examine his accusers by pleading guilty.

Moore v. State, 479 N.E.2d 1264 (Ind. 1985), *cert. den'd.*, 474 U.S. 1026, 106 S. Ct. 583 (defendant's Sixth Amendment right to confront witnesses was not violated by incorporation of evidence from guilty plea hearing, including presentence report, into record of sentencing hearing because defendant was given opportunity to rebut any and all of matters contained in report and by pleading guilty, he waived his Sixth Amendment right).

e. Privilege against self-incrimination

A defendant's exercise of her Fifth Amendment right against self-incrimination is inadmissible during the sentencing hearing.

Mitchell v. United States, 526 U.S.314, 119 S. Ct.. 1307 (1999) (by holding defendant's silence against her in determining facts of offense at sentencing hearing, court imposed impermissible burden on exercise of constitutional right against compelled self-incrimination).

However, trial court does not have an affirmative duty to inform the Defendant of his right to remain silent prior to the Defendant testifying at the sentencing hearing. Lykins v. State, 726 N.E.2d 1265 (Ind. Ct. App. 2000).

A defendant's failure to object to a PSI report does not constitute an admission to the accuracy of the facts within the report. Using a defendant's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the right against self- incrimination. Ryle v. State, 842 N.E.2d 320, 324 n.5 (Ind. 2005); see also Edrington v. State, 909 N.E.2d 1093 (Ind. Ct. App. 2009), *trans. denied* (a violation of D's 5th & 6th Amendment rights would have been implicated had Tr.Ct. relied solely on D's failure to object to facts in or attached to his pre-sentence report as evidence of position of trust aggravator; see also Thomas v. State, 840 N.E.2d 893 (Ind. Ct. App. 2006).

4. Defendant's right to present evidence

The defendant is entitled to subpoena and call witnesses and present evidence in his own behalf at the sentencing hearing. U.S. Const., amend. VI. Ind. Const., art. I, § 13; Ind. Code § 35-38-1-3.

Rabadi v. State, 541 N.E.2d 271 (Ind. 1989) (defendant was not entitled to present alibi witnesses during sentencing phase of trial because testimony of two excluded witnesses was irrelevant to considerations at sentencing).

McDaniel v. State, 268 Ind. 380, 375 N.E.2d 228 (1978) (refusal of trial court to permit defense counsel to further explore at sentencing hearing matter presented by statement of employee of local retail store that unidentified woman entered store and stated that she was juror in trial of that "nigger who killed the cop" was not error, finding that comment was only passing means of description and not conclusion of guilt).

Wilson v. State, 865 N.E.2d 1024 (Ind. Ct. App. 2007) (trial court violated defendant's due process rights by denying him the right to present evidence at his sentencing hearing because of his refusal to cooperate with probation officer assigned to prepare his PSI report).

5. Victim's right to make an impact statement

Pursuant to Ind. Code § 35-38-1-8.5, the victim or the victim's representative has a right to make an oral or written statement to the court at the sentencing hearing. However, in murder cases, Ind. Code § 35-38-1-8.5 has been expanded to permit those other than the victim or the victim's representative to testify to the impact the crime had on them. In a death penalty or life without parole case, though, the victim impact statement cannot be given until after the trial court has pronounced sentence. Ind. Code § 35-50-2-9(e).

Brown v. State, 698 N.E.2d 779 (Ind. 1998) (in murder case, trial court did not err in allowing victim's family members to recommend maximum sentence during sentencing hearing; victims' or their representatives' recommendations are not evidence of impact of crime on victim and, thus, are not mitigating or aggravating factors as those terms are used in sentencing statute but may, nonetheless, properly assist court in determining what sentence to impose for crime).

Jones v. State, 675 N.E.2d 1084 (Ind. 1996) (trial court did not err by allowing victim's friend and sister, in addition to victim's representative, to make victim impact statement).

Loveless v. State, 642 N.E.2d 974 (Ind. 1994) (trial court did not err in permitting family members, in addition to victim's mother who had been appointed victim's representative, to testify following murder of twelve-year-old girl where nothing in statute prevented use of multiple witnesses, there was no jury present to be outraged by heinous nature of crime and sentencing was conducted before a judge who was presumed to be unbiased).

Haddock v. State, 800 N.E.2d 242 (Ind. Ct. App. 2003) (while court did not err in considering the recommendations of victims, it was error to find as an aggravating circumstance that the victims recommended the maximum sentence).

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001) (in sentencing following murder prosecution in which defendant was found guilty of crimes against victim 1 and not victim 2, trial court erred in allowing mother of victim 2 to testify at sentencing).

Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002) (when a victim impact statement strays from the effect that a crime had upon the victim, caution should be used in assessing the weight to be given to such allegations).**PRACTICE POINTER:** Because Jones, Loveless and Brown were murder cases where a judge was determining the sentence, argue that the use of impact statements from those other than the victim representative is limited to such cases.

J. ADVISEMENT OF APPELLATE RIGHTS

1. Criminal Rule 11

Criminal Rule 11 provides that after sentencing the defendant, the court must inform the defendant that he/she has the following rights:

a. he/she is entitled to take an appeal or file a motion to correct error;

b. if he/she wishes to file a motion to correct error, it must be done within thirty days of the sentencing;

c. if he/she wishes to take an appeal from the judgment, he/she must file a Notice of Appeal designating what is to be included in the record on appeal within thirty days of sentencing or within thirty days after the court's ruling on the motion to correct error, if one is filed; if the Notice of Appeal is not timely filed, the right to appeal will be forfeited;

d. if he/she is financially unable to employ an attorney, court will appoint counsel at public expense for the purpose of filing the motion to correct error and for taking an appeal.

Carter v. State, 438 N.E.2d 738 (Ind. 1982) (trial court's failure to advise defendant of his appellate rights pursuant to this rule was not prejudicial error where defendant failed to show harm from oversight).

Blackmon v. State, 450 N.E.2d 104 (Ind. Ct. App. 1983) (informing defendant only of her right to appellate review of sentence did not satisfy requirement of C.R.11 because judge must also advise defendant of right to appeal from judgment of conviction).

2. Failure to advise of right to appeal sentence

A defendant who was not advised of his right to appeal a sentence from a guilty plea or was incorrectly advised that he waived such right may be entitled to challenge his sentence in a belated appeal through Post-conviction Rule 2. Collins v. State, 817 N.E.2d 230 (Ind. 2004); Kling v. State, 837 N.E.2d 502 (Ind. 2005).