CHAPTER FOUR

SENTENCING DECISION

Advisory and Standard Sentencing Additions or Subtractions

Class	Advisory	Maximum	Minimum	Fines
Murder	55 years	65 years	45 years	$10,000
Level 1 IC 35-50-2-4	30 years	40 years 50 years for Child Molesting under IC 35-31.5-2-72(1) or (2)	20 years	$10,000
Level 2 IC 35-50-2-4.5	17.5 years	30 years	10 years	$10,000
Level 3 IC 35-50-2-5	9 years	16 years	3 years	$10,000
Level 4 IC 35-50-2-5.5	6 years	12 years	2 years	$10,000
Level 5 IC 35-50-2-6	3 years	6 years	1 year	$10,000
Level 6 IC 35-50-2-7	1 year	2.5 years	6 months	$10,000
A mis.	1 year max.			$5,000
B mis.	180 days max.			$1,000
C mis.	60 days max.			$500

Felony Sentencing Enhancements

Enhancement Description	Minimum	Maximum
Habitual criminal IC 35-50-2-8	Murder/Level 1-4 6 years Level 5-6 2 years	Murder/Level 1-4 20 years Level 5-6 6 years
Use of firearm IC 35-50-2-11	5 years	20 years
Repeat sexual offender IC 35-50-2-14	1x advisory	1x advisory; 10 years max.
Habitual Vehicular Substance Offender IC 9-30-15.5-2 (effective Jan. 1, 2015)	1 year	8 years

I. COURT'S STATEMENT OF REASONS FOR SENTENCE & APPELLATE STANDARD OF REVIEW

A. STATEMENT OF REASONS

1. When required

a. Under the advisory sentencing scheme

Ind. Code § 35-38-1-1.3 requires the trial court to issue a statement of reasons for selecting the sentence for a felony it imposes unless it imposes the advisory sentence. For a more detailed discussion, see Chapter 3, Subsection II.E, *Sentencing Hearing; Record of Sentencing Hearing*.

The sentencing statement should include a reasonably detailed recitation of the trial court's reasons for the sentence it imposed. 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. The relative weight or value assigned to reasons properly found or those which should have been found is not subject to appellate review, but a defendant may challenge the appropriateness of his sentence under Indiana Appellate Rule 7(B). Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007).

Id.

Berry v. State, 904 N.E.2d 365 (Ind. Ct. App. 2009) (sentencing statement not required for probation revocations).

Windhorst v. State, 868 N.E.2d 504 (Ind. 2007) (even if trial court fails to enter sentencing statement, appellate court will not reverse or remand if sentence is appropriate under Ind. Appellate Rule 7(B)).

McDonald v. State, 868 N.E.2d 1111 (Ind. 2007) (where, as here, trial court's reason for imposing sentence includes a finding of aggravating and mitigating factors, they must be supported by the record and consistent with what Indiana courts have traditionally deemed as either aggravators or mitigators; oral and written sentencing statements in this case were "meticulously detailed," and even if trial court erred in identifying aggravators, remand for resentencing is not required because trial court would have imposed same sentence without regard to challenged aggravators).

b. Under the presumptive sentencing scheme

For offenses committed prior to April 25, 2005, if mitigating or aggravating circumstances are found, Ind. Code § 35-38-1-3 requires that the record include a statement of the court's reasons for selecting the sentence that it is imposing. The court's sentencing statement must contain three elements: (1) an identification of all significant mitigating and aggravating circumstances; (2) a statement of specific reasons why each circumstance is considered to be mitigating or aggravating; and (3) an articulation that it evaluated and balanced the mitigating with the aggravating circumstances to determine if the mitigating circumstances are outweighed by the aggravating circumstances. Bowles v. State, 737 N.E.2d 1150, 1154 (Ind. 2000); Thacker v. State, 709 N.E.2d 3, 9 (Ind.

1999); Crawley v. State, 677 N.E.2d 520, 521-22 (Ind. 1997); Taylor v. State, 681 N.E.2d 1105, 1112 (Ind. 1997); Harris v. State, 659 N.E.2d 522, 527-28 (Ind. 1995).

At sentencing, the trial court should initially focus upon the presumptive sentence. Lander v. State, 762 N.E.2d 1208, 1214-15 (Ind. 2002); Hildebrandt v. State, 770 N.E.2d 355, 361 (Ind. Ct. App. 2002). When the judge imposes the presumptive sentence, the appellate court will presume that the statutory mandatory considerations were made, even where the record lacks specificity in enumerating these considerations. Jones v. State, 698 N.E.2d 289, 290 (Ind. 1998). However, if the judge chooses to exercise discretion by departing from the presumptive sentence, the judge must make a statement of reasons for selecting the sentence imposed. Page v. State, 424 N.E.2d 1021, 1022 (Ind. 1981); Gardner v. State, 270 Ind. 627, 388 N.E.2d 513, 517 (1979).

2. Purpose: facilitate meaningful appellate review

The sentencing statement is necessary in order to conduct meaningful appellate review. Ramos v. State, 869 N.E.2d 1262 (Ind. Ct. App. 2007). If the sentencing statement 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. The standard of review on appeal of a trial court's sentencing decision is abuse of discretion.

Zavala v. State, 138 N.E.3d 291 (Ind. Ct. App. 2019) (while the oral and written sentencing statements could have been more detailed, trial court did not abuse its discretion by considering but rejecting pre-sentencing rehabilitation as significant mitigator).

However, unlike the pre-Blakely statutory regime, the trial court cannot now be said to have abused its discretion in failing to properly weigh aggravating and mitigating factors. Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). In other words, the relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse. Id. But a defendant may challenge the appropriateness of his sentence under Indiana Appellate Rule 7(B).

B. APPELLATE COURT'S POWER TO REVISE

Whether the reviewing court determines the sentence violates the Indiana Code or the sentence is inappropriate, the reviewing court may revise the sentence. Judicial amendments to the Indiana Constitution confer a distinct responsibility on the appellate courts to review and revise the sentence imposed. Ind. Const., Art. VII, § 4; Walker v. State, 747 N.E.2d 536 (Ind. 2001).

Lewis v. State, 755 N.E.2d 1116 (Ind. Ct. App. 2001) (where trial court fails to provide explanation for imposing sentence, or explanation appears inadequate, appellate court is not required to remand for resentencing by trial court; instead, under appropriate circumstances, appellate court may modify sentence).

1. Appellate review of sentences pursuant to guilty plea

A defendant may, on appeal, challenge the appropriateness of a sentence imposed under the terms of a plea agreement where the trial court exercises discretion in imposing the sentence. Even where a plea agreement sets forth a sentencing cap or a sentencing range, the court must

still exercise some discretion in determining the sentence it will impose. Childress v. State, 848 N.E.2d 1073 (Ind. 2006).

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

Miles v. State, 889 N.E.2d 295 (Ind. 2008) (defendant's request at sentencing that trial court impose no more than a 65-year sentence does not equate to invited error or acquiescence in a 65-year sentence such that defendant is precluded from asking appellate court to review his sentence).

2. Waiver of right to appellate review

In the plea agreement, a defendant may waive his right to appellate review of his sentence. Creech v. State, 887 N.E.2d 73 (Ind. 2008). Neither the Indiana Rules of Criminal Procedure nor the Indiana Code require trial courts accepting plea agreements to make express findings regarding a defendant's intention to waive his appellate rights.

Brattain v. State, 891 N.E.2d 1055 (Ind. Ct. App. 2008) (fact that trial court appointed appellate counsel pursuant to defendant's request more than a week following his guilty plea did not invalidate the waiver provision).

3. Appellate challenges to sentences

a. Lack of statutory authority

A trial court can only order sentences authorized by statute and permissible under the Indiana Constitution, regardless of the presence of aggravating or mitigating factors. Ind. Code § 35-38-1-7.1(d).

b. Inappropriateness

(1) Standard

As of January 1, 2003, Ind. Appellate Rule 7(B) authorizes the appellate court to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." This standard provides the appellate courts with more power to revise sentences than did the old "manifestly unreasonable" language.

Neale v. State, 826 N.E.2d 635 (Ind. 2005) (when Indiana Supreme Court made change to language of Rule 7(B) in 2003, it changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied).

Serino v. State, 798 N.E.2d 852 (Ind. 2003) (the Appellate Rule 7(b) formulation places the central focus on role of trial judge, while reserving for the appellate court the chance to review matter in a climate more distant from local clamor).

(2) State's challenge of sentence

In the exercise of constitutional and appellate authority to review and revise criminal sentences, the Court may decrease or *increase* a sentence. McCullough v. State, 900 N.E.2d 745 (Ind. 2009) (Boehm, J., concurring on basis that Court's power to revise a sentence is not dependent on whether the defendant challenges the sentence and although the Court has power to increase a sentence, it has never used its power to increase a sentence and does not expect to use it in the future except in the most unusual cases).

Akard v. State, 937 N.E.2d 811 (Ind. 2010) (Court of Appeals erroneously increased defendant's sentence from 93 to 118 years, where State did not request a greater sentence at trial or on appeal; Court noted "these are strong indicators that the trial court's sentence is not inappropriately lenient").

Moore v. State, 907 N.E.2d 179 (Ind. Ct. App. 2009) (refusing to apply McCullough retroactively "without specific direction from our supreme court allowing us to do so"); see also Atwood v. State, 905 N.E.2d 479 (Ind. Ct. App. 2009).

(3) Use of aggravator and mitigator case law

Although abuse of discretion and appropriateness challenges to sentences are two separate challenges, the court's consideration of mitigators and aggravators has always been relevant to both challenges. Thus, even though abuse of discretion may be a limited challenge under the advisory sentencing scheme, the case law, other than requirement of finding one aggravator to support an enhanced sentence, should still be relevant to the appellate court's appropriateness review of sentences.

Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007) (relative weight or value assignable to aggravators/mitigators properly found or those which should have been found is not subject to review for abuse, but defendant may challenge appropriateness of his sentence on grounds outlined in Appellate Rule 7(B)).

Westmoreland v. State, 787 N.E.2d 1005 (Ind. Ct. App. 2003) (maximum sentence was inappropriate where defendant had multiple mitigators and trial court found several incorrect aggravators; appellate court reduced maximum sentence to presumptive sentence).

c. Abuse of discretion

(1) Under the advisory sentencing scheme

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. The following are ways a trial court can abuse its discretion:

1. Failure to enter a sentencing statement. Id.

2. Stating reasons, including aggravating and mitigating circumstances, which are not supported by the record. Id.

3. Failing to include reasons, most notably mitigating reasons or circumstances that are clearly supported by the record and advanced for consideration. 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.)

4. Stating reasons that are improper as a matter of law. Anglemyer*, supr*a, 868 N.E.2d at 491.

(2) Under the presumptive sentencing scheme

(a) Aggravators

Prior to April 25, 2005, under the presumptive sentencing scheme, the defendant could challenge the sentence as an abuse of the trial court's discretion. An enhanced sentence could not be imposed absent a valid aggravating factor. Ajabu v. State, 722 N.E.2d 339, 342 (Ind. 2000). However, only one valid aggravating factor need be shown to sustain the enhancement of a presumptive sentence. Nixon v. State, 539 N.E.2d 483, 485 (Ind. 1989); Guenther v. State, 501 N.E.2d 1071, 1072 (Ind. 1986).

When a trial court uses an improper aggravating circumstance to enhance a sentence, the sentence will be affirmed if other aggravating circumstances are adequate to support the sentence imposed. Scheckel v. State, 620 N.E.2d 681, 684 (Ind. 1993); Serano v. State, 555 N.E.2d 487, 494 (Ind. Ct. App. 1990). However, where the reviewing court cannot determine whether the trial court would have imposed the same sentence without reliance on an aggravator that the reviewing court found invalid, the appellate court must review and revise the sentence or remand for resentencing despite there being another valid aggravator. Hollen v. State, 761 N.E.2d 398 (Ind. 2002); Day v. State, 560 N.E.2d 641, 643 (Ind. 1990).

(b) Mitigators

(i) Failure to find mitigating factors

The sentencing court must make a finding of a mitigating circumstance if the circumstance is clearly supported by the record or if the court reduces the presumptive sentence or uses the mitigating circumstances to offset the aggravating circumstances which serve to enhance the sentence. Widener v. State, 659 N.E.2d 529, 534 (Ind. 1995).

Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002) (a factor which cannot be used to aggravate a sentence, such as elements of offense, may not be used to offset a mitigator).

(ii) Reduce presumptive or offset enhancement

Morgan v. State, 675 N.E.2d 1067 (Ind. 1996) (although court stated factors which could have been construed as mitigating, reversal was required because court suspended sentence and failed to specifically identify mitigating circumstances).

(iii) Circumstances clearly supported by record

The trial court's failure to find a mitigating circumstance clearly supported by the record gives rise to the belief that the court was not cognizant of the factor and therefore failed to or did not properly consider it. Barany v. State, 658 N.E.2d 60, 67 (Ind. 1995); Johnson v. State, 580 N.E.2d 959, 961 (Ind. 1991); Jones v. State, 467 N.E.2d 681, 683 (Ind. 1984).

Scheckel v. State, 620 N.E.2d 681 (Ind. 1993) (where substantial mitigation evidence was presented through fourteen people and presentence report, but trial court found no mitigating circumstances, sentence was vacated due to conclusion that mitigators were erroneously overlooked).

Fointno v. State, 487 N.E.2d 140 (Ind. 1986) (although defendant committed crime involving atrocious conduct, sentence imposed by trial court was subject to reduction because trial court failed to consider mitigators such as otherwise good character and absence of brutalization of victim).

(iv) Existence of substantial mitigator

No prior criminal record is a factor which deserves substantial mitigating weight. Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (quoting Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)).

Allen v. State, 719 N.E.2d 815 (Ind. Ct. App. 1999) (fact that court recognized two mitigators, defendant's young age and minimal criminal history but still imposed maximum consecutive sentences made defendant's sentence manifestly unreasonable).

Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (where court identified fact that defendant did not have prior criminal history but still imposed maximum sentence, court failed to consider substantial mitigating factor; remanded for resentencing).

(v) Waiver

Failure to raise proposed mitigators at sentencing precludes the defendant from raising them for the first time on appeal. Pennington v. State, 821 N.E.2d 899 (Ind. Ct. App. 2005); Burgess v. State, 854 N.E.2d 35 (Ind. Ct. App. 2006). However, where the trial court is "inherently aware" of the mitigator, such as the effect of the defendant's guilty plea, the appellate court will consider the mitigator regardless of whether the defendant argued the mitigator at the trial level. Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004); Creekmore v. State, 853 N.E.2d 523, 530 (Ind. Ct. App. 2006); Anglemyer v. State, 875 N.E.2d 218, 220-21 (Ind. 2007) (under advisory scheme, defendant can raise guilty plea mitigator for the first time on appeal).

PRACTICE POINTER: Pennington and Burgess, *supra*, can be used to challenge the State's use of aggravators for the first time on appeal.

II. ADVISORY SENTENCE

For purposes of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider when imposing sentence. Ind. Code § 35-50-2-1.3(a). For a list of the advisory sentences, see the chart at the beginning of this chapter.

A. WHEN MANDATORY

A court is not required to use an advisory sentence with two exceptions. Ind. Code § 35-50-2-1.3(b).

First, the court must use the advisory when imposing consecutive sentences for felony convictions that are not crimes of violence (as defined in Ind. Code § 35-50-1-2(a)) arising out of an episode of criminal conduct, in accordance with Ind. Code § 35-50-1-2. Ind. Code § 35-50-1-2(c)(1). However, the court is not required to use the advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct. Ind. Code § 35-50-2-1.3(d).

Second, the court must use the advisory sentence when imposing an additional fixed term to a repeat sexual offender under section 14 of this chapter. Ind. Code § 35-50-2-1.3(c)(2). However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense. Ind. Code § 35-50-2-1.3(c).

Robertson v. State, 871 N.E.2d 280 (Ind. 2007) (under Ind. Code § 35-50-2-1.3, a trial court imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence; rather, trial court may impose any sentence within the applicable range; subsection 1.3(c) does no more than retain the fixed maximum sentences permissible under Ind. Code §

35-50-1-2 ("episode" statute) and the repeat sexual offender provisions); see also Miller v. State, 138 N.E.3d 314 (Ind. Ct. App. 2019).

B. NOT A MIDPOINT

The advisory sentences delineated in Ind. Code § 35-50-2-4 through -7 are not mathematical midpoints between the maximum and minimum sentences. If the sentencing statement is reasonably detailed, if the court did not abuse its discretion by using improper/unsupported reasons or omitting supported reasons, and if the sentence is within statutory range and appropriate in light of the nature of the offense and character of offender, whether the judge started at the advisory sentence, mathematical midpoint, or elsewhere is of no moment.

Richardson v. State, 906 N.E.2d 241, 245-46 (Ind. Ct. App. 2009) (in sentencing defendant for two Class B felonies, trial court did not err by beginning its sentencing analysis at thirteen years rather than the advisory sentence of ten years).

C. NO MANDATORY MITIGATORS OR AGGRAVATORS

Prior to April 25, 2005, Ind. Code § 35-38-1-7.1(a) required sentencing courts to consider certain factors, such as risk that defendant will commit another crime and the defendant's character, when determining and imposing a sentence. After April 25, 2005, these mandatory considerations were removed from the statute.

Brown v. State, 698 N.E.2d 779 (Ind. 1998) (court's statement that lengthy sentence was required to keep defendant off streets because his past behavior indicated that he was significant threat to society was valid, indeed required under prior Ind. Code § 35-18-1-7.1(a), consideration in passing sentence).

III. AGGRAVATING CIRCUMSTANCES

PRACTICE POINTER: Any of the following aggravators that require a factual finding may violate the Defendant's right to be tried by a jury and found beyond a reasonable doubt if the defendant committed the crime prior to April 25, 2005, the date the legislature amended Indiana's sentencing scheme. Smylie v. State, 823 N.E.2d 629 (Ind. 2005). The amended statute cannot be applied to those who were convicted prior to April 25, 2005, without being an ex post facto law. Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006); Patterson v. State, 846 N.E.2d 723 (Ind. Ct. App. 2006); but see Sameniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005). A defendant may challenge these aggravators via a belated appeal. Green v. State, 850 N.E.2d 977 (Ind. Ct. App. 2006); Sullivan v. State, 836 N.E.2d 1031 (Ind. Ct. App. 2005); but see Robbins v. State, 839 N.E.2d 1196 (Ind. Ct. App. 2006).

A. STATUTORY AGGRAVATORS

Pursuant to Ind. Code § 35-38-1-7.1(a), the following factors may be considered as aggravating circumstances in determining what sentence to impose.

1. Significant harm, injury, loss or damage suffered by the victim: Ind. Code § 35-38-1-7.1(a)(1)

The court may consider, as an aggravating circumstance, the harm, injury, loss or damage suffered by the victim of an offense that was: (A) significant; and (B) greater than the elements necessary to prove the commission of the offense. Ind. Code § 35-38-1-7.1(a)(1).

This aggravator was added on April 25, 2005 and seems to be a codification of years of case law. The seriousness of the victim's physical, mental and emotional injuries may be considered as an aggravating circumstance. Boyd v. State, 546 N.E.2d 825, 826 (Ind. 1989); Dillon v. State, 492 N.E.2d 661, 665 (Ind. 1986). However, the emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime. Thompson v. State, 793 N.E.2d 1046 (Ind. Ct. App. 2003) (citing Mitchem v. State, 685 N.E.2d 671, 679-80 (Ind. 1997)).

Penick v State, 659 N.E.2d 484 (Ind. 1995) (infliction of grave injury and pain over extended period of time is sufficient to support aggravating factor for murder).

Lang v. State, 461 N.E.2d 1110 (Ind. 1984) (seriousness of injury was proper aggravator where defendant intended to injure elderly victim who had shown him a great deal of kindness and victim never regained capacity to live normal life).

Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994) (harmful mental effects suffered by victim can be aggravator for enhanced sentence). See also Caccavallo v. State, 436 N.E.2d 775, 779 (Ind. 1982); Hogan v. State, 409 N.E.2d 588, 591 (Ind. 1980); Yoder v. State, 574 N.E.2d 929 (Ind. Ct. App. 1991).

Moore v. State, 569 N.E.2d 695 (Ind. Ct. App. 1991) (enhancement of rape sentence beyond presumptive was proper based on two aggravating factors: defendant deliberately burned victim with cigarette and inflicted psychological injury upon her).

Bunch v. State, 760 N.E.2d 1163 (Ind. Ct. App. 2002), *sum. aff'd* 778 N.E.2d 1285 (Ind. 2002) (despite fact that defendant was acquitted of reckless homicide, consideration of fact that victim died was proper because death was consequence of crime that defendant committed (i.e., dealing in cocaine)).

McCoy v. State, 856 N.E.2d 1259 (Ind. Ct. App. 2006) (fact that stepdaughter was impregnated and then experienced a miscarriage due to the molest was a proper aggravator).

Gober v. State, 163 N.E.3d 347 (Ind. Ct. App. 2021) (emotional harm suffered by victim, who was left alone in apartment for 15 hours with younger siblings, during which time they inadvertently started fire that engulfed entire apartment complex and killed siblings, was significantly greater than that usually associated with crime of neglect of a dependent).

2. History of criminal or delinquent behavior: Ind. Code § 35-38-1-7.1(a)(2)

An enhanced sentence may be imposed when the only aggravating circumstance is prior criminal history. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993); Markham v. State, 484 N.E.2d 573, 575 (Ind. 1985); but see Hollen v. State, 761 N.E.2d 398 (Ind. 2002).

a. The remoteness of the prior criminal history

The chronological remoteness of a defendant's prior criminal history should be taken into account. Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (citing Harris v. State, 272 Ind. 210, 396 N.E.2d 674, 677 (1979)). However, it is within the ambit of the trial

court's discretion to view the remoteness of the prior criminal history as a mitigating circumstance, or on the other hand, it could find the remoteness to not affect the consideration of the criminal history as an aggravating circumstance. Id.

Settles v. State, 791 N.E.2d 812 (Ind. Ct. App. 2003) (trial court could consider defendant's criminal history as aggravator even though his last conviction was 12 years before instant offense).

b. The gravity and nature of the prior criminal history

The court must consider the gravity, the nature, and the number of prior offenses as they relate to the current offense before simply aggravating the sentence based on prior criminal activity. Wooley v. State, 716 N.E.2d 919 (Ind. 1999).

Alvies v. State, 905 N.E.2d 57 (Ind. Ct. App. 2009) (in murder and rape prosecution, trial court abused its discretion by relying on defendant's juvenile record as an aggravating circumstance; adjudications for criminal trespass, battery and auto theft were "quite dissimilar" from present offenses and did not even approach the seriousness of present offenses).

Wooley v. State, 716 N.E.2d 919 (Ind. 1999) (criminal history comprised of single, nonviolent misdemeanor for driving while intoxicated was not a significant aggravator in the context of sentence for murder).

Ashworth v. State, 901 N.E.2d 567 (Ind. Ct. App. 2009) (although a prior criminal history of burglary, theft and misdemeanor battery/ conversion are not of sufficient gravity to justify a maximum sentence of sixty years for murder, it is sufficient to justify an enhanced 50-year sentence).

Ruiz v. State, 818 N.E.2d 927 (Ind. 2004) (defendant's four prior alcohol-related misdemeanors were at best marginally significant as aggravator in context of sentence for class B felony child molesting); see also Neale v. State, 826 N.E.2d 635 (Ind. 2005); Howell v. State, 859 N.E.2d 677 (Ind. Ct. App. 2006); Walsman v. State, 855 N.E.2d 645 (Ind. Ct. App. 2006); Westmoreland v. State, 787 N.E.2d 1005 (Ind. Ct. App. 2003).

Baxter v. State, 727 N.E.2d 429 (Ind. 2000) (in light of other mitigating factors, maximum sentence based on nonviolent criminal history was manifestly unreasonable). See also Evans v. State, 725 N.E.2d 850 (Ind. 2000).

Ballard v. State, 808 N.E.2d 729 (Ind. Ct. App. 2004) (trial court erroneously enhanced defendant's voluntary manslaughter conviction based on his criminal history, consisting of four non-violent misdemeanors which were all at least sixteen years-old).

Traylor v. State, 817 N.E.2d 611 (Ind. Ct. App. 2004) (standing alone, one five-year-old misdemeanor battery conviction was not a proper aggravator to enhance a sentence for manufacturing methamphetamine).

But see:

Spiller v. State, 740 N.E.2d 1270 (Ind. Ct. App. 2001) (in murder prosecution, no error in finding defendant's prior criminal history as aggravator; defendant had two misdemeanor convictions, one for driving while intoxicated and another for disorderly conduct; court distinguished Wooley in that, in instant case, aggravator of prior criminal history was offset by court considering mitigator that criminal history did not include felony conviction).

Vazquez v. State, 839 N.E.2d 1229 (Ind. Ct. App. 2005) (in imposing 50-year sentence for conspiracy to commit dealing in cocaine, trial court did not err in weight it gave to defendant's criminal history as aggravator, where defendant displayed an uninterrupted criminal record related to substance offenses).

Baysinger v. State, 854 N.E.2d 1211 (Ind. Ct. App. 2006) (prior misdemeanor conviction for marijuana which occurred six months before murders could be used to enhance sentence where motive for murder was drug dispute).

c. Proof of criminal history

To enhance a criminal sentence based in whole or in part on the defendant's criminal history, a sentencing court must find instances of specific criminal conduct shown by probative evidence. Tunstill v. State, 568 N.E.2d 539, 544 (Ind. 1991). The trial court should recite all incidents comprising "criminal activity." St. John v. State, 523 N.E.2d 1353 (Ind. 1988). An arrest record, with no convictions, alone, cannot be used to enhance a sentence. Id.; Stone v. State, 727 N.E.2d 33 (Ind. Ct. App. 2000).

Westmoreland v. State, 787 N.E.2d 1005 (Ind. Ct. App. 2003) (trial court improperly considered defendant's prior criminal history as aggravating circumstance, where pre-sentence investigation report erroneously indicated that defendant was charged with possession of marijuana and was on probation at time offense was committed).

Meriweather v. State, 659 N.E.2d 133 (Ind. Ct. App. 1995) (where prior criminal activity is readily discernible from brief review of the record, remand for court to articulate aggravating circumstances would be pointless). See also Adkins v. State, 532 N.E.2d 6 (Ind. 1989).

Currie v. State, 448 N.E.2d 1252 (Ind. Ct. App. 1983) (mere statement that defendant had two prior felony convictions was insufficient for enhanced sentence).

Bergdorff v. State, 405 N.E.2d 550 (Ind. Ct. App. 1980) (certified record of prior convictions is not necessary, but prior convictions should be included in written presentence report, which defendant may challenge).

Specific instances of criminal activity need not be reduced to convictions in order to enhance a sentence. May v. State, 502 N.E.2d 96, 100 (Ind. 1986); Chamness v. State, 447 N.E.2d 1086, 1088 (Ind. 1983). Criminal history may be established as an aggravating circumstance either through a conviction, through the defendant's admission that he committed other crimes, or through evidence of other crimes presented at trial or sentencing. Powell v. State, 644 N.E.2d 82, 84 (Ind. 1994).

Carmona v. State, 827 N.E.2d 588 (Ind. Ct. App. 2005) (where a defendant vigorously contests his criminal history and that history is highly relevant to his

sentence, State has burden to produce some affirmative evidence, *e.g.*, docket sheets, certified copies of convictions, affidavits from appropriate officials, etc., to support a criminal history alleged in a PSI and urged as basis for sentence enhancement).

(1) Arrest record

A record of arrest, without more, does not establish the historical fact that the defendant committed a criminal offense on a previous occasion such that it may be properly considered as evidence that the defendant has a history of criminal activity. Sherwood v. State, 702 N.E.2d 694, 700 (Ind. 1998); Tunstill v. State, 568 N.E.2d 539 (Ind. 1991). Also, a trial court cannot consider the facts surrounding the arrest as an aggravating factor. Miller v. State, 709 N.E.2d 48, 50 (Ind. Ct. App. 1999). However, arrests subsequent to the crime for which a sentence is being imposed may be considered as aggravating factors. Id. at 49-50.

> Miller v. State, 709 N.E.2d 48 (Ind. Ct. App. 1999) (where facts surrounding arrest were never proven nor admitted to, it was improper for trial court to consider them as aggravator).

However, a long line of arrests is relevant to the court's assessment of the defendant's character and the risk that he will commit another crime and is therefore properly considered by a court in determining sentence. Tunstill v. State, 568 N.E.2d 539, 544-45 (Ind. 1991). Pursuant to Ind. Code § 35-38-1-7.1(d), the court may also consider a defendant's prior arrest when such arrest reveals to the court that subsequent antisocial behavior of the defendant has not been deterred even after having been subject to the police authority of the State. However, the court must make this specific finding on the record. Monegan v. State, 756 N.E.2d 499 (Ind. 2001); Sherwood v. State, 702 N.E.2d 694 (Ind. 1998).

> Monegan v. State, 756 N.E.2d 499 (Ind. 2001) (rather than as evidence of criminal history, trial court properly deemed defendant's four prior arrests as evidence that his antisocial behavior was not deterred by numerous encounters with the law).
>
> Singh v. State, 40 N.E.3d 981 (Ind. Ct. App. 2015) (given defendant's three prior domestic violence-related arrests, trial court was well within its discretion in expressing concern that he would engage in further acts of domestic violence in the future and in noting his apparent lack of respect for the law).
>
> Miller v. State, 709 N.E.2d 48 (Ind. Ct. App. 1999) (trial court may consider subsequent arrest as evidence of defendant's character and risk of committing another crime); see also Haddock v. State, 800 N.E.2d 242 (Ind. Ct. App. 2003); Pickens v. State, 767 N.E.2d 530 (Ind. 2002).

(2) Dismissed charges

A previously dismissed charge is arguably insufficient to demonstrate a defendant's criminal history. Monegan v. State, 756 N.E.2d 499, 502-03 (Ind. 2001). But pursuant to Ind. Code § 35-38-1-7.1(d), the court may consider a defendant's prior dismissed charges when making a specific finding that his or her subsequent antisocial behavior has not been deterred even after having been subject to the police

authority of the State. Id.; Cf. Allen v. State, 720 N.E.2d 707, 715 (Ind. 1999) (citing Misenheimer v. State, 268 Ind. 274, 374 N.E.2d 523, 532 (1978) for proposition that 'criminal history' would seem to include charges which were dropped or resulted in an acquittal").

(3) Charges resulting in acquittal

A sentencing court may consider a defendant's previous charge which resulted in an acquittal 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) (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 the defendant had been acquitted on others).

McNew v. State, 271 Ind. 214, 391 N.E.2d 607 (1979) (trial court improperly considered prior charge which resulted in acquittal).

Fugate v. State, 516 N.E.2d 75 (Ind. Ct. App. 1987) (trial court's express reliance on presentence 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.

(4) Convictions reversed on appeal

A conviction for a prior crime which was reversed on appeal cannot serve as a valid aggravator. White v. State, 647 N.E.2d 684, 688 (Ind. Ct. App. 1995).

(5) Subsequent crimes

Although subsequent crimes cannot be used as criminal history, they can be used to support a finding of bad character or risk defendant will commit more crimes. Shafer v. State, 856 N.E.2d 752 (Ind. Ct. App. 2006).

But see Griffin v. State, 273 Ind. 184, 402 N.E.2d 981 (1980) (court properly considered subsequent robbery although defendant had not been tried or convicted of the latter offense).

(6) Uncharged crimes

A sentencing judge may consider uncharged crimes as part of a defendant's criminal history. Kent v. State, 675 N.E.2d 332, 341 (Ind. 1996); Hensley v. State, 573 N.E.2d 913, 917 (Ind. Ct. App. 1991).

Harlan v. State, 971 N.E.2d 163 (Ind. Ct. App. 2012) (trial court did not abuse its discretion by citing as aggravators the defendant's uncharged act of molestation of the victim's sister, as the trial court did not identify the act as part of a criminal history but rather as a non-statutory aggravator).

Jordan v. State, 512 N.E.2d 407 (Ind. 1987) (aggravating factor being considered is pattern of criminal activity or conduct from which sentencing judge may evaluate whether this person might continue pattern and commit crimes in future).

(a) Established by alleged victim's statements

Kent v. State, 675 N.E.2d 332, 341 (Ind. 1996) (trial court properly considered letters by woman who claimed she was previously physically abused by defendant).

Russelburg v. State, 529 N.E.2d 1193 (Ind. 1988) (proper to consider testimony of defendant's former girlfriend that he previously beat her and nearly choked her to death during alcoholic blackout).

Mahla v. State, 496 N.E.2d 568 (Ind. 1986) (uncharged prior molestation may be considered as aggravating circumstance where witness testified at sentencing that defendant molested him when he was six).

(b) Established by defendant's admission

Sauerheber v. State, 698 N.E.2d 796 (Ind. 1998) (when defendant was fourteen, he made statement that he molested ten-year-old girl; although police failed to secure valid juvenile waiver prior to taking statement, such statement was admissible because defendant voluntarily gave statement).

Willoughby v. State, 552 N.E.2d 462 (Ind. 1990) (judge properly enhanced sentence because defendant admitted to helping another person conceal body seven years earlier in same field he used to place murder victim in instant case).

Randall v. State, 455 N.E.2d 916 (Ind. 1983) (court upheld twenty-year enhancement on felony-murder conviction where defendant admitted in trial testimony that he was a drug dealer/user and car thief).

Holmes v. State, 272 Ind. 435, 398 N.E.2d 1279 (1980) (twenty-year sentence for burglary upheld where defendant admitted involvement in other home burglaries).

Durham v. State, 510 N.E.2d 202 (Ind. Ct. App. 1987) (trial court properly used defendant's prior uncharged child molesting acts, to which he admitted, as aggravating factors).

Shafer v. State, 856 N.E.2d 752 (Ind. Ct. App. 2006) (although trial court cannot take judicial notice of defendant's testimony in co-defendant's trial to support finding of lack of remorse, there was sufficient evidence at sentencing hearing as to lack of remorse)

(c) Not established by clean-up statements

A sentencing court may not consider "clean-up" statements which involve uncharged crimes made by a defendant during plea negotiations that did not result in a plea agreement accepted by the court. Hensley v. State, 573 N.E.2d 913, 918 (Ind. Ct. App. 1991).

(7) Pending charges

The court may consider a pending charge as an aggravating circumstance. Stark v. State, 489 N.E.2d 43, 48 (Ind. 1986); Lindsey v. State, 485 N.E.2d 71, 73 (Ind. 1985); Ashby v. State, 486 N.E.2d 469, 477 (Ind. 1985).

However, to be considered criminal history, there must be more than just the charge; rather, the criminal history must be established through the defendant's admission or through evidence of the other crimes presented at trial or at sentencing. Powell v. State, 644 N.E.2d 82, 84 (Ind. 1994) (citing Tunstill v. State, 568 N.E.2d 539 (Ind. 1991)). Without more, the arrest and/or pending charge is entitled to only modest weight. Id.

Stark v. State, 489 N.E.2d 43 (Ind. 1986) (pending charges can be considered even where court did not specify exact dates of pending charges but expressly noted the nature of charges and various jurisdictions in which they had been filed).

Griffin v. State, 273 Ind. 184, 402 N.E.2d 981 (1980) (court properly considered subsequent robbery although defendant had not been tried or convicted of latter offense).

(8) Uncounseled prior convictions

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).

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 knowing waiver of counsel in earlier proceeding).

Morphew v. State, 672 N.E.2d 461 (Ind. Ct. App. 1996), *trans. den'd* (uncounseled class A misdemeanor OWI conviction, where defendant was fined $90 but not incarcerated, was used to enhance sentence for subsequent OWI offense under habitual substance offender statute; court followed Nichols).

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).

(9) Juvenile Adjudications

(a) General rule

When a juvenile proceeding ends without a disposition, the mere fact that a petition was filed alleging delinquency does not suffice as proof of a criminal history. Day v. State, 560 N.E.2d 641, 643 (Ind. 1990). A trial court must rely on more than the existence of a delinquency petition, and an adjudication itself may not even be enough to prove a criminal history. However, the *acts* committed by juvenile may constitute a criminal history to support enhancement of a sentence. Saylor v. State, 765 N.E.2d 535, 559 (Ind. 2002). The courts are unclear as to what, if any, details must be presented of the juvenile acts.

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001) (listing of disposition for an act that would be theft in the pre-sentence report when the police narrative for the offense could not be located was insufficient to support a criminal history; simply stating specific offense for each arrest and disposition will not support an enhancement).

Lane v. State, 551 N.E.2d 897 (Ind. Ct. App. 1990) (CHINS record does not contain "criminal activity" which would warrant consideration as aggravating circumstance).

Morrell v. State, 121 N.E.3d 577 (Ind. Ct. App. 2019) (trial court abused its discretion in considering as a sentencing aggravator defendant's contacts with the juvenile justice system that were not adjudicated (found true)).

But see:

Pitts v. State, 904 N.E.2d 313 (Ind. Ct. App. 2009) (where PSI details defendant's juvenile charges and true findings, trial court can use juvenile adjudication as criminal history aggravator). See also Jordan v. State, 512 N.E.2d 407 (Ind. 1987); Anderson v. State, 798 N.E.2d 875 (Ind. Ct. App. 2003); Barker v. State, 622 N.E.2d 1336 (Ind. Ct. App. 1993); Schick v. State, 570 N.E.2d 918 (Ind. Ct. App. 1991).

Anderson v. State, 798 N.E.2d 875 (Ind. Ct. App. 2003) (pre-sentence investigation report, the accuracy of which defendant had acknowledged,

contained sufficient information to show "acts" committed by defendant as juvenile to constitute a criminal history to support this aggravator).

However, a trial court can consider the defendant's juvenile record in assessing the risk of his committing another crime and in determining his sentence, even if the available record is not sufficient to establish history of delinquent activity as a separate aggravator. Jimmerson v. State, 751 N.E.2d 719 (Ind. Ct. App. 2001). The court must make this specific finding on the record. Sherwood v. State, 702 N.E.2d 694 (Ind. 1998).

(b) Exception - expungement

Expunged juvenile records cannot be considered as an aggravating factor to enhance a sentence. Owens v. State, 544 N.E.2d 1375, 1378 (Ind. 1989).

Willis v. State, 567 N.E.2d 1170 (Ind. Ct. App. 1991) (Youth Corrections Act 18 U.S.C. 5005 *et seq*., which permits judge to set aside conviction, does not provide for expunction of court record; thus, record of conviction set aside under the YCA may be considered by trial court in determining appropriate sentence).

(c) Uncounseled juvenile adjudications

It is unclear whether an uncounseled juvenile adjudication may be considered as an aggravating circumstance.

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, fn. 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 in presentence report juvenile delinquent adjudication in which defendant was uncounseled).

3. The victim is less than twelve (12) years-old or at least sixty-five (65) years old at the time of the offense: Ind. Code § 35-38-1-7.1(a)(3)

A finding in a sentencing report recommending an enhanced punishment because the victim was older than sixty-five or younger than twelve is a statement of fact and needs no explanation. Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981); Kile v. State, 729 N.E.2d 211 (Ind. Ct. App. 2000). The defendant does not need to be aware of victim's age in order to qualify as an aggravator. McCann v. State, 749 N.E.2d 1116 (Ind. 2001).

However, where a victim's age comprises a material element of the crime, it cannot also constitute an aggravating circumstance to support an enhanced sentence. Reynolds v. State, 575 N.E.2d 28 (Ind. 1991).

Landrum v. State, 428 N.E.2d 1228 (Ind. 1981) (proof of injury is not necessary in order for court to consider as aggravator fact that victim was elderly).

Ray v. State, 838 N.E.2d 480 (Ind. Ct. App. 2005) (in battery causing death as Class A felony, trial court did not err in assigning significant aggravating weight to victim's age, even though age was already covered by enhancement from Class C felony to an A felony).

Davis v. State, 796 N.E.2d 798 (Ind. Ct. App. 2003) (because element of crime may not also be used to enhance sentence without particularized circumstances of case, and trial court here gave no particularized circumstances, fact that victim was less than twelve years old was not valid aggravator in case where battery was elevated to class D felony because victim was below fourteen). See also Thompson v. State, 793 N.E.2d 1046 (Ind. Ct. App. 2003); Comer v. State, 839 N.E.2d 721 (Ind. Ct. App. 2005) (same result where age of victim is element of child molesting as a class B felony).

Edwards v. State, 842 N.E.2d 849 (Ind. Ct. App. 2006) (in neglect of dependent prosecution, trial court properly considered victim's age–fifteen months– in relation to nature and circumstances of crime as a valid aggravating circumstance).

For a detailed discussion as to when, if ever, an element of the crime can be used as an aggravator, see the section of this chapter on Improper Enhancement of Sentence.

4. Crime of violence committed in presence of child: Ind. Code § 35-38-1-7.1(a)(4)

The court may consider, as an aggravating circumstance, that the person: (A) committed a crime of violence (Ind. Code § 35-50-1-2); and (B) knowing committed the offense in the presence or within the hearing of an individual who: (i) was less than eighteen (18) years of age at the time the person committed the of offense; and (ii) is not the victim of the offense. Ind. Code § 35-38-1-7.1(a)(4).

Taylor v. State, 891 N.E.2d 155 (Ind. Ct. App. 2009) (both the trial court's findings that child molesting occurred in presence of other children and that harm to child was greater than ordinary were not supported by the record, and thus, trial court abused its discretion in relying on them).

Crawley v. State, 677 N.E.2d 520, 522 (Ind. 1997) (where children were present when defendant unlawfully entered house armed with a sawed-off shotgun, heard shots, and later returned and discovered victim in upstairs bedroom, use of presence of child aggravator in sentencing for murder was proper even though children did not actually see defendant shoot victim). See also Cloum v. State, 779 N.E.2d 84, 87 (Ind. Ct. App. 2002) (same result in voluntary manslaughter sentencing).

Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2002) (rejecting defendant's assertion that this aggravator should only apply when witness sees the crime committed with the knowledge of the perpetrator). See also Firestone v. State, 838 N.E.2d 468 (Ind. Ct. App. 2005)

5. Violation of protective order, restraining order or no contact order: Ind. Code § 35-38-1-7.1(a)(5)

The court may consider, as an aggravating circumstance, that the person violated a protective order issue against the person under Ind. Code 34-26-5 (or Ind. Code 31-1-11.5, Ind. Code 34-26-2, or Ind. Code 34-4-5.1 before their repeal), a workplace violence restraining order issued against the person under Ind. Code 34-26-6, or a no-contact order against the person. Ind. Code § 35-38-1-7.1(a)(5).

Cox v. State, 792 N.E.2d 898 (Ind. Ct. App. 2003), overruled in part, Davidson v. State, 926 N.E.2d 1023 (Ind. 2010) (upholding maximum sentence where trial court deemed defendant's violation of a protective order, which was in effect with respect to the person that was the target of defendant's attempted residential entry, a serious aggravating circumstance).

6. Recent violation of probation, parole, pardon, community corrections placement, or pretrial release: Ind. Code § 35-38-1-7.1 (a)(6)

The court may consider, as an aggravating circumstance that the person has recently violated the conditions of any probation, parole, pardon, community corrections placement, or pretrial release grated to the person. Ind. Code § 35-38-1-7.1(a)(6). Since the purpose of probation is to warn a defendant in an attempt to place him on the path of good behavior, the nature of the crimes for which he was placed on probation is of little moment. Page v. State, 615 N.E.2d 894, 896 (Ind. 1993).

Page v. State, 615 N.E.2d 894 (Ind. 1993) (fact that defendant was on probation for public intoxication when he committed crime was aggravating circumstance).

Tunstill v. State, 568 N.E.2d 539 (Ind. 1991) (although not given much weight, fact that defendant was on probation at time of crime only because probationary term was tolled due to alleged violation that defendant failed to pay fines was aggravating circumstance).

Cox v. State, 780 N.E.2d 1150 (Ind. Ct. App. 2002) (rather than considering fact that defendant was on probation when he committed crimes, it appears that trial court was considering prior violations committed by defendant while he was on probation).

7. Crime victim was disabled or mentally/physically infirm: Ind. Code § 35-38-1-7.1(a)(7)

The court may consider, as an aggravating circumstance, that the victim of the offense was mentally or physically infirm; or that the victim was a person with a disability (as defined in Ind. Code 27-7-6-12), and the defendant knew or should have known that the victim was a person with a disability. Ind. Code § 35-38-1-7.1(a)(7). The defendant does not need to be aware of victim's mental or physical infirmity in order to qualify as an aggravating factor.

McCann v. State, 749 N.E.2d 1116 (Ind. 2001) (victim's pregnancy at time of offense, regardless of whether defendant was aware of pregnancy, was a proper aggravator). See also McCoy v. State, 856 N.E.2d 1259 (Ind. Ct. App. 2006).

Scheckel v. State, 620 N.E.2d 681 (Ind. 1993) (trial court erroneously found that victim was in physically or mentally infirm state due to sleep or blood alcohol content where

defendant and victim engaged in scuffle prior to murder, demonstrating that victim was not asleep, and blood alcohol content was not in record). See also Deloney v. State, 938 N.E.2d 724 (Ind. Ct. App. 2010).

Jenkins v. State, 492 N.E.2d 666 (Ind. 1986) (trial court properly found that victim, a "helpless, crippled woman" who suffered angina attack during burglary of her home, was mentally and physically infirm).

Wilson v. State, 458 N.E.2d 654 (Ind. 1984) (fact that victim was an unarmed woman overpowered and shot by an armed man is not a correct definition of "infirm" within the meaning of statute; however, these circumstances could still be considered as non-statutory aggravator based on "disparity of position").

Perkins v. State, 181 Ind.App. 461, 392 N.E.2d 490 (1979) (sentencing court properly found that victim was mentally and physically infirm where evidence showed that victim was thirteen months old, was suffering from malnutrition, cried a lot, was unable to stand easily, could not keep food down, and was inactive child).

8. Position of care, custody or control of victim: Ind. Code § 35-38-1-7.1(a)(8)

The court may consider, as an aggravating circumstance that the person was in a position having care, custody, or control of the victim of the offense. Ind. Code § 35-38-1-7.1(a)(8). See also, *Aggravators, Non-Statutory Aggravators, Position of Trust, Subsection,* III.B.7.

9. Death was result of shaken baby syndrome: Ind. Code § 35-38-1-7.1(a)(9)

The court may consider, as an aggravating circumstance, that the injury to or death of the victim of the offense was the result of shaken baby syndrome (as defined in Ind. Code 16-41-40-2). Ind. Code § 35-38-1-7.1(a)(9).

Ray v. State, 838 N.E.2d 480 (Ind. Ct. App. 2005) (in prosecution for battery causing death, a Class A felony, trial court did not err in finding as aggravators that victim was two years old and injury and death resulted from shaken baby syndrome; when policy behind each aggravator is different, they are not impermissibly duplicative; here, age of victim focuses on status of victim whereas shaken baby aggravator focuses on nature and circumstances of crime).

10. Threatening victim or witness if they tell: Ind. Code § 35-38-1-7.1(a)(10)

The court may consider, as an aggravating circumstance that the person threatened to harm the victim of the offense or a witness if the victim or witness told anyone about the offense. Ind. Code § 35-38-1-7.1(a)(10).

11. Trafficking with an inmate: Ind. Code § 35-38-1-7.1(a)(11)

The court may consider, as an aggravating circumstance, that the person: (A) committed trafficking with an inmate under Ind. Code § 35-44-3-5; and (B) is an employee of the penal facility. Ind. Code § 35-38-1-7.1(a)(11).

B. NON-STATUTORY AGGRAVATORS

The statutory list of mitigating and aggravating circumstances does not limit the matters that the court may consider in determining the sentence. Ind. Code § 35-38-1-7.1(c). 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. Ind. Code § 35-38-1-7.1(d). Other aggravating circumstance include the following:

1. Lack of remorse

The defendant's lack of remorse has generally been held to be a valid non-statutory aggravating circumstance. Willoughby v. State, 552 N.E.2d 462, 471 (Ind. 1990); Dinger v. State, 540 N.E.2d 39, 40 (Ind. 1989); Ballard v. State, 531 N.E.2d 196, 198 (Ind. 1988); Brooks v. State, 497 N.E.2d 210, 221 (Ind. 1986); Mullens v. State, 456 N.E.2d 411, 414 (Ind. 1983).

Manns v. State, 637 N.E.2d 842 (Ind. Ct. App. 1994) (lack of remorse may be underlying consideration in determining risk that defendant will commit another crime). See also Coleman v. State, 409 N.E.2d 647 (Ind. Ct. App. 1980).

a. Defendant admits guilt

Where the defendant admits to the crime, lack of remorse is clearly a proper aggravating circumstance.

Widener v. State, 659 N.E.2d 529 (Ind. 1995) (although defendant admitted to crime and showed remorse during sentencing, trial court did not abuse its discretion by concluding undisputed facts that defendant shot and robbed unsuspecting woman and went out next day and enjoyed recreational entertainment showed lack of remorse).

Owens v. State, 544 N.E.2d 1375 (Ind. 1989) (where defendant expressed remorse for less than all acts in a multiple count conviction, lack of remorse was proper aggravator). See also Guenther v. State, 501 N.E.2d 1071 (Ind. 1986).

Mahla v. State, 496 N.E.2d 568, 575 (Ind. 1986) (lack of remorse finding was proper when based on evidence of defendant's pretrial admission of molestation acts, and not defendant's failure to testify).

Shafer v. State, 856 N.E.2d 752 (Ind. Ct. App. 2006) (although trial court cannot take judicial notice of defendant's testimony in co-defendant's trial to support finding of lack of remorse, there was sufficient evidence at sentencing hearing as to lack of remorse).

b. Defendant denies guilt

(1) Indiana

Lack of remorse is not a proper aggravator where the defendant maintains his innocence at all stages of trial and the evidence of the criminal acts comes solely

from uncorroborated victim's testimony. Dinger v. State, 540 N.E.2d 39, 40 (Ind. 1989) (citing Dockery v. State, 504 N.E.2d 291 (Ind. Ct. App. 1987)).

(a) Lack of remorse above and beyond denying guilt

Lack of remorse can be distinguished from denial of guilt. The defendant may vigorously assert his innocence while at the same time display an "I don't care" demeanor.

Cox v. State, 780 N.E.2d 1150 (Ind. Ct. App. 2002) (defendant's assertions that State witnesses were lying about incident and that it did not occur was no more than defendant maintaining his innocence and did not support trial court's conclusion that defendant was unremorseful or failed to accept responsibility for his actions).
Garrett v. State, 756 N.E.2d 523 (Ind. Ct. App. 2001) (trial court seemed to improperly enhance defendant's sentence based on her denial of guilt rather than lack of remorse, where defendant continually said she was sorry for death of her son but also continually denied guilt).

Smith v. State, 655 N.E.2d 532 (Ind. Ct. App. 1995) (where defendant made no effort to admit guilt and trial judge did not point to any conduct or words which could be construed as equivalent of "I don't care" as opposed to "I didn't do it," trial court could not consider lack of remorse as aggravating factor in imposing sentence).

But see:

Deane v. State, 759 N.E.2d 201 (Ind. 2001) (trial court properly enhanced defendant's sentence based on his lack of remorse beyond his denial of guilt, shown through his demeanor at sentencing, affront to prosecutor, and disrespect for proceedings).

(b) Consideration of evidence against defendant

There is disagreement among panels of the Court of Appeals as to whether lack of remorse is a proper aggravator where the defendant denies guilt and there is more evidence establishing guilt than just uncorroborated victim testimony.

Newsome v. State, 797 N.E.2d 293 (Ind. Ct. App. 2003) (lack of remorse aggravator was proper where guilt was supported by corroborated evidence that defendant failed polygraph and DNA results indicated defendant was father of complaining witness's child).

Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (court properly considered lack of remorse as aggravator where defendant denied guilt but victim's testimony was corroborated by the admission of defendant's failure of polygraph test).

Watkins v. State, 571 N.E.2d 1262 (Ind. Ct. App. 1991), *reversed in part on other grounds,* 575 N.E.2d 624 (where defendant at sentencing maintained his innocence, there was no general prohibition against using lack of remorse

as aggravator, especially where there was other evidence of guilt in addition to victim's testimony).

But see:

Kien v. State, 782 N.E.2d 398, 412-13 (Ind. Ct. App. 2003) (although there was corroborating medical evidence of abuse, defendant did not deny abuse occurred but only that he was the guilty party; testimony of victim's ten-year-old brother to witnessing sexual act was not sufficient corroborating evidence to find that defendant maintained his innocence in bad faith, therefore aggravator was improper).

Hollen v. State, 740 N.E.2d 149 (Ind. Ct. App. 2000) (even though there was corroborating evidence of defendant's guilt, it did not necessarily follow that defendant's claim of self-defense in battery case was maintained in bad faith to justify enhanced sentence).

(c) Modest weight given to lack of remorse when guilt is denied

When a defendant continually insists upon his innocence, the lack of remorse should be regarded only as a modest aggravating circumstance, even if there is sufficient corroborating evidence to use lack of remorse as an aggravator. Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997); Owens v. State, 544 N.E.2d 1375, 1379 (Ind. 1989); Bewley v. State, 572 N.E.2d 541 (Ind.Ct.App 1991).

However, at least one court has found that lack of remorse should be given only modest weight even if defendant does not deny guilt, due to "intangible nature of the evidence of [defendant's] mental attitude." Manns v. State, 637 N.E.2d 842 (Ind. Ct. App. 1994).

(2) Other States

Several other states preclude consideration of "lack of remorse" as inferred from denial of guilt as a sole or determinative aggravating factor. State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), *cert. denied*, 471 U.S. 1111; Thomas v. State, 99 Nev. 757, 670 P.2d 111 (1983); Pope v. State, 441 S.2d 1073 (Fla. 1983); People v. Key, 203 Cal.Rptr. 144 (Cal.Ct.App. 1984); Colesanti v. State, 60 Md.App. 185, 481 A.2d 1143 (1984), *cert. denied*, 489 A.2d. 1129.

2. Police officer as victim

A defendant can only be sentenced to death for murdering a law enforcement officer if the trier of fact is convinced beyond reasonable doubt that, at the time of the shooting, the defendant knew or should have known that he was shooting at a law enforcement officer. Castor v. State, 587 N.E.2d 1281, 1290 (Ind. 1992); Moore v. State, 479 N.E.2d 1264, 1275 (Ind. 1985), *cert. den'd*, 474 U.S. 1026, 106 S.Ct. 583. This statement of law has been expanded to apply to non-capital cases.

Petruso v. State, 441 N.E.2d 446 (Ind. 1982) (fact that defendant intended to kill police officer was inferred by defendant's use of deadly weapon in manner likely to cause death or great bodily harm).

3. Age of victim

Ind. Code § 35-38-1-7.1(a)(3) (previously Ind. Code § 35-38-1-7.1(b)(5)) does not limit the court's ability to find age an aggravating factor. Although the legislature in Ind. Code § 35-38-1-7(a)(3) makes the victim's age an aggravating factor if the victim is under twelve or over sixty-five, the court may find age to be a non-statutory aggravator when victim is older than twelve or younger than sixty-five.

Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002) (proper to rely upon the age of a victim of child molesting as aggravating factor even though age is element of crime, because court specifically found victim was of "particularly tender years"). See also Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003).

Loveless v. State, 642 N.E.2d 974 (Ind. 1994) (fact that defendant was sixteen and four years older than victim at time of crime was aggravator which was entitled to substantial weight because this was appreciable age differential, indicative of fact that defendant and not victim was in control of events).

Kaufman v. State, 496 N.E.2d 90 (Ind. 1986) (prior to amendment of Ind. Code § 35-38-1-7.1(b) in 1990 which added age of victim as statutory aggravator, infancy of victim could be used as non-statutory aggravator to enhance sentence). See also Wade v. State, 490 N.E.2d 1097 (Ind. 1986); Petruso v. State, 441 N.E.2d 446 (Ind. 1982).

Goodwin v. State, 573 N.E.2d 895 (Ind. Ct. App. 1991) (fact that victim was thirteen at time of sex crime was proper consideration for aggravating sentence by five years; although there is no clear legislative intent to preclude consideration of age of victim where victim is twelve or older, there is clear legislative intent to criminalize sex crimes where child is under sixteen, even where act appears to be consensual; see Ind. Code § 35-42-4-3 (child molestation); Ind. Code § 35-42-4-5 (vicarious sexual gratification) and Ind. Code § 35-42-4-6 (child solicitation)).

McCoy v. State, 96 N.E.3d 95 (Ind. Ct. App. 2018) (when victim's age material element of crime, trial court abused discretion treating age as aggravating circumstance without setting forth any particularized circumstances to justify it).

Hudson v. State, 135 N.E.3d 973 (Ind. Ct. App. 2019) (no abuse of discretion in considering victim's tender age of 23 months in aggravation of sentence for neglect of a dependent).

4. Defendant's bad character

Defendant's character was a necessary consideration of sentencing under Ind. Code § 35-38-1-7.1(a) prior to April 25, 2005 and could be used to enhance a presumptive sentence. Cooper v. State, 687 N.E.2d 350 (Ind. 1997). See also *Aggravators, Statutory Aggravators, History of criminal or delinquent activity, Section III.A.2.*

Monegan v. State, 756 N.E.2d 499 (Ind. 2001) (rather than as evidence of criminal history, trial court properly deemed defendant's four prior arrests as evidence that his

antisocial behavior was not deterred by numerous encounters with the law). See also Martin v. State, 784 N.E.2d 997, 1011 (Ind. Ct. App. 2003).

Shields v. State, 699 N.E.2d 636 (Ind. 1998) (trial court properly considered defendant's character by stating that defendant was "dishonest, violent, manipulative").

Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003) (defendant's involuntary manslaughter sentence was properly enhanced due to defendant's disinclination to accurately explain events and repeated changing of his version of the facts, as this was relevant to defendant's character).

Kirby v. State, 746 N.E.2d 440 (Ind. Ct. App. 2001) (trial court did not err in considering defendant's failure to pay child support as one of three aggravators in determining appropriate sentence for his conviction for possession of controlled substance; fact that defendant would spend money on drugs rather than children could be considered part of character).

Inman v. State, 482 N.E.2d 451 (Ind. 1985) (trial court's conclusion, which was supported by the record, that defendant's behavior was that of "dangerous person" was properly considered as an aggravating circumstance).

PRACTICE POINTER: Character is a broad and amorphous category that encompasses a large number of statutory and non-statutory aggravators and mitigators. Often, it can be argued that bad character is duplicitous of other aggravators and should not be given independent weight. "The factors that disclose 'the character of the offender' are an assortment of general and specific, mandatory and discretionary considerations... the patchwork nature of these factors, while regrettable, is the product of the continuous and evolutionary change in the sociological backdrop against which criminal conduct occurs, such as use of bulletproof clothing, HIV-infected offender, shaken baby syndrome, and the victim who becomes an offender when responding to repeated abuse." Hildebrandt v. State, 779 N.E.2d 355, 361 (Ind. Ct. App. 2002).

5. Deliberate mental state for duration of crime

Loveless v. State, 642 N.E.2d 974 (Ind. 1994) (defendant's deliberate mental state over duration of crime, including planning and executing burning of body, indicated mind capable of maintaining intent to inflict grave injury and pain upon another in immediate circumstances over extended period; although part of this criminal intent and activity formed basis for sentence for confinement, major part is separate and distinct from that intent and activity).

6. Acts during trial

Drake v. State, 555 N.E.2d 1278 (Ind. 1990) (defendant's attempt to flee jurisdiction of court while his trial was still pending was proper consideration for enhancement of his sentence).

Smith v. State, 491 N.E.2d 193 (Ind. 1986) (trial court properly considered that defendant took public defender hostage while case was pending).

7. Position of trust

Violation of "position of trust" by itself constitutes a valid aggravating factor upon which the court could properly enhance defendant's sentence. Middlebrook v. State, 593 N.E.2d 212, 214 (Ind. Ct. App. 1992). See also *Aggravators, Statutory Aggravators, Person having care, custody or control over victim, Subsection III.A.8.*

Edgecomb v. State, 673 N.E.2d 1185 (Ind. 1996) (neighbor relationship, without more, was not position of trust warranting consideration as aggravating circumstance).

Phelps v. State, 914 N.E.2d 283 (Ind. Ct. App. 2009) (defendant was convicted of vicarious sexual gratification and dissemination of matter harmful to a minor after allowing three boys ages 13 and 14 to come to his home, granting their request to watch a pornographic video and masturbating with them; trial court erroneously found "position of trust" aggravator because the record did not establish that defendant was regularly in a position of control over the boys or suggest that he actively sought opportunities to supervise them, and there was no evidence he sought to establish a prior position of trust or confidence). Amalfitano v. State, 673 N.E.2d 1185 (Ind. Ct. App. 2011) (landlord-tenant relationship constituted a position of trust where defendant offered the 65 year-old victim suffering from dementia a place to live).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (because defendant knew, through his previous employment, of victim's friendly nature and policy regarding robbery and because he and his cohorts determined that victim would be easy to rob based on this information, trial court properly used defendant's previous employment as aggravator).

Wesby v. State, 535 N.E.2d 133 (Ind. 1989) (position of trust was proper aggravator where defendant was convicted of robbing and murdering a woman who had known him since childhood and who had been girlfriend of the defendant's father).

Stout v. State, 834 N.E.2d 707 (Ind. Ct. App. 2005) (no error in finding defendant's violation of his position of trust with his stepdaughter; court strongly disagreed with argument that this should not be an aggravator because acts of molestation are commonly committed by stepfathers).

Reyes v. State, 828 N.E.2d 420 (Ind. Ct. App. 2005), *sum. aff'd*, 841 N.E.2d 1081 (Ind. 2006) (defendant admitted to being victim's friend and was more than a person who "occasionally borrowed things" or "casually conversed" with victim; defendant used his relationship with victim to gain access to victim's home).

Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002) (no error in recognizing the fact that children's father killed mother has potential for harming children above and beyond harm they may have suffered had victim been killed by someone else), *disapproved on other grounds by* Childress v. State, 848 N.E.2d 1073 (Ind. 2006).

Marshall v. State, 643 N.E.2d 957 (Ind. Ct. App. 1994) (breach of position of trust was proper aggravator where police officer molested child whom he was counseling on drugs and alcohol). See also Brewer v. State, 562 N.E.2d 22 (Ind. 1990); Bisard v. State, 26 N.E.3d 1060 (Ind. Ct. App. 2015).

Collins v. State, 643 N.E.2d 375 (Ind. Ct. App. 1994) (where defendant was convicted of molesting his daughter, trial court properly considered defendant's former occupation as police officer as aggravator because defendant was trained in the law and placed in position of trust).

Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994) (violation of position of trust was proper aggravator when physician convicted of raping patient used his position and knowledge of medicine to facilitate crime).

Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990) (where defendant, university business manager, was convicted on several counts of theft and forgery, violation of his "position of trust and confidence . . . within the local community" were proper aggravating factors warranting consecutive sentences).

Trusley v. State, 829 N.E.2d 923 (Ind. 2005) (position of trust was proper aggravator for day care provider's sentence, who had a child die in her care).

8. Post-act premeditation

Kingery v. State, 659 N.E.2d 490 (Ind. 1995) (it was proper for trial court to consider post-act premeditation as aggravator where defendant attempted to conceal ownership of particular weapon after murder and robbery).

9. Behavior at sentencing hearing

Coleman v. State, 490 N.E.2d 711 (Ind. 1986) (court did not err by increasing defendant's sentence prior to any entry being made in court's record book and after defendant began to use rude and profane language toward judge upon hearing initial sentence).

PRACTICE POINTER: Although the trial court is not able to modify a defendant's sentence after it is on the record, the trial court may sentence a defendant to imprisonment for direct criminal contempt based on the defendant's behavior towards the judge after the sentence is pronounced. Holly v. State, 681 N.E.2d 1176 (Ind. Ct. App. 1997).

10. Behavior while incarcerated

Anderson v. State, 798 N.E.2d 875 (Ind. Ct. App. 2003) (defendant's conduct during incarceration was relevant to risk that he will commit another crime). See also Brock v. State, 983 N.E.2d 636 (Ind. Ct. App. 2013).

11. Manner in which weapon was used

The sentencing court may not consider possession of a weapon as an aggravating factor where possession of a weapon is an element of the offense. However, the court may consider the manner in which the weapon is used as an aggravator. Townsend v. State, 498 N.E.2d 1198, 1202 (Ind. 1986); Washington v. State, 422 N.E.2d 1218, 1221 (Ind. 1981).

Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501 (1995) ("use" means the *active employment of* a firearm; some examples of "use" are: brandishing, displaying, bartering,

striking with, and, firing or attempting to fire a firearm; "use" may also include the offender's reference to a firearm in his possession).

Biddinger v. State, 846 N.E.2d 271 (Ind. Ct. App. 2006), *sum aff'd*, 868 N.E.2d 407 (Ind. 2007) (trial court erred in considering type of weapon and ammunition defendant used to kill victim as an aggravating factor because he was legally entitled to carry a large caliber weapon loaded with hollow-point bullets).

Crawley v. State, 677 N.E.2d 520 (Ind. 1997) (trial court properly considered defendant's actions in reloading and firing second shot into victim as aggravator, regardless of which shot caused death; court did not err in considering position of victim and placement of shots as aggravators).

Warfield v. State, 417 N.E.2d 304 (Ind. 1981) (fact that defendant was armed was considered as aggravator even though court used it to enhance offenses; after encountering police officer, defendant refused to surrender, threatened to kill officer and held gun to officer's head before finally being disarmed).

Meadows v. State, 785 N.E.2d 1112 (Ind. Ct. App. 2003) (trial court did not err in considering nature of weapons in context of sentencing because firearms were ultimately used in crime in which their capabilities may have played a significant role in death of police officer and injury of bystander).

Smith v. State, 580 N.E.2d 298 (Ind. Ct. App. 1991) (fact that defendant used gun, both to intimidate and to beat his victim, was proper aggravator).

12. Manner in which crime was committed

Facts supported by the evidence and relating to the nature of the crime and the manner in which it was committed are proper elements to be used by a sentencing judge in enhancing a sentence. Johnson v. State, 537 N.E.2d 1191, 1193 (Ind. 1989); Limp v. State, 457 N.E.2d 189, 191 (Ind. 1983). However, such details of the crime must illustrate deservedness of an enhanced sentence. Wethington v. State, 560 N.E.2d 496, 509 (Ind. 1990).

Where the only aggravating circumstance properly found by the trial court is the manner in which the crime was committed, the finding is adequate to support some enhancement, but inadequate to support maximum term of imprisonment. Newhart v. State, 669 N.E.2d 953, 956 (Ind. 1996).

a. Lying in wait/premeditation

Angleton v. State, 714 N.E.2d 156 (Ind.1999) (court did not abuse its discretion when it enhanced sentence based on single aggravator that killing of wife for insurance purposes while she slept was "cold-blooded and calculated," as it necessarily required some degree of calculation or planning beyond a mere knowing or intentional killing as defined by statute).

Taylor v. State, 695 N.E.2d 117 (Ind. 1998) (lying in wait fell within such high range of aggravation that it outweighed mitigating factors (minimal criminal history and remorse) and was adequate to support imposition of maximum sentence).

Brown v. State, 667 N.E.2d 1115 (Ind. 1996) (trial court properly considered as aggravating factor fact that defendant and co-defendants had gone beyond choking victim with their bare hands, but used ligature, as part of pre-planned, intentional, matter of fact murder).

Kingery v. State, 659 N.E.2d 490 (Ind. 1995) (record contained ample evidence supporting trial court's conclusion that defendant was lying in wait, where after learning of victim's plan to visit lounge and that victim had substantial cash on his person, defendant traveled to lounge himself, parked his truck out of sight, and waited for victim to arrive).

b. Invasion of victim's home

Johnson v. State, 687 N.E.2d 345 (Ind. 1997) (invasion of victim's home, representing place of security in minds of most, can plausibly be used by trial court as aggravating circumstance).

c. Heinousness of crime

Johnson v. State, 687 N.E.2d 349 (Ind. 1997) (trial court's use of word "bludgeoning" to describe defendant's crime sufficiently articulated aggravating aspects of crime to qualify as proper aggravating factor).

Smith v. State, 638 N.E.2d 1255 (Ind. 1994) (trial court did not err in enhancing defendant's sentence where murder was planned, defendant volunteered and demanded that he be one to shoot victim, victim was lured to scene of murder on ruse of supposed drug deal, and defendant deliberately executed him by firing four shots into his body, any one of which would have been fatal).

Tackett v. State, 642 N.E.2d 978 (Ind. 1994) (circumstances involving extended intent to engage in pointless torture of helpless victim and then to burn her body was extremely serious and justified enhancement).

Geunther v. State, 501 N.E.2d 1071 (Ind. 1986) (act of child molestation, where victim was defendant's stepdaughter, was heinous and warranted enhancement of presumptive sentence). See also Newsome v. State, 797 N.E.2d 293 (Ind. Ct. App. 2003) (repeated molestations can support maximum enhancement).

May v. State, 502 N.E.2d 96 (Ind. 1986) (trial court did not err in enhancing defendant's sentence because crime caused real threat of harm to victim and defendant used care in planning commission of offenses).

Green v. State, 850 N.E.2d 977 (Ind. Ct. App. 2006) (acts of "scoping out" victims' residence on two separate occasions and knowing that a weapon would be involved is adequate to support conclusion that crime was "heinous" in nature, and such is a permissible aggravator).

Martin v. State, 784 N.E.2d 997 (Ind. Ct. App. 2003) (in battery resulting in serious bodily injury prosecution, trial court did not err in finding crime was extremely brutal when it involved striking victim in head area a number of times with great force, although court should not have considered defendant's involvement in contact sports and

awareness of his own strength as a separate aggravator). See also Settles v. State, 791 N.E.2d 812 (Ind. Ct. App. 2003); Benton v. State, 691 N.E.2d 459 (Ind. Ct. App. 1998).

Hornbostel v. State, 757 N.E.2d 170 (Ind. Ct. App. 2001) (trial court properly considered defendant killing victim with his bare hands as part of nature and circumstances of crime).

d. Callousness towards human life

Schultz v. State, 422 N.E.2d 1176 (Ind. 1981) (trial court did not abuse its discretion by considering defendant's total callousness toward human life as part and parcel of conspiracy to defraud insurance company to enhance sentence).

e. Impact of crime upon others

Smith v. State, 770 N.E.2d 818, 821-22 (Ind. 2002) (impact of crime upon others may be considered as aggravator when defendant's actions had impact on other person of destructive nature that is not normally associated with commission of crime in question and which impact must have been reasonably foreseeable by defendant).

Ajabu v. State, 722 N.E.2d 339, 344 (Ind. 2000) (trial court can consider non-statutory aggravating factor of psychological and emotional effects upon victim's family).

Kien v. State, 782 N.E.2d 398 (Ind. Ct. App. 2003) (it is irrelevant whether perpetrator knew that witnesses were present; perpetrator may be held to consequences of unanticipated observation).

Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002) (trial court did not err in assigning aggravating weight to defendant's violation of his "duty to safeguard and protect his mate," and of his obligation "to nurture, sustain, and provide an atmosphere in which his and victim's children can flourish").

But see *Improper Enhancement of Sentence, Impact on victim and victim's family*, Section C. 4 (below).

f. Wearing of bullet proof vest during crime

Prior to April 25, 2005, Ind. Code § 35-338-1-7.1(b)(7) stated that the court may consider, as an aggravating circumstance, that the person committed a forcible felony while wearing a garment designed to resist the penetration of a bullet. This aggravator was removed from the statute after April 25, 2005.

> Powell v. State, 769 N.E.2d 1128 (Ind. 2002) (sufficient evidence must be presented that defendant was actually wearing bulletproof garment at time of commission of crime; where defendant police officer testified that he had been in "full uniform" at the crime scene and defendant was wearing a bulletproof vest when he was arrested the next morning, use of this aggravator was improper).

13. Multiple victims

Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990) (fact that crimes of theft and forgery involved multitude of victims was proper aggravating factor).

Gleaves v. State, 859 N.E.2d 766 (Ind. Ct. App. 2007) (multiple victim aggravator tipped the balance such that aggravators outweighed mitigators and also justified imposition of consecutive sentences).

14. Illegal alien status

Bonilla v. State, 907 N.E.2d 586 (Ind. Ct. App. 2009) (in light of defendant's illegal entry into this country and his failure to follow the laws once here, advisory sentence for dealing in cocaine was not inappropriate)

Samaniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005) (being an illegal alien is itself more properly viewed as an aggravator than as a mitigator). See also Sanchez v. State, 891 N.E.2d 174 (Ind. Ct. App. 2008).

Alexander v. State, 837 N.E.2d 552 (Ind. Ct. App. 2005), *overruled on other grounds*, Ryle v. State, 842 N.E.2d 320 (Ind. 2005) (defendant could have rectified his illegal alien status by returning to his native country or by applying for a visa in this country; record showed that defendant fraudulently obtained his driver's license and committed perjury on his BMV application; circumstances demonstrate defendant's patent disregard for laws of this country and this State).

15. Racial motivation

Choosing a victim based on race can be a valid aggravating circumstance. Witmer v. State, 800 N.E.2d 571 (Ind. 2003) (trial judge properly took into account racial hatred in murder case).

16. Failing to be truthful about crime

Shields v. State, 699 N.E.2d 636 (Ind. 1998) (quoting Brown v. State, 667 N.E.2d 1115, 1116 (Ind. 1996)) (failure to give fully truthful account of crime is valid aggravating factor).

Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003) (defendant's attempt to conceal truth and mislead police in their investigation of shooting by relating various inconsistent stories was aggravating circumstance).

17. Failure to support family

Kirby v. State, 746 N.E.2d 440 (Ind. Ct. App. 2001) (trial court did not err in considering defendant's failure to pay child support as an aggravator in determining appropriate sentence for his conviction of possession of a controlled substance).

18. Lack of employment

Although lack of employment alone cannot be used as an aggravator, along with other circumstances, such as making money as a drug dealer, it is a proper aggravator. Fredrick v. State, 755 N.E.2d 1078 (Ind. 2001).

19. Alcohol and drug abuse

When defendant is aware of drug and alcohol problem, yet does not take positive steps to treat his addiction, it is proper for trial court to treat substance abuse as aggravating factor. Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004).

Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (defendant's alcoholism could be considered as an aggravating circumstance because he never sought help).

Calvert v. State, 930 N.E.2d 633 (Ind. Ct. App. 2010) (defendant's substance abuse reflects poorly on his character).

But see:

Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003) (in dealing in controlled substance prosecution, trial court erred in considering defendant's extensive drug habit at time offense was committed as aggravating circumstance without considering alternative drug abuse treatment programs).

PRACTICE POINTER: Appellate courts have recognized an admission by the defendant that he is addicted to drugs in addition to expressing remorse and asking the court for mercy is entitled to mitigating weight. See Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005); Fields v. State, 843 N.E.2d 1008 (Ind. Ct. App. 2006); James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007) (dissent disagreeing with majority as to the mitigating nature of the defendant's substance abuse). Even if a defendant's substance abuse problem may not rise to the level of a mitigating circumstance, it may, in the least, offset the aggravating nature of the defendant's criminal history. Frye v. State, 837 N.E.2d 1012 (Ind. 2005) (prior criminal history did not warrant maximum sentence for burglary where much of the history was substance abuse related).

20. Nature and circumstances of crime committed by principal

Meadows v. State, 785 N.E.2d 1112 (Ind. Ct. App. 2003) (in prosecution for possession of firearm by serious violent felon (aiding and abetting), trial court properly considered nature and circumstances of crimes committed by principal while using firearms purchased by defendant; all acts by principal which involved use of firearms were relevant to sentencing of defendant because they are inextricably linked to fact that defendant put guns in hands of principal knowing him to be convicted felon).

21. Risk of HIV

Prior to April 25, 2005, Ind. Code § 35-38-1-7.1(b)(8) and (9) stated that the court could consider, as an aggravating circumstance, that the defendant knew he had HIV and was convicted of specified sex crimes or controlled substance crimes, that the crime created a risk of transmission of HIV, and the defendant had risk counseling about how HIV is transmitted.

White v. State, 647 N.E.2d 684 (Ind. Ct. App. 1995) (risk of spreading HIV in child molest case could not be considered aggravating factor where no evidence on record that defendant had HIV, knew he had HIV or received risk counseling). See also Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994).

PRACTICE POINTER: Although courts are permitted to consider aggravators not set forth by the statute, it can be argued that sound policy requires all of the elements of former Ind. Code § 35-38-1-7.1(8) or (9) to be met prior to enhancing a defendant's sentence from putting others at risk for HIV. In other words, the fact that a defendant may have spread HIV through this crime should not be used as an aggravator unless the defendant knew he was HIV positive.

C. IMPROPER ENHANCEMENT OF SENTENCE

PRACTICE POINTER: Any of the following aggravators that require a factual finding may also violate the defendant's right to be tried by a jury and found beyond a reasonable doubt if the defendant committed the crime prior to April 25, 2005, the date the legislature amended Indiana's sentencing scheme. The amended statute cannot be applied to those who were convicted prior to April 25, 2005 without being an ex post facto law. Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006); Patterson v. State, 846 N.E.2d 723 (Ind. Ct. App. 2006); but see Sameniego-Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005). However, a defendant may not challenge, via Blakely, these aggravators in a belated appeal. *See* Gutermuth v. State, 868 N.E.2d 435 (Ind. 2007); but see Kline v. State, 875 N.E.2d 435 (Ind. Ct. App. 2007) (where defendant's resentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the resentencing).

1. Enhanced sentence to compensate for erroneous verdict or displeasure with plea agreement

A defendant must be sentenced based on a crime for which he was found guilty. When the court sentences the defendant based on an erroneous verdict, generally the appellate court will impose the presumptive sentence rather than remand to the appellate court because all comments of the judge are suspect. Gambill v. State, 436 N.E.2d 301, 305 (Ind. 1982). This rule does not apply to charges dismissed pursuant to a guilty plea. Bethea v. State, 983 N.E.2d 1134 (Ind. 2013).

Hamman v. State, 504 N.E.2d 276 (Ind. 1987) (remanded for imposition of presumptive sentence where trial court's enhancement of voluntary manslaughter and battery convictions was based upon disagreement with jury's verdict).

Hammons v. State, 493 N.E.2d 1250, 1251-53 (Ind. 1986) (remanded for imposition of presumptive sentence where trial court sentenced defendant to maximum possible sentence for voluntary manslaughter conviction stating on three different occasions that he disagreed with jury verdict because there was sufficient evidence to support murder conviction).

Phelps v State, 24 N.E.3d 525 (Ind. Ct. App. 2015) (although presence of valid aggravators such as defendant's criminal history and probation violations would otherwise justify an enhanced sentence, this "does not wash away the stain left by the trial court's blatant disagreement" with jury's acquittal on the greater charge, rendering the maximum sentence "a suspect enhancement;" thus, Court revised sentence from eight to six years).

Ind. Ct. App.
McCain v. State, 148 N.E.3d 977 (Ind. 2020) (in murder prosecution, although trial court's comments expressing disagreement with jury's voluntary manslaughter verdict came very close to unacceptable comment indicating judicial disagreement with the verdict, the record contained sufficient other factors that demonstrate the judge did not enhance the sentence based on that disagreement; further, defendant did not receive a maximum sentence, and his 45-year sentence is "substantially lower" than what it would have been for murder).

Garrett v. State, 756 N.E.2d 523 (Ind. Ct. App. 2001) (where court stated defendant was lucky jury did not find her guilty of murder, but rather reckless homicide, court was merely recognizing verdict rather than compensating for verdict).

Madden v. State, 697 N.E.2d 964 (Ind. Ct. App. 1998) (trial court erred in citing defendant's eligibility for death penalty as aggravating circumstance).

Puckett v. State, 956 N.E.2d 1182 (Ind. Ct. App. 2011) (applying this rule to the probation revocation context, trial court erred by revoking defendant's entire suspended sentence because court found the original sentence was too lenient).

Forshee v. State, 56 N.E.3d 1182 (Ind. Ct. App. 2017) (in sentencing defendant who pleaded guilty to dangerous control of a child, trial court did not abuse its discretion in using as aggravator the "position of care" element of Class A felony neglect offense dismissed pursuant to guilty plea agreement); see also Morris v. State, 985 N.E.2d 364 (Ind. Ct. App. 2013).

2. Element of offense may not be used as aggravator

a. General rule

(1) Under advisory scheme

Where a trial court's reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is "improper as a matter of law." Gomillia v. State, 13 N.E.3d 846, 852-53 (Ind. 2014) (quoting Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007)). Nothing in Pedraza v. State, 887 N.E.2d 77 (Ind. 2008), should be understood to alter this basic premise. Gomillia, 13 N.E.3d at 853 (disapproving on this ground of Barker v. State, 994 N.E.2d 306, 312 (Ind. Ct. App. 2013); Kubina v. State, 997 N.E.2d 1134, 1138 (Ind. Ct. App. 2013); Simmons v. State, 962 N.E.2d 86, 93 n. 2 (Ind. Ct. App. 2011); and Taylor v. State, 891 N.E.2d 155, 161 (Ind. Ct. App. 2008)).

Mannix v. State, 54 N.E.3d 1002 (Ind. Ct. App. 2016) (applying Gomillia's rationale to enhancement of a sentence based on an element of a separate offense).

(a) Different than prohibition on double enhancement

In Pedraza v. State, 887 N.E.2d 77 (Ind. 2008), the Court held that under the advisory scheme, an element of an offense or habitual offender status can be used as an aggravator without violating the prohibition on double enhancement. However, two sentences enhanced by the same prior crime cannot be run consecutively. Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) (holding the double enhancement law set forth in McVey v. State, 531 N.E.2d 458 (Ind. 1998), and Townsend v. State, 498 N.E.2d 1198 (Ind. 1986), no longer apply under the advisory scheme).

(b) Different than appropriateness analysis

Even when an enhancement is proper, enhancing a sentence to maximum based *only* on an element of the offense may provide an "unconvincing reason" that may warrant revision of sentence on appeal. Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008). Whether a sentence is appropriate with a double enhancement will vary from offense to offense and from one prior criminal record to another. See, e.g., Taylor v. State, 891 N.E.2d 155 (Ind. Ct. App. 2008).

Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006) (pre-Pedraza case; trial court erroneously enhanced defendant's sentence for felony operating while intoxicated based on her risk to re-offend due to prior conviction for OWI; this was improper double enhancement, as prior conviction comprised material element of class C felony OWI conviction; regardless of validity of double enhancement holding in light of Pedraza, Court found that defendant's 8-year sentence was inappropriate and revised sentence to 4 years).

Robinson v. State, 894 N.E.2d 1038 (Ind. Ct. App. 2008) (court held that under advisory scheme, defendant's position of care over newborn baby was sufficient *particularized circumstance* of conviction for class A felony neglect of dependent based on defendant's leaving newborn baby to die after birth; Court also rejected appropriateness challenge to defendant's advisory 30-year sentence).

(2) Under presumptive scheme

An element of the offense may not be used as an aggravating factor to enhance the sentence. Tidmore v. State, 637 N.E.2d 1290, 1291 (Ind. 1994); Townsend v. State, 498 N.E.2d 1198, 1202 (Ind. 1986). However, if the court differentiates the aggravating circumstance from the element of the crime, the particularized circumstance can be used as an aggravator although it is also an element of the crime.

Edgecomb v. State, 673 N.E.2d 1185 (Ind. 1996) (because victim's death was material element of murder, factor could not be considered as aggravator in enhancement of sentence).

b. Improper Enhancements – not sufficiently particularized or unique

Merlington v. State, 814 N.E.2d 269 (Ind. Ct. App. 2004) (fact that defendant dealt drugs for financial gain rather than to support a drug habit and that he sold a large amount of drugs were elements of the offense and could not be used as aggravators).

Hart v. State, 829 N.E.2d 541 (Ind. Ct. App. 2005) (trial court improperly used fact that defendant disseminated photos of his four-year-old child over internet to enhance child exploitation counts, as this consideration is part of criminal conduct); see also Kelp v. State, 119 N.E.3d 1071 (Ind. Ct. App. 2019).

Davis v. State, 796 N.E.2d 798 (Ind. Ct. App. 2003) (because element of crime may not also be used to enhance sentence without particularized circumstances of case, and trial court here gave no particularized circumstances, fact that victim was less than twelve years old, normally a statutory aggravator, was not a valid aggravator in domestic battery case).

Bradley v. State, 770 N.E.2d 382 (Ind. Ct. App. 2002) (it was improper toenhance defendant's Class A felony voluntary manslaughter conviction by five years because defendant had intentionally used handgun).

Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002) (aggravator that defendant was in need of treatment that could best be provided by commitment to penal facility because he was intending to have sexual contact with thirteen-year-old was nothing more than referencing elements of crime).

Allen v. State, 722 N.E.2d 1246 (Ind. Ct. App. 2000) (although defendant brandished gun during course of armed robbery and his threats to motel employee could be construed as menacing, trial court improperly considered his role in robberies as aggressive and serious beyond material elements of crime).

Stone v. State, 727 N.E.2d 33 (Ind. Ct. App. 2000) (apparent inference of "substantial drug dealing" based upon seizure of large amount of cocaine was entitled to no weight as aggravator because defendant was already convicted of two counts of dealing cocaine as Class A felony); Cf. Quintanilla v. State, 146 N.E.3d 982 (Ind. Ct. App. 2020) (no error in considering large amount of drugs as aggravator even though the degree of the offense had already been elevated based upon the amount of drugs).

Cheshier v. State, 690 N.E.2d 1226 (Ind. Ct. App. 1998) (fact that defendant used deadly weapon during battery could not be aggravator because it was also element of conviction).

Stanger v. State, 545 N.E.2d 1105 (Ind. Ct. App. 1989) (where court failed to address circumstance which made young age of victim particularly aggravating, fact that age was element of crime precluded its use as aggravator), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997); see also McCoy v. State, 96 N.E.3d 95 (Ind. Ct. App. 2018).

Linger v. State, 508 N.E.2d 56 (Ind. Ct. App. 1987) (fact that theft was from employer was not such particularized circumstance as could be used as aggravator).

c. Proper Enhancements – sufficiently particularized or unique

Smith v. State, 580 N.E.2d 298 (Ind. Ct. App. 1991) (Class B robbery requires either use of deadly weapon or bodily injury, and since jury verdict was supportable on grounds of injury alone, trial court could consider use of gun as aggravating factor without treating it as element of crime). See also Smith v. State, 485 N.E.2d 898, 901 (Ind. 1985).

Bonds v. State, 729 N.E.2d 1002 (Ind. 2000) (purpose for committing robbery, defendant's role as primary actor and his recruiting of other participants are not material elements of murder or conspiracy, but rather constitute nature and circumstances of crime).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (trial court did not err in considering fact that defendant who was convicted of robbery used knowledge of previous employer's friendly nature to determine that he would be easy to rob).

Holmes v. State, 642 N.E.2d 970 (Ind. 1994) (fact that victims were defendant's parents and that shootings were witnessed by defendant's nine-year-old sister which resulted in her experiencing severe psychological trauma could be used as aggravator; in no way was presence of nine-year-old girl element of murder).

Adkins v. State, 561 N.E.2d 787 (Ind. 1990) (because court made it clear that it was not shooting alone that was aggravating factor but manner in which shooting was committed, use of aggravating factor was proper).

Stewart v. State, 531 N.E.2d 1146 (Ind. 1988) (where age was element of crime, fact that victim was not only minor, but one of tender age, handicapped, and defendant's acts caused serious emotional harm showed particularized individual circumstances which constituted separate aggravating factors). See also Mallory v. State, 563 N.E.2d 640 (Ind. Ct. App. 1990) and Hudson v. State, 135 N.E.3d 973 (Ind. Ct. App. 2019).

Haas v. State, 849 N.E.2d 550 (Ind. Ct. App. 2006) (facts charged as overt acts in furtherance of conspiracy could be used to support heinous nature and circumstances aggravator).

Ross v. State, 835 N.E.2d 1090 (Ind. Ct. App. 2005) (while it is improper to consider fact that a person died as a result of murder as an aggravator, number of times a victim is shot is a proper consideration under nature and circumstances aggravator).

Jones v. State, 812 N.E.2d 820 (Ind. Ct. App. 2004) (in nonsupport case, trial court did not err in aggravating defendant's sentence based solely on excessive arrearage which defendant argued was an element of the offense; amount of arrearage was "astounding" and several times more than statutory minimum for a Class C felony).

Matshazi v. State, 804 N.E.2d 1232 (Ind. Ct. App. 2004) (no error in attaching significant aggravating weight to rape victim's loss of security and fear of others, as well as physical and emotional pain that victim endured; because of victim's physical disability, she had to undergo additional surgery and had to experience physical and emotional pain of delivering her child and giving baby up for adoption because she could not physically or mentally care for child).

Glass v. State, 801 N.E.2d 204 (Ind. Ct. App. 2004) (defendant, an admitted methamphetamine addict, consented and assisted in his drug supplier's construction of a meth lab in trailer in which his girlfriend's children resided; trial court properly found the "expense, harm, and threat" of meth manufacture and the "scourge" of meth use on society as aggravating circumstances; these are not material elements of dealing in meth, but more like nature and circumstances of crime).

Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003) (maximum sentence for involuntary manslaughter was justified by facts and circumstances of case, which amounted to degree of recklessness beyond that normally associated with crime of involuntary manslaughter).

Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003) (in OWI causing death prosecution, trial court properly considered defendant's high BAC level and clear abuse of alcohol and time of day of defendant's conduct together as separate and proper aggravating circumstances).

Sanders v. State, 713 N.E.2d 918 (Ind. Ct. App. 1999) (fact that defendant used gun in carjacking was properly used as aggravator because use of force, and not use of gun, is element of carjacking).

Smith v. State, 655 N.E.2d 532 (Ind. Ct. App. 1995) (duration of conspiracy and deaths resulting from conspiracy were not elements of offense and could be used as aggravators).

d. Exception: Term of years rather than LWOP or death penalty

Where the Defendant is eligible for LWOP or the death penalty, but rather is sentenced to a term of years, the court can consider the aggravating factors enumerated in Ind. Code § 35-50-2-9 in addition to the factors listed in Ind. Code § 35-38-1-7.1. Thus, the court can consider an intentional killing as an aggravator for murder. Davies v. State, 758 N.E.2d 981, 986 (Ind. Ct. App. 2001).

3. Lesser included offense and element distinguishing greater

If a plea bargain lacks any language limiting what factors could be considered aggravating, the trial court is permitted to use an element of a dismissed charge as an aggravator. "It is not necessary for a trial court to turn a blind eye to the facts of the incident that brought the defendant before them." Bethea v. State, 983 N.E.2d 1134, 1145 (Ind. 2013) (implicitly overruling Carlson v. State, 716 N.E.2d 469 (Ind. Ct. App. 1999); Conwell v. State, 542 N.E.2d 1024 (Ind. Ct. App. 1989); Farmer v. State, 772 N.E.2d 1025 (Ind. Ct. App. 2002); Miller v. State, 709 N.E.2d 48 (Ind. Ct. App. 1999); and Swain v. State, 870 N.E.2d 1058 (Ind. Ct. App. 2007).

Bunch v. State, 760 N.E.2d 1163 (Ind. Ct. App. 2002), *sum. aff'd* 778 N.E.2d 1285 (Ind. 2002) (despite fact that defendant was acquitted of reckless homicide, consideration of fact that victim died was proper because death was consequence of crime that defendant committed (i.e., dealing in cocaine)).

Patterson v. State, 846 N.E.2d 723 (Ind. Ct. App. 2006) (fact that victim died could be used to enhance sentence for robbery causing serious bodily injury, although murder

charge was dismissed pursuant to plea agreement); see also Morris v. State, 985 N.E.2d 364 (Ind. Ct. App. 2013).

4. Impact on victim and victim's family

Under normal circumstances, the impact upon the victim and the victim's family is not an aggravating circumstance for purposes of sentencing. The impact on others may qualify as an aggravator only when the defendant's actions had an impact on the other persons in a destructive nature that is not normally associated with the commission of the offense in question and this impact was foreseeable to the defendant. Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (citing Penick v. State, 659 N.E.2d 484, 488 (Ind. 1995)). Generally, the impact that a victim or a family experience as a result of a particular offense is accounted for in the presumptive sentence. Mitchem v. State, 685 N.E.2d 671 (Ind. 1997).

Lewis v. State, 759 N.E.2d 1077 (Ind. Ct. App. 2001) (in murder prosecution in which defendant was found guilty of crimes against victim 1 but not victim 2, trial court erred in considering mother of victim 2's statements).

Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001) (trial court improperly considered impact on victim and victim's family as aggravator where impact on this family and victim of child molest was not different than on similarly situated victims); see also Leffingwell v. State, 793 N.E.2d 307 (Ind. Ct. App. 2003); Rodriguez v. State, 785 N.E.2d 1169 (Ind. Ct. App. 2003) (OWI causing death prosecution).

Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (because impact on family from loss of loved one accompanies almost every murder, it is encompassed within range of impact which presumptive sentence is designed to punish; it cannot be used as aggravator unless the impact is one far beyond the norm and is foreseeable by the defendant).

5. Victim's or victim's representative's sentence recommendation

The sentencing court cannot consider a victim's recommendation as an aggravator or mitigator, but the recommendation can aid the sentencing court. Hill v. State, 751 N.E.2d 273 (Ind. Ct. App. 2001) (Sullivan, J., concurring with separate opinion that courts should not inferentially adopt the wishes of victim for harsh punishment when sentencing authority would otherwise not impose such sentence); see also Brown v. State, 698 N.E.2d 779 (Ind. 1998).

Serino v. State, 798 N.E.2d 852 (Ind. 2003) (although recommendations from a victim's family as to sentencing and testimonies regarding good character do not constitute mitigating or aggravating circumstances of customary sort; they may properly assist court in determining sentence to be imposed).

6. Sentence cannot be enhanced simply to send message

Trial judge's desire to send a message is not a proper reason to aggravate a sentence. Sentencing process is not to be used as a method of sending a personal, philosophical or political message. Gregory-Bey v. State, 669 N.E.2d 154, 159 (Ind. 1996); Scheckel v. State, 655 N.E.2d 506, 510 (Ind. 1995).

Nybo v. State, 799 N.E.2d 1146 (Ind. Ct. App. 2003) (trial court improperly relied on its own personal belief, after sitting through defendant's husband's trial, in reaching conclusion that State had been too lenient in charging defendant to justify imposition of maximum sentence).

Beno v. State, 581 N.E.2d 922 (Ind. 1991) (in imposing sentence, trial court improperly stated that it was going to make example of defendant to other drug dealers).

But see:

Vanyo v. State, 450 N.E.2d 524 (Ind. 1983) (five-year enhancement of sentence was not error where trial court cited as aggravating circumstances that to give a lesser sentence would set bad example for younger people who might be inclined to participate in sale of illegal drugs).

7. Community outrage

Community outrage is not a proper consideration in determining or reviewing a sentence. Escobedo v. State, 989 N.E.2d 1248 (Ind. 2013).

8. Maximum enhancement when no physical injury

Although the absence of physical injury does not mean that the trial court should not impose an enhanced sentence, the court may not sentence a defendant to the maximum enhancement permitted by law when there was no physical injury and property loss was minimal. Buchanan v. State, 699 N.E.2d 655 (Ind. 1998).

Buchanan v. State, 699 N.E.2d 655 (Ind. 1998) (maximum sentence was unreasonable where defendant hijacked victim's car, locked her in trunk of car and drove her around for almost twenty-four hours because victim suffered no physical injury and sustained minimal property damage).

9. Drug addiction

Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003) (in dealing in controlled substance prosecution, trial court erred in considering defendant's extensive drug habit at time offense was committed as aggravating circumstance without considering alternative drug abuse treatment programs). See also Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005); Fields v. State, 843 N.E.2d 1008 (Ind. Ct. App. 2006); James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007).

But see:

Bryant v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (when defendant is aware of drug and alcohol problem yet does not take positive steps to treat his addiction, it is proper for trial court to treat substance abuse as aggravating factor); Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003); Calvert v. State, 930 N.E.2d 633 (Ind. Ct. App. 2010).

10. Immunized testimony from another trial

Nybo v. State, 799 N.E.2d 1146 (Ind. Ct. App. 2003) (in neglect of dependent prosecution, trial court improperly considered defendant's immunized testimony from her husband's murder trial to justify its imposition of maximum sentence); see also Neff v. State, 832 N.E.2d 1006 (Ind. 2006), *sum. aff'd*, 849 N.E.2d 556.

11. Defendant's race

Williams v. State, 811 N.E.2d 462 (Ind. Ct. App. 2004) (in felony murder prosecution, trial court abused its discretion when it considered defendant's race to be an aggravating circumstance; while trial judge's concern over race relations in community is laudable, his use of defendant's race to address that concern was impermissible).

12. Denial of guilt

For a detailed analysis of this improper aggravator, see *Non-statutory Aggravators, Lack of Remorse, this chapter, section III.B.1.b.*

13. Need for correctional or rehabilitative treatment in penal facility

Although prior to April 25, 2005, Ind. Code § 35-38-1-7.1(b)(3) stated that the need for correctional or rehabilitative that can best be provided by commitment to a penal facility was a proper aggravating circumstances, this aggravator was removed from the statute. There is considerable case law, as set forth below, that addressed the misapplication of this aggravator. When the legislature amends a statute in response to case law, the legislature's intent to clarify the law is clear. Senn v. State, 766 N.E.2d 1190 (Ind. Ct. App. 2002). Thus, arguably, the need for correctional or rehabilitative treatment is no longer a proper aggravator.

Although aggravators, such as need for correctional treatment, may be "derivative" of criminal history, and therefore be legitimate observations about weight to be given to facts appropriately noted by a judge alone under Blakely, they cannot serve as separate aggravating circumstances. See, e.g., Morgan v. State, 829 N.E.2d 12 (Ind. 2005).
Regardless, for this aggravating circumstance to justify an enhanced sentence, there must be a finding that the defendant is in need of correctional or rehabilitative treatment that can best be provided by a period of incarceration in a penal facility in excess of the presumptive sentence term. Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997); Hollins v. State, 679 N.E.2d 1305, 1308 (Ind. 1997); Mayberry v. State, 670 N.E.2d 1262, 1271 (Ind. 1996).

a. Deserving of sentence in excess of the presumptive

In order to aggravate a defendant's sentence under this section, the record must support a sentence in excess of the presumptive.

Powell v. State, 751 N.E.2d 311 (Ind. Ct. App. 2001) (because defendant had never been incarcerated before, there was nothing in record to support conclusion that presumptive period of incarceration would not be sufficient to give defendant necessary correctional and rehabilitative treatment).

Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001), *reh'g denied, trans. denied* (as defendant had never served entire presumptive sentence, record failed to support aggravator that he was in need of sentence in excess of presumptive).

b. Particularized statement

In addition, if this aggravator is to be used when there is no question that the defendant is going to a penal facility, the court is required to give an individualized statement of why the defendant is in need of rehabilitative treatment that could best be provided by a period of incarceration in excess of the presumptive sentence. Ajabu v. State, 722 N.E.2d 339, 343 (Ind. 2000), *reh'g denied*; Berry v. State, 703 N.E.2d 154, 158 (Ind. 1998).

Recitation of the statute is insufficient; rather, the court must explain why the defendant is in need of more correctional treatment. Smith v. State, 675 N.E.2d 693, 698 (Ind. 1996).

Adkins v. State, 703 N.E.2d 182 (Ind. Ct. App. 1998) (because court failed to articulate consideration of facts of specific crimes or characteristics of particular defendant as they relate to need for rehabilitative treatment, court remanded with instructions to enter specific statement or to impose concurrent sentences or reduce them to presumptive length). See also Powell v. State, 751 N.E.2d 311 (Ind. Ct. App. 2001).

Lane v. State, 551 N.E.2d 897 (Ind. Ct. App. 1990) (determination that defendant could not succeed without supervision on probation was insufficient to support aggravator that defendant was in need of treatment).

Penick v. State, 659 N.E.2d 484 (Ind. 1995) (explanation that prior multiple probations and multiple incarcerations had not caused defendant to cease criminal activity and be rehabilitated was more than mere perfunctory recitation, and was sufficient to support aggravator of defendant's need for correctional treatment). See also Jones v. State, 790 N.E.2d 536 (Ind. Ct. App. 2003).

Forrester v. State, 440 N.E.2d 475 (Ind. 1982) (evidence that defendant was on parole or probation at time of crime or that he had history of criminal activity was probative and relevant and supported findings that defendant was in need of commitment and confinement). See also Harris v. State, 272 Ind. 210, 396 N.E.2d 674 (1979).

Flammer v. State, 786 N.E.2d 293 (Ind. Ct. App. 2003) (aggravator proper where trial court provided specific and individualized statement that defendant "committed a violent and senseless criminal act that resulted in the death of his wife" and that defendant "should be separated from our citizens for their protection").

Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (fact that defendant would not admit to molesting child and some studies had shown that "average" child molester cannot be rehabilitated without admitting to molestation did not support finding that defendant was in need of commitment because fact that defendant denies conduct cannot aggravate sentence and reason for commitment was generalized to group of offenders and not particular defendant).

14. Reduction would depreciate the seriousness of the crime: Ind. Code § 35-38-1-7.1(b)(4)

Although prior to April 25, 2005, Ind. Code § 35-38-1-7.1(b)(4) stated that imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime was a proper aggravating circumstance, this aggravator was removed from the statute. There is considerable case law, as set forth below, that addressed the misapplication of this aggravator. When the legislature amends a statute in response to case law, the legislature's intent to clarify the law is clear. Senn v. State, 766 N.E.2d 1190 (Ind. Ct. App. 2002). Thus, arguably, the depreciation of the seriousness of the crime is no longer a proper aggravator.

There is a long line of cases that hold that this aggravator may be considered only for the limited purpose of supporting the court's refusal to reduce the presumptive sentence. Price v. State, 725 N.E.2d 82, 85 (Ind. 2000); Berry v. State, 703 N.E.2d 154, 158 (Ind. 1998); Hollins v. State, 679 N.E.2d 1305, 1308 (Ind. 1997); Jones v. State, 675 N.E.2d 1084, 1088 (Ind. 1996); Walton v. State, 650 N.E.2d 1134, 1136-37 (Ind. 1995); Mahla v. State, 496 N.E.2d 568, 575 (Ind. 1986). Thus, the aggravator is improper if the court is not considering reducing the defendant's sentence. Cox v. State, 792 N.E.2d 878, 883 (Ind. Ct. App. 2003); Powell v. State, 751 N.E.2d 311, 317 (Ind. Ct. App. 2001); Ridenour v. State, 639 N.E.2d 288, 297 (Ind. Ct. App. 1994).

> Jackson v. State, 752 N.E.2d 45 (Ind. 2001) (defendant's presumptive sentence was proper despite fact that only aggravator was reduction of sentence would depreciate seriousness of crime; that aggravator outweighed mitigators).
>
> Ector v. State, 639 N.E.2d 1014 (Ind. 1994) (trial court could not rely on "depreciate the seriousness statutory aggravator" to enhance sentence when court did not have authority to reduce sentence because plea agreement precluded consideration of sentence less than presumptive).
>
> Burgess v. State, 854 N.E.2d 35 (Ind. Ct. App. 2006) (under circumstances of crime, specifically that defendant's three-year-old son was present in same house where defendant was manufacturing meth, trial court properly concluded that reducing or suspending the presumptive sentence would depreciate the seriousness of the crime; however, fact that crime occurred within 1000 feet of a school was erroneously used as "depreciate the seriousness" factor, because it constituted a material element of offense).

However, the Indiana Supreme Court has held, contrary to these prior decisions, that the "depreciation of the seriousness of the crime" may be used as a non-statutory aggravator which the court may apply if it finds that a sentence less the *enhanced* term would depreciate the seriousness of the crime. Mathews v. State, 849 N.E.2d 578 (Ind. 2006); Evans v. State, 497 N.E.2d 919, 923 (Ind. 1986). But, depreciation of the seriousness of the crime cannot justify imposition of consecutive sentences. Mathews v. State, 849 N.E.2d 578 (Ind. 2006).

> But see Walsman v. State, 855 N.E.2d 645 (Ind. Ct. App. 2006) (citing Taylor v. State, 840 N.E.2d 324 (Ind. 2006), court held it was improper to use seriousness of crime as aggravator).

15. LSI-R Score Inappropriate Aggravator Because Impermissible Substitute For Trial Court's Individual Evaluation

It is clear that neither the LSI-R nor the SASSI are intended nor recommended to substitute for the judicial function of determining the length of sentence appropriate for each offender. But such evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence, how to design a probation program for the offender, whether to assign an offender to alternative treatment facilities or programs, and other such corollary sentencing matters. The scores do not in themselves constitute an aggravating or mitigating circumstance because neither the data selection and evaluations upon which a probation officer or other administrator's assessment is made, nor the resulting scores are necessarily congruent with a sentencing judge's findings and conclusion regarding relevant sentencing factors. Having been determined to be statistically valid, reliable, and effective in forecasting recidivism, the assessment tool scores may, and if possible, should, be considered to supplement and enhance a judge's evaluation, weighing, and application of the other sentencing evidence in the formulation of an individualized sentencing program appropriate for each defendant. Malenchik v. State, 928 N.E.2d 564, 573 (Ind. 2010) (disapproving of Rhodes v. State, 896 N.E.2d 1193 (Ind. Ct. App. 2008)); see also J.S. v. State, 923 N.E.2d 576 (Ind. Ct. App. 2010) and Kayser v. State, 131 N.E.3d 717 (Ind. Ct. App. 2019).

Shotts v. State, 53 N.E.3d 526 (Ind. Ct. App. 2016) (there was no evidence that when trial court used the words "very high risk to reoffend" in its written sentencing order, that it meant to reference defendant's IRAS score).

Moyer v. State, 83 N.E.3d 136 (Ind. Ct. App. 2017) (when trial court said it was considering as an aggravator the probation department's determination that defendant was at a high risk to reoffend—a fact that, if true, would be improper as a matter of law—trial court was actually using defendant's risk assessment scores as a supplement to the factors in the written sentencing orders; the risk assessment scores were not included in the written order, so they were not improperly considered as an aggravator).

IV. MITIGATING CIRCUMSTANCES

See also Chapter 4, I.b.2, *Failure to find mitigating factors*.

A. STATUTORY MITIGATORS

The following factors may be considered as mitigating circumstances or as favoring suspending sentence and imposing probation:

1. Crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so: Ind. Code § 35-38-1-7.1(b)(1)

The court may consider, as a mitigating circumstance that, the crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so. Ind. Code § 35-38-1-7.1(b)(1). Both factors (crime neither caused nor threatened bodily harm) must be present or the above mitigator may not be considered. Clay v. State, 275 Ind. 256, 416 N.E.2d 842, 844 (1981).

Wilkins v. State, 500 N.E.2d 747, 748, n.1 (Ind. 1986) (in burglary prosecution, court did not err in refusing to consider above mitigator because although defendant's crimes may have posed no threat of serious injury to persons, same could not be said as to property).

Warfield v. State, 417 N.E.2d 304 (Ind. 1981) (crime threatened serious harm where defendant wore mask, carried gun with hollow-point bullets, robbed three people, bound three people, refused to surrender, threatened to kill officer, and held gun to officer's head).

2. Crime was result of circumstances unlikely to recur: Ind. Code § 35-38-1-7.1(b)(2)

The court may consider, as a mitigating circumstance that the crime was the result of circumstances unlikely to recur. Ind. Code § 35-38-1-7.1(b)(2).

Herrera v. State, 679 N.E.2d 1322 (Ind. 1997) (trial court did not err in rejecting this mitigator where defendant was a recidivist).

3. Victim of crime induced or facilitated the offense: Ind. Code § 35-38-1-7.1(b)(3)

The court may consider, as a mitigating circumstance that the victim of the crime induced or facilitated the offense. Ind. Code § 35-38-1-7.1(b)(3).

Geralds v. State, 647 N.E.2d 369 (Ind. Ct. App. 1995) (fact that victim would not have been killed if victim had not attempted to burglarize defendant's store was not mitigating circumstance in light of fact that victim had terminated attempt at burglary and was attempting to flee when defendant shot him).

Roan v. State, 599 N.E.2d 230 (Ind. Ct. App. 1992) (trial court did not abuse its discretion by failing to consider fact that victim had facilitated offense of OWI resulting in death, by purchasing drinks for defendant).

4. Substantial grounds tending to excuse or justify crime though failing to establish a defense: Ind. Code § 35-38-1-7.1(b)(4)

The court may consider, as a mitigating circumstance, that there are substantial grounds tending to excuse or justify the crime, though failing to establish a defense. Ind. Code § 35-38-1-7.1(b)(4).

Wallace v. State, 640 N.E.2d 374 (Ind. 1994), *cert. den'd,* 514 U.S. 1115, 115 S.Ct. 1972 (1995) (while it would be entirely proper for physician or lay person to testify that they believe defendant did not have ability to form intent at time of commission of crime based on factors including mistreatment of defendant as child, medication or intoxication, this does not mean that childhood treatment, medication or intoxication are in and of themselves excuse for committing crime).

5. Person acted under strong provocation: Ind. Code § 35-38-1-7.1(b)(5)

The court may consider, as a mitigating circumstance that the person acted under strong provocation. Ind. Code § 35-38-1-7.1(b)(5). However, a finding in a sentencing report that the defendant acted under strong provocation is the judge's conclusion and requires a

statement of facts to evidence its validity or reasonableness. Page v. State, 424 N.E.2d 1021, 1023 (Ind. 1981).

Ousley v. State, 807 N.E.2d 758 (Ind. Ct. App. 2004) (evidence did not support consideration of provocation as a significant mitigating factor).

Jimmerson v. State, 751 N.E.2d 719 (Ind. Ct. App. 2001) (it would contravene clear legislative intent to hold that a person convicted of voluntary manslaughter is entitled to double mitigation of his sentence, once by being convicted only of voluntary manslaughter instead of murder and again by use of the "strong provocation" statutory mitigator).

6. Person has no history of delinquency or criminal activity, or has led a law-abiding life for a substantial period before commission of the crime: Ind. Code § 35-38-1-7.1(b)(6)

The court may consider, as a mitigating circumstance that the person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime. Ind. Code § 35-38-1-7.1(b)(6). In fact, no prior criminal record is a factor which deserves substantial mitigating weight. Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (quoting Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)); but see Sipple v. State, 788 N.E.2d 473, 483 (Ind. Ct. App. 2003) (a trial court may properly conclude that a defendant's lack of a criminal history is not entitled to mitigating weight).

However, it is within the ambit of the trial court's discretion to view the remoteness of the prior criminal history as a mitigating circumstance, or on the other hand, it could find the remoteness to not affect the consideration of the criminal history as an aggravating circumstance. Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002).

Bacher v. State, 686 N.E.2d 791 (Ind. 1997) (in murder case, court should have considered defendant's proffered evidence of lack of criminal record, where only past convictions were for public intoxication and absence without leave from service). Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002) (sentence for 38-year-old without so much as a single arrest on his record should be entitled to substantial mitigation).

Mann v. State, 742 N.E.2d 1025 (Ind. Ct. App. 2001), *disapproved of on other grounds,* Childress v. State, 848 N.E.2d 1073 (Ind. 2006) (after defendant pled guilty, trial court improperly enhanced defendant's sentence when it recognized mitigating factor of lack of criminal history).

Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (trial court erred in not giving any weight to significant mitigator, defendant's lack of criminal history).

7. Person likely to respond affirmatively to probation or short-term imprisonment: Ind. Code § 35-38-1-7.1(b)(7)

The court may consider, as a mitigating circumstance that, the person is likely to respond affirmatively to probation or short-term imprisonment. Ind. Code § 35-38-1-7.1(b)(7).

Angleton v. State, 714 N.E.2d 156 (Ind. 1999) (where trial court found defendant's lack of criminal history to be a mitigator, trial court properly declined to find that he was

likely to respond affirmatively to probation or short-term imprisonment as a separate mitigator where such sentences were not options because defendant was convicted of murder).

8. Character and attitudes of person indicate he is unlikely to commit another crime: Ind. Code § 35-38-1-7.1(b)(8)

The court may consider, as a mitigating circumstance, the character and attitudes of the person indicate that the person is unlikely to commit another crime. Ind. Code § 35-38-1-7.1(b)(8).

Gambill v. State, 675 N.E.2d 668 (Ind. 1996) (where defendant was mentally ill and defendant's sister testified that defendant would never knowingly hurt her son, defendant was unlikely to commit another crime; court abused its discretion by failing to reduce defendant's sentence).

Johnson v. State, 580 N.E.2d 959 (Ind. 1991) (trial court did not abuse its discretion by omitting specific reference to mitigating factors claimed by defendant, including that defendant was unlikely to commit another crime, where defendant killed her husband, his girlfriend and another couple).

9. Person has or will make restitution to victim for injury, damage, or loss sustained: Ind. Code § 35-38-1-7.1(b)(9)

The court may consider, as a mitigating circumstance, that the person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained. Ind. Code § 35-38-1-7.1(b)(9). This section does not give the court authority to impose restitution as a part of the sentence but permits the court to consider the defendant's restitution in determining the sentence. Rife v. State, 424 N.E.2d 188, 192 (Ind. Ct. App. 1981). The authority to order restitution must come from other statutes.

Kemp v. State, 887 N.E.2d 102, 106 (Ind. Ct. App. 2008) (reducing sentences for forgery, theft, and corrupt business influence and remanding for the trial court to determine how defendant should serve the sentence "keeping the goal of monetary restitution to the [victim] in mind").

Miller v. State, 659 N.E.2d 622 (Ind. Ct. App. 1995) (counseling sessions for victim of child molestation, which defendant's insurance provided while defendant provided co-payment, did not so clearly constitute restitution that failure to find them to be mitigating factor amounted to abuse of discretion).

Crandell v. State, 490 N.E.2d 377 fn.1 (Ind. Ct. App. 1986) (defense counsel's suggestion to victim that he files civil suit for damages was not offer to make restitution).

10. Imprisonment of person will result in undue hardship to himself or his dependents: Ind. Code § 35-38-1-7.1(b)(10)

The court may consider, as a mitigating circumstance, that imprisonment of the person will result in undue hardship to the person or dependents of the person. Ind. Code § 35-38-1-7.1(b)(10). The nature of the hardship to the defendant's dependents - whether slight or

serious - is dependent upon facts of each case. Linger v. State, 508 N.E.2d 56, 63, n.5 (Ind. Ct. App. 1987). The court is not required to find undue hardship merely because defendant has dependents. Haun v. State, 792 N.E.2d 69 (Ind. Ct. App. 2003); Reese v. State, 939 N.E.2d 695 (Ind. Ct. App. 2011).

Antrim v. State, 745 N.E.2d 246 (Ind. Ct. App. 2001) (trial court abused its discretion by failing to consider uncontroverted testimony that defendant's wife had cerebral palsy and is disabled, defendant provided support for his two teenage children and also paid support for third child and defendant had two jobs).

Battles v. State, 688 N.E.2d 1230 (Ind. 1997) (court did not abuse discretion by failing to find impact on defendant's five-year-old son to be significant mitigating factor, where increase of sentence was only from fifty to sixty years).

Mason v. State, 539 N.E.2d 468 (Ind. 1989) (trial court found no threat of undue hardship in that defendant had not been living with children's mother and had never supported them).

Allen v. State, 453 N.E.2d 1011 (Ind. 1983) (fact that defendant had wife and child was not necessarily mitigator when facts of crime revealed that defendant apparently had no sympathy for other parents and children).

Abel v. State, 773 N.E.2d 276 (Ind. 2002) (defendant failed to explain how his incarceration for maximum sentence will result in more hardship to his daughter than his incarceration for presumptive or minimum sentence).

Edmonds v. State, 840 N.E.2d 456 (Ind. Ct. App. 2006) (undue hardship was not a significant mitigating circumstance where defendant had custody of only two of her three children and they had been in care of her mother while defendant was in jail pending outcome of this case); accord Zavala v. State, 138 N.E.3d 291 (Ind. Ct. App. 2019).

Miller v. State, 634 N.E.2d 57 (Ind. Ct. App. 1994) (although defendant's grandmother testified that his family needed him at home to work and provide for them, evidence did not show that his imprisonment would cause his family undue hardship in order to find it mitigator).

Parker v. State, 424 N.E.2d 132 (Ind. Ct. App. 1981) (where defendant killed her husband, trial court need not consider as mitigator fact that imprisonment would work hardship on her children in that she was now only surviving parent or fact that crime was result of circumstances unlikely to recur).

11. Person convicted was abused by victim and suffered from the effects of the abuse. Ind. Code § 35-38-1-7.1(b)(11).

The court may consider, as a mitigating circumstance, that the person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of batter as a result of the course of conduct of the individual who is the victim of the crime for which the person was convicted. Ind. Code § 35-38-1-7.1(b)(11).

12. Requesting medical assistance for substance-related emergency. Ind. Code § 35-38-1-7.1(b)(12).

The court may consider, as a mitigating circumstance, that the person was convicted of a crime relating to a controlled substance and the person's arrest was facilitated in part because the person: (A) requested emergency medical assistance; or (B) acted in concert with another person who requested emergency medical assistance; for an individual who reasonably appeared to be in need of medical assistance due to the use of alcohol or controlled substance. Ind. Code § 35-38-1-7.1(b)(12).

13. Person has posttraumatic stress disorder, traumatic brain injury, or a postconcussive brain injury. Ind. Code § 35-38-1-7.1(b)(13).

The court may consider, as a mitigating circumstance, that the person convicted has posttraumatic stress disorder, traumatic brain injury, or a postconcussive brain injury. Ind. Code § 35-38-1-7.1(b)(13). If a court suspends a sentence and orders probation for a person described in subsection (b)(13), the court may require the person to receive treatment for the person's injuries. Ind. Code § 35-38-1-7.1(e).

B. NON-STATUTORY MITIGATORS

The statutory list of mitigating and aggravating circumstances do not limit the matters that the court may consider in determining the sentence. Ind. Code § 35-38-1-7.1(c). 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 of aggravating circumstances or mitigating circumstances. Ind. Code § 35-38-1-7.1(d). The following may also be considered as mitigating circumstances:

1. Remorse

Remorse may be a proper mitigating circumstance. Jones v. State, 675 N.E.2d 1084, 1089 (Ind. 1996); Gibbs v. State, 460 N.E.2d 1217, 1222 (Ind. 1984); Kocher v. State, 439 N.E.2d 1344, 1346 (Ind. 1982); Manns v. State, 637 N.E.2d 842, 846 (Ind. Ct. App. 1994).

Price v. State, 765 N.E.2d 1245, 1253 (Ind. 2002) (defendant's statements that he was "very sorry about what happened" and that he knew how it felt to lose a loved one were insufficient to justify finding that trial court's failure to consider remorse as a mitigating factor was abuse of discretion).

Battles v. State, 688 N.E.2d 1230 (Ind. 1997) (defendant's remorse was not significant mitigating factor in light of brutal nature of murder).

Allen v. State, 453 N.E.2d 1011 (Ind. 1983) (court has no duty to believe defendant's self-serving statements that he was not guilty and was sorry).

Banks v. State, 841 N.E.2d 654 (Ind. Ct. App. 2006) (defendant was "somewhat ambivalent" in his statements to trial court at sentencing, and failed to take full responsibility for his actions; thus, trial court did not abuse its discretion by choosing not to give mitigating weight to his remorseful statements).

Holmes v. State, 86 N.E.3d 394 (Ind. Ct. App. 2017) (trial court was mistaken in finding defendant never said she was sorry for neglecting dependent); Cf. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005).

2. Guilty plea - Acceptance of responsibility

A guilty plea demonstrates the defendant's acceptance of responsibility for a crime and should be considered as a mitigating factor. Hardebeck v. State, 656 N.E.2d 486, 493 (Ind. Ct. App. 1995). Nevertheless, this determination is necessarily fact sensitive, and not every plea of guilty is a significant mitigating circumstance that must be credited by the trial court. Cherry v. State, 772 N.E.2d 433 (Ind. Ct. App. 2002) (quoting Trueblood v. State, 715 N.E.2d 1242, 1257 (Ind. 1999); see also Glass v. State, 801 N.E.2d 204 (Ind. Ct. App. 2004).

Anglemyer v. State, 875 N.E.2d 218 (Ind. 2007) (on rehearing) (court clarified that a defendant who pleads guilty does not forfeit the opportunity to claim on appeal that trial court should have considered his guilty plea a mitigating circumstance even though defendant failed to assert this claim at sentencing).

Francis v. State, 817 N.E.2d 235 (Ind. 2004) (fact that defendant pled guilty to child molesting at early stage of proceedings, demonstrated remorse, and apologized for his actions was a mitigating circumstance entitled to weight "in the high range"; held, 50-year sentence inappropriate, remanded to impose 30-year sentence).

Antrim v. State, 745 N.E.2d 246 (Ind. Ct.App. 2001) (trial court erred in failing to consider defendant's acceptance of responsibility via guilty plea).

Hope v. State, 834 N.E.2d 713 (Ind. Ct. App. 2005) (trial court did not give proper weight to defendant's accepting responsibility through guilty plea, which was entitled to substantial weight; court rejected State's argument that defendant waited several months prior to pleading and would have been easily convicted had case gone to trial).

Cloum v. State, 779 N.E.2d 84 (Ind. Ct. App. 2002) (in murder prosecution, trial court abused its discretion in not assigning any mitigating weight to defendant's decision to plead guilty to voluntary manslaughter; State reaped substantial benefit from plea, which conserved judicial resources and spared victim's family from trauma of full-blown trial; also, even though guilty plea does not by itself necessarily demonstrate remorse, it can show acceptance of responsibility where it is at least partially confirmed by other mitigating evidence of defendant's character). See also Sensback v. State, 720 N.E.2d 1160 (Ind. 1999).

Marlett v. State, 878 N.E.2d 860 (Ind. Ct. App. 2007) (trial court should have considered mitigating effect of guilty plea; although courts will look at benefit derived by a defendant from a dismissal of charges in a plea agreement, courts will do so with a practical eye towards discouraging the obvious overcharging of defendants).

Hunter v. State, 676 N.E.2d 14 (Ind. 1996) (trial court was not required to consider guilty plea as showing of defendant's acceptance of responsibility where defendant claimed he was innocent at sentencing).

Farmer v. State, 772 N.E.2d 1025 (Ind. Ct. App. 2002) (where State reaps a substantial benefit from defendant's guilty plea, plea saves court time and victim is spared trauma of trial, defendant should have a substantial benefit returned).

Smith v. State, 908 N.E.2d 1251 (Ind. Ct. App. 2009) (trial court does not necessarily abuse its discretion when it does not announce that it is considering defendant's guilty plea as a mitigating factor because guilty plea may not be due significant mitigating weight; defendant exchanged his guilty plea for substantial benefit, thus no error in not finding guilty plea a mitigating factor).

Glass v. State, 801 N.E.2d 204 (Ind. Ct. App. 2004) (defendant already received benefit from his guilty plea and cooperation with authorities, as he was originally charged with two class A felonies and two class C felonies that State dismissed); see also Hollins v. State, 145 N.E.3d 847, 852 (Ind. Ct. App. 2020).

Reyes v. State, 828 N.E.2d 420 (Ind. Ct. App. 2005) (because defendant was charged with murder and unquestionably killed victim, defendant's class B felony plea agreement is best described as a pragmatic decision, rather than acceptance of responsibility), *disapproved on other grounds by* Childress v. State, 848 N.E.2d 1073 (Ind. 2006).

Sipple v. State, 788 N.E.2d 473 (Ind. Ct. App. 2003) (trial court was not required to use guilty plea as mitigator where defendant had already admitted facts sufficient to prove his guilt, the benefit to the victim's family was slight because they wanted defendant prosecuted to maximum possible extent, and defendant's changing story indicated that he did not accept responsibility).

Healey v. State, 969 N.E.2d 607 (Ind. Ct. App. 2002) (stipulating to the facts in a bench trial in order to avoid a jury trial while preserving an issue for appeal is not entitled to mitigating weight because it is not the same as accepting responsibility through a guilty plea).

Caraway v. State, 977 N.E.2d 469 (Ind. Ct. App. 2012) (on remand, the trial court did not abuse its discretion by acknowledging the guilty plea but assigning it little mitigating weight as defendant's refusal to actually enter the plea delayed the proceedings and the decision was pragmatic).

The court of appeals may consider the defendant's guilty plea as a mitigator even if the defendant did not argue the mitigating effect of the plea at sentencing. Hope v. State, 834 N.E.2d 713, 718, n.3 (Ind. Ct. App. 2005) (quoting Francis v. State, 817 N.E.2d 235, 237 n. 2 (Ind. 2004)). However, the mitigating effect of a guilty plea may be reduced if plea gave defendant a substantial benefit, such as dismissal of charges. Lamar v. State, 915 N.E.2d 193 (Ind. Ct. App. 2009).

3. Age of defendant

While the defendant's age is not among the statutory mitigating factors, it is a significant mitigating factor. Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999); Stephens v. State, 546 N.E.2d 1260, 1265 (Ind. Ct. App. 1989); see also Cooper v. State, 687 N.E.2d 350, 355 (Ind. 1997); Herrera v. State, 679 N.E.2d 1322, 1326 (Ind. 1997). Youth is considered a powerful factor where the offender is less than sixteen. Carter v. State, 711 N.E.2d 835 (Ind. 1999). However, "age is neither a statutory nor a per se mitigating factor. There are cunning children

and there are naive adults." Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999); see also Monegan v. State, 756 N.E.2d 499 (Ind. 2001).

James v. State, 868 N.E.2d 543 (Ind. Ct. App. 2007) (maximum, consecutive sentence of twenty-eight years for sixteen-year-old who pled guilty to two Class C felony burglaries and four Class D felonies, including escape, theft and two counts of fraud, was inappropriate as Court could not find any case where a maximum sentence for non-violent juvenile offender being charged as an adult was upheld; defendant pled guilty, expressed remorse, had difficult childhood, and his offenses were non-violent); but cf. Collins v. State, 868 N.E.2d 557 (Ind. Ct. App. 2007) (in affirming ten-year sentence for burglary and possession of controlled substance, court acknowledged defendant's turbulent life as both a child and an adult, but defendant had not responded positively to more lenient punishments).

Evans v. State, 725 N.E.2d 850 (Ind. 2000) (maximum sentence was unreasonable for 19-year-old defendant). See also Love v. State, 741 N.E.2d 789 (Ind. Ct. App. 2001); Redmon v. State, 734 N.E.2d 1088 (Ind. Ct. App. 2000).

Walton v. State, 650 N.E.2d 1134 (Ind. 1995) (although defendant participated in gruesome killing of his adoptive parents, and such participation clearly supported sentence greater than presumptive sentence, court must consider that defendant was only sixteen years old at time he committed crime).

Roper v. Simmons, 543 U.S. 511, 125 S.Ct. 1183, 1195, 161 L.Ed.2d 1 (2005) (citing to scientific studies and common sentence, court noted that "juvenile offenders cannot with reliability be classified among the worst offenders" and any conclusion otherwise is "suspect"; death penalty for juveniles was unconstitutional).

Graham v. Florida, 130 S.Ct. 2011, 2026 (2010) (because juveniles have both "lessened culpability" and "greater capacity for change," Eighth Amendment prohibits imposing life without parole on a juvenile for non-homicide offenses; a sentence of Life Without Parole "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the [juvenile] convict, he will remain in prison for the rest of his days'").

Miller v. Alabama, 132 S.Ct. 2455 (2012) (Court prohibited sentencing schemes that provided for mandatory LWOP for juveniles convicted of murder).

Sanders v. State, 71 N.E.3d 839 (Ind. Ct. App. 2017) (trial court acknowledged defendant's youth but chose to not find it as a mitigating factor).

Wilson v. State, 157 N.E.3d 1163 (Ind. 2020) (defendant's age of 16 was a "major factor" requiring careful consideration when reviewing character of offender under Appellate Rule 7(B)).

4. Mental Illness

The Indiana Supreme Court has reduced sentences based on the trial court's failure to consider the defendant's mental illness as a mitigating factor. See Archer v. State, 689 N.E.2d 678, 686 (Ind. 1997); Gambill v. State, 675 N.E.2d 668, 678 (Ind. 1996); Barany v. State, 658 N.E.2d 60, 67 (Ind. 1995). Although a trial court is not required to give mental

illness mitigating weight, a failure to indicate in a sentencing order that the trial court gave mental illness due consideration as required by Archer and Weeks (below) requires remand for a new sentencing order. Smith v. State, 770 N.E.2d 818, 822-823 (Ind. 2002).

a. Factors to be considered

Factors that bear on the weight, if any, that should be given to mental illness at the sentencing include: 1) the extent of the defendant's inability to control his or her behavior due to the disorder; 2) the overall limitations on the defendant's functioning; 3) the duration of the mental illness; and 4) the extent of any nexus between the disorder or impairment and the commission of crime. Weeks v. State, 697 N.E.2d 28 (Ind. 1998).

Archer v. State, 689 N.E.2d 678 (Ind. 1997) (court must recognize degrees of impairment of defendant's ability to control her behavior).

Loveless v. State, 642 N.E.2d 974 (Ind. 1994) (court was not obligated to consider defendant's extremely dysfunctional family background and mental illness; mental illness must be relevant to defendant's level of culpability).

Wessling v. State, 798 N.E.2d 929 (Ind. Ct. App. 2003) (trial court abused its discretion by enhancing sentence based on defendant's mental capability, which was found to be both aggravating and mitigating).

b. Evidence of illness

Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996) (trial court abused its discretion by refusing to find mental illness as significant mitigating factor in face of evidence that two of four psychiatrists, one court-appointed, found that defendant was mentally ill at time she committed crime and jury returned verdict of guilty but mentally ill). See also Powell v. State, 751 N.E.2d 311 (Ind. Ct. App. 2001).

Tackett v. State, 642 N.E.2d 978 (Ind. 1994) (where defendant's deep mental disturbance was evidenced through self-inflicted razor scars on arms and stomach, court erred in not considering mental disturbance in sentencing).

Biddinger v. State, 846 N.E.2d 271 (Ind. Ct. App. 2006), *sum. aff'd*. 868 N.E.2d 407 (trial court erroneously overlooked undisputed fact that defendant suffered from post-traumatic stress disorder as a mitigating circumstance).

Magers v. State, 621 N.E.2d 323 (Ind. 1993) (court did not abuse its discretion by finding that evidence that defendant was admitted as teenager to mental hospitals and diagnosed as incorrigible, aggressive and paranoid schizophrenic did not rise to level of mental illness as mitigating factor; definition of mental disease does not include abnormality manifested only by repeated unlawful or antisocial conduct).

Scott v. State, 840 N.E.2d 376 (Ind. Ct. App. 2006) (though he suffered from bipolar disorder, defendant was capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense).

Vasquez v. State, 449 N.E.2d 284 (Ind. 1983) (trial court did not abuse discretion by failing to credit psychiatrist's opinion that defendant was insane, in light of nature of offense and character of offender).

Steinberg v. State, 941 N.E.2d 515 (Ind. Ct. App. 2011) (defendant failed to demonstrate nexus between his mental illness and murder where he did not present independent evidence regarding his mental health at sentencing).

c. Limitations on use as mitigator

Lopez v. State, 869 N.E.2d 1254 (Ind. Ct. App. 2007) (even where all four factors outlined in Weeks (697 N.E.2d 28) indicate strongly that crimes at issue are attributable to defendant's mental illness, the mitigating weight of such illness has generally served to favor imposition of presumptive, rather than reduced, sentence, especially when nature of offense is particularly egregious); but see Biel v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000) (finding presumptive sentence unreasonable, in part, due to Defendant's mental illness).

Belcher v. State, 138 N.E.3d 318 (Ind. Ct. App. 2019) (trial court did not abuse discretion declining to give mental illness significant mitigating weight on grounds defendant had failed to take advantage of help he had been offered in the past).

Johnson v. State, 855 N.E.2d 1014 (Ind. Ct. App. 2006) (trial court did not abuse its discretion in finding defendant's mental illness as a mitigator and then finding as aggravators that defendant did not regularly take his medication for schizophrenia and that defendant is a risk if he is released from prison and does not take his medication; but Vaidik, J., dissented and cited to studies that show low compliance rates with medication and finding that the schizophrenic defendant's non-compliance with medication and risk of reoffending were two hallmarks of his illness). See also Webb v. State, 941 N.E.2d 1082 (Ind. Ct. App. 2011).

Prowell v. State, 787 N.E.2d 997 (Ind. Ct. App. 2003) (psychiatrist's testimony that defendant should never again be in society due to likelihood that he would murder again clearly outweighed any mitigating weight of defendant's illness).

Ousley v. State, 807 N.E.2d 758 (Ind. Ct. App. 2004) (evidence of defendant's mental illness is not required to be considered and given weight at all times; rather, mental illness is a mitigating factor to be used in certain circumstances, such was when evidence demonstrates longstanding mental health issues or when jury finds that a defendant is mentally ill). See also Washington v. State, 940 N.E.2d 1220 (Ind. Ct. App. 2011).

PRACTICE POINTER: Mental illness is such a significant mitigating factor that an advisory sentence may be considered inappropriate in light of the defendant's mental illness. See, e.g., Biehl v. State, 738 N.E.2d 337 (Ind. Ct. App. 2000) (presumptive sentence manifestly unreasonable).

5. Illness and need for medical attention

Where the record demonstrates that the defendant is seriously ill and requires constant medical attention, the trial court should consider the defendant's illness as a significant mitigating circumstance.

Moyer v. State, 796 N.E.2d 309 (Ind. Ct. App. 2003) (in dealing in controlled substance prosecution, trial court erroneously ignored mitigating factor of defendant's serious illness and need for constant medical attention, which was clearly supported by record).

6. Surrender to authorities

The defendant's motivation to surrender and the police's knowledge linking the defendant to the crime are properly considered when determining the weight the court will afford to the defendant's surrender.

Brown v. State, 698 N.E.2d 779 (Ind. 1998) (trial court did not abuse its discretion by failing to consider as mitigating factor defendant's surrender to police in Tennessee day after murder where police already identified defendant as suspect).

Battles v. State, 688 N.E.2d 1230 (Ind. 1997) (trial court did not abuse its discretion by refusing to find defendant's surrender mitigating factor where evidence linking defendant to crime was available to police).

Brewer v. State, 646 N.E.2d 1382 (Ind. 1995) (fact that defendant walked into police station and confessed to fifteen-year-old murder for which investigation had proven fruitless required reduction of sentence).

Evans v. State, 598 N.E.2d 516 (Ind. 1992) (defendant's decision to immediately report his crimes and his willing surrender to police were entitled to substantial mitigating weight). See also Hurt v. State, 657 N.E.2d 112 (Ind. 1995).

7. Cooperation with authorities

Beason v. State, 690 N.E.2d 277 (Ind. 1998) (defendant's voluntary videotaped confession six hours after committing crimes was entitled to some weight as mitigating factor, but not great weight, because defendant never alerted police to his whereabouts and police had already identified defendant as suspect).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (trial court did not abuse discretion by failing to find defendant's cooperation with authorities mitigating factor). See also Middlebrook v. State, 593 N.E.2d 212 (Ind. Ct. App. 1992).

Richardson v. State, 447 N.E.2d 574 (Ind. 1983) (when defendant's cooperation with authorities by testifying against accomplices took place after imposition of sentence, it was not relevant mitigating circumstance).

8. Academic achievements

It is proper for sentencing court to consider defendant's school life and academic achievements as mitigators. Lottie v. State, 273 Ind. 529, 406 N.E.2d 632, 640 (1980), *overruled on other grounds*, Ludy v. State, 784 N.E.2d 459 (Ind. 2003); see also Hineman v. State, 155 Ind.App. 293, 292 N.E.2d 618 (1973).

9. Military service

Defendant's military service is generally regarded as a mitigating factor, especially for those who fought on the front lines. Porter v. McCollum, 558 U.S. 30, 43-44, 130 S. Ct. 447, 455 (2009) (defense counsel's failure to introduce the defendant's heroic military service and resulting stress and emotional toll that combat took on him as mitigating evidence in a death penalty case was sufficiently deficient, in part, to overturn a death sentence).

10. Defendant's good character

Even if the nature of an offense supports an enhanced sentence, this may be neutralized by defendant's good character. Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003).

Jordan v. State, 787 N.E.2d 993 (Ind. Ct. App. 2003) (in light of the defendant's youth, extensive drug habit, non-violent nature, and request for drug treatment, maximum sentence was inappropriate).

PRACTICE POINTER: Character is a broad and amorphous category that encompasses a large number of statutory and non-statutory aggravators and mitigators. "The factors that disclose 'the character of the offender' are an assortment of general and specific, mandatory and discretionary considerations... the patchwork nature of these factors, while regrettable, is the product of the continuous and evolutionary change in the sociological backdrop against which criminal conduct occurs, such as use of bulletproof clothing, HIV-infected offender, shaken baby syndrome, and the victim who becomes an offender when responding to repeated abuse." Hildebrandt v. State, 779 N.E.2d 355, 361 (Ind. Ct. App. 2002).

11. Defendant's role as a follower

Brown v. State, 720 N.E.2d 1157 (Ind. 1999) (defendant's sentences should have been ordered concurrently instead of consecutively because of defendant's youthful age and fact that he was following lead of another).

12. Defendant's lesser role in crime

A lesser role that defendant played in the crime may be a mitigating factor. Sensback v. State, 720 N.E.2d 1160 (Ind. 1999).

Simmons v. State, 814 N.E.2d 670 (Ind. Ct. App. 2004) (fact that co-conspirator was more involved in beating jail officer was not enough to be considered mitigating factor, where defendant was active in planning and execution of escape, anticipated attacking officer and was present in room while co-conspirator attacked officer; moreover, by acquitting defendant of aggravated battery and attempted murder, jury took into consideration defendant's role in attack).

Roney v. State, 872 N.E.2d 192 (Ind. Ct. App. 2007) (trial court erred by failing to give mitigating weight to defendant's lesser role in planning the offense).

Cardwell v. State, 895 N.E.2d 1219 (Ind. 2008) (although there is no right to proportional sentences for co-defendants, fact that co-defendant who is equally or even less culpable received substantially greater sentence was considered in finding that sentence was inappropriate).

13. Substance abuse

In the following cases, the trial court did not abuse its discretion by finding that the defendant's alcoholism was not a mitigating circumstance. Fugate v. State, 608 N.E.2d 1370, 1378 (Ind. 1993); Mahaffey v. State, 459 N.E.2d 380, 383-84 (Ind. 1984). However, an admission to being an alcoholic or drug addict in certain circumstances has been considered mitigating. See Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005).

Welch v. State, 564 N.E.2d 525 (Ind. Ct. App. 1990) (court did not abuse its discretion by finding that defendant's alcoholism was not mitigating when defendant was given ample opportunity to correct alcohol problem).

Wilson v. State, 533 N.E.2d 114 (Ind. 1989) (court was not required to consider during sentencing that defendant was drunk when he committed offense). See also Legue v. State, 688 N.E.2d 408 (Ind. 1997).

Townsend v. State, 45 N.E.3d 821 (Ind. Ct. App. 2015) (no abuse of discretion in failing to find that temporary insanity due to voluntary intoxication was a mitigating factor).

PRACTICE POINTER: Even if a defendant's substance abuse problem may not rise to the level of a mitigating circumstance, it may, in the least, offset the aggravating nature of the defendant's criminal history. Frye v. State, 837 N.E.2d 1012 (Ind. 2005) (prior criminal history did not warrant maximum sentence for burglary where much of the history was substance-abuse related).

14. Defendant's good reputation

Page v. State, 689 N.E.2d 707 (Ind. 1997) (court was not required to consider defendant's good behavior in jail as mitigator). See also Trueblood v. State, 587 N.E.2d 105 (Ind. 1992), *cert. denied,* 506 U.S. 897, 113 S.Ct. 278.

Grund v. State, 671 N.E.2d 411 (Ind. 1996) (sentencing court did not abuse its discretion by failing to find as mitigator that number of people in community found murder defendant to be of good character, especially given that others requested imposition of maximum sentence).

Magers v. State, 621 N.E.2d 323 (Ind. 1993) (court was not required to accept as mitigator fact that defendant made progress upon hospitalization for treatment of hostility, belligerence and uncooperativeness).

15. Troubled childhood

A difficult childhood warrants little, if any, mitigating weight. Patterson v. State, 909 N.E.2d 1058 (Ind. Ct. App. 2009); Blanche v. State, 690 N.E.2d 709 (Ind. 1998); Penick v. State, 659 N.E.2d 484 (Ind. 1995); Trice v. State, 693 N.E.2d 649 (Ind. Ct. App. 1998); Hudson v. State, 135 N.E.3d 973 (Ind. Ct. App. 2019).

Mefford v. State, 983 N.E.2d 232 (Ind. Ct. App. 2013) (it was within the trial court's discretion to refuse to consider the fact that defendant was molested as a child as a mitigating circumstance).

16. History of human trafficking

Scott v. State, 162 N.E.3d 578 (Ind. Ct. App. 2021) (in robbery and fraud prosecution, trial court abused its discretion in failing to consider and include as a mitigating circumstance defendant's significant history as a victim of human trafficking; conclusions that either defendant was never trafficked at all and had hoodwinked Indiana's statewide human trafficking task force, advocates and federal prosecutors or that her victimization had no traumatic effect were clearly against the logic and effect of the facts before the court; error was harmless considering many other uncontested aggravators that would have resulted in same 14-year sentence).

17. Pre-sentencing rehabilitation

The trial court has discretion to consider pre-sentencing rehabilitation. Livingston v. State, 113 N.E. 3d 611, 614 (Ind. 2018) (shortening the defendant's sentence due to pre-sentence rehabilitation).

Zavala v. State, 138 N.E.3d 291 (Ind. Ct. App. 2019) (no abuse of discretion by failing to accept defendant's rehabilitation efforts as a mitigator in light of the very serious nature of offense of shooting another person repeatedly).

C. IMPROPER MITIGATORS

An existence of a prior physical relationship between the defendant and the victim cannot and should not serve as a mitigator when the trial court considers appropriate sentence for a rape conviction. Collins v. State, 740 N.E.2d 143, 148 (Ind. Ct. App. 2000).

V. SUSPENDIBILITY OF SENTENCE

PRACTICE POINTER: When placed in a situation where the defendant is pleading guilty to a suspended sentence, be certain that the defendant understands the consequences of the suspended sentence. The suspended sentence results in probation, which in return may result in a reinstatement of the suspended sentence. Although the defendant's failure to understand this may constitute a plea which he did not enter knowingly and voluntarily, it may not be the court's duty to make sure the defendant understands the difference between an executed and suspended sentence. See Page v. State, 706 N.E.2d 230 (Ind. Ct. App. 1999).

A. TRIAL COURT'S DISCRETION

The decision not to suspend is reviewable only for abuse of discretion. Reinbold v. State, 555 N.E.2d 463, 471 (Ind. 1990), *overruled on other grounds,* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

Morgan v. State, 675 N.E.2d 1067 (Ind. 1996) (where statute permitted court to suspend ten years on possession count and five years on conspiracy count, court abused its discretion by suspending all fifteen years on conspiracy count).

Childers v. State, 656 N.E.2d 514, 516 (Ind. Ct. App. 1995) (suspension of portion of sentence is grant of conditional liberty; suspension is favor to defendant and not a right).

However, when trial court decides to adjust the defendant's sentence by suspending a portion of

the sentence, the record should disclose what factors the judge considered to be mitigating and aggravating circumstances. Morgan v. State, 675 N.E.2d 1067, 1073 (Ind. 1996).

Jackson v. State, 540 N.E.2d 1232 (Ind. 1989) (record revealed that trial court considered aggravator in determining overall length of sentence although court could only suspend part of sentence which exceeded mandatory minimum).

B. OFFENSES COMMITTED AFTER JUNE 30, 2014

1. GENERALLY SUSPENDIBLE

Ind. Code § 35-50-2-2.2(a) provides that: "Except as provided in subsection (b) or (c), the court may suspend any part of a sentence for a felony."

Ind. Code § 35-50-3-1(a) provides that "the court may suspend any part of a sentence for a misdemeanor."

2. EXCEPTIONS: NON-SUSPENDIBLE ABOVE MINIMUM

a. Level 2 and 3 felonies

If a person is convicted of a Level 2 felony or a Level 3 felony and has any prior unrelated felony conviction, other than a conviction for a felony involving marijuana, hashish, hash oil, or salvia divinorum, the court may suspend only that part of a sentence that is in excess of the minimum sentence for the: (1) Level 2 felony; or (2) Level 3 felony. Ind. Code § 35-50-2-2.2(b).

For the definition of "prior unrelated felony" under the prior version of Ind. Code § 35-50-2-2, see Hill v. State, 751 N.E.2d 273, 277 (Ind. Ct. App. 2001) and Woodward v. State, 798 N.E.2d 260 264 (Ind. Ct. App. 2003).

b. Murder and Level 1 felonies: non-suspendible above minimum

The court may suspend only that part of a sentence for murder or a Level 1 felony conviction that is in excess of the minimum sentence for murder or the Level 1 felony conviction. Ind. Code § 35-50-2-2.2(c).

c. Definition of "minimum sentence"

Pursuant to Ind. Code § 35-50-2-1(c), "minimum sentence" means:

Crime	*Sentence (in years)*	*Limitation*
Murder	45	N/A
Class A Felony	20	Before July 1, 2014
Class B Felony	6	Before July 1, 2014
Class C Felony	2	Before July 1, 2014
Class D Felony	½	Before July 1, 2014
Level 1 Felony	20	After June 30, 2014
Level 2 Felony	10	After June 30, 2014
Level 3 Felony	3	After June 30, 2014
Level 4 Felony	2	After June 30, 2014
Level 5 Felony	1	After June 30, 2014
Level 6 Felony	½	After June 30, 2014

C. OFFENSES COMMITTED BEFORE JULY 1, 2014

The court may suspend any part of a sentence for a felony except as provided in Ind. Code § 35-50-2-2 (repealed) and Ind. Code § 35-50-2-2.1. Ind. Code § 35-50-2-2(a) (repealed). With respect to the following crimes, the court may suspend only that part of the sentence that is in excess of the minimum sentence, unless the court has approved placement of the offender in a forensic diversion program under Ind. Code 11-12-3.7.

1. Repeated Crimes

a. Definition: "prior unrelated felony"

Prior unrelated felonies can cause a sentence to become non-suspendible below the minimum. The suspendibility statute envisions: (1) a prior unrelated felony being committed; (2) the defendant being charged and convicted for the prior unrelated felony; (3) the defendant being completely discharged from probation, imprisonment, or parole for the prior unrelated felony; and (4) the defendant subsequently committing another felony within the proscribed time period. Hill v. State, 751 N.E.2d 273, 277 (Ind. Ct. App. 2001). Thus, if an individual is on probation or parole when she commits a new offense, the sentence for the new offense may still be suspendible.

> Woodward v. State, 798 N.E.2d 260, 264 (Ind. Ct. App. 2003) ("prior unrelated convictions" as used in general suspension statute does not impose a sequential requirement concerning dates of commission and conviction relative to predicate offenses, except that those convictions must be entered before judgment was entered on current offense).

Thus, where a defendant commits a prior felony before the instant felony, the defendant's sentence may still be suspendible below the minimum as long as the defendant is not convicted of the prior felony before being convicted of the instant felony.

> Hill v. State, 751 N.E.2d 273 (Ind. Ct. App. 2001) (where defendant committed prior felony few weeks before instant felony, defendant's sentence was still suspendible below minimum because he was not convicted of prior felony until after he was convicted of instant felony).

b. Class A and B felony

The crime committed was a Class A or Class B felony and the person has a prior unrelated felony conviction. Ind. Code § 35-50-2-2(b)(1) (repealed).

c. Class C felony

The crime committed was a Class C felony and less than seven (7) years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the Class C felony for which he is being sentenced. Ind. Code § 35-50-2-2(b)(2) (repealed).

d. Class D felony

The crime committed was a Class D felony and less than three years have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for a prior unrelated felony conviction and the date he committed the Class D felony for which he is being sentenced. However, court may suspend minimum sentence for crime only if court orders home detention under Ind. Code § 35-38-1-21 or Ind. Code § 35-38-2.5-5 instead of minimum sentence specified for crime under this chapter. Ind. Code § 35-50-2-2(b)(3) (repealed).

Prior to May 11, 2001, there was a conflict in the Indiana Code and the Indiana Court of Appeals as to the minimum sentence for a Class D felony. Although Ind. Code § 35-50-2-7 stated that the sentence for a Class D felony is between six months and three years, Ind. Code § 35-50-2-1 defined the minimum sentence for a Class D felony as one year. Anticliff v. State, 688 N.E.2d 166 (Ind. Ct. App. 1997) (minimum sentence for Class D felony is six months). But see Snider v. State, 753 N.E.2d 721 (Ind. Ct. App. 2001) (minimum sentence for Class D felony is one year).

Because the Legislature amended Ind. Code § 35-50-2-1 to define the minimum sentence for a Class D felony as six months, the Legislature resolved the split in authority by evidencing its intent that the minimum sentence for a Class D felony was always six months. Further, the amendment to Ind. Code § 35-50-2-1 should be treated as ameliorative, and thus, anyone sentenced after May 11, 2001, regardless of the date of the offense, should be sentenced under the amended statute.

PRACTICE POINTER: Ind. Code § 35-50-2-2(b)(3) (repealed) does not limit the availability of home detention for those who commit crimes other than D felonies. Rather, the statute addresses limitations on sentence suspensions. When determining whether home detention is available to a particular defendant, one must look to the more specific chapter dealing with home detention, Ind. Code § 35-38-2.5.

2. Specific crimes – crimes of violence

The crime committed was one of the following specified in Ind. Code § 35-50-2-2(b)(4) (repealed):

(a) murder (IC 35-42-1-1);

(b) battery (IC 35-42-2-1) with a deadly weapon or battery causing death;

(c) sexual battery (IC 35-42-4-8) with a deadly weapon;

(d) kidnapping (IC 35-42-3-2);

(e) confinement (IC 35-42-3-3) with a deadly weapon;

(f) rape (IC 35-42-4-1) as a Class A felony;

(g) criminal deviate conduct (IC 35-42-4-2) as a Class A felony;

(h) except as provided by IC 35-50-2-2(i), child molesting (IC 35-42-4-3) as a Class A or Class B felony, unless:

(i) the felony committed was child molesting as a class B felony;

(ii) the victim was not less than 12 years old at the time the offense was committed;

(iii) the person is not more than four (4) years older than the victim, or more than five (5) years older than the victim if the relationship between the person and the victim was a dating relationship or an ongoing personal relationship (not including a family relationship);

(iv) the person did not have a position of authority or substantial influence over the victim; and

(v) 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;

(i) robbery (IC 35-42-5-1) resulting in serious bodily injury or with a deadly weapon;

(j) arson (IC 35-43-1-1) for hire or resulting in serious bodily injury;

(k) burglary (IC 35-43-2-1) resulting in serious bodily injury or with a deadly weapon;

(l) resisting law enforcement (IC 35-44-3-3) with a deadly weapon;

(m) escape (IC 35-44-3-5) with a deadly weapon;

(n) rioting (IC 35-45-1-2) with a deadly weapon;

(o) dealing in cocaine or a narcotic drug (IC 35-48-4-1), dealing in methamphetamine (IC 35-48-4-1.1) or dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2) if the court finds:

(1) the person possessed a firearm (as defined in IC 35-47-1-5) at the time of the offense; or

(2) the person delivered or intended to deliver:

(a) to a person under eighteen (18) years of age at least three (3) years junior to the person; and

(b) was on a school bus or within one thousand feet of school property, a public park, a family housing complex, or a youth program center;

(p) offense under IC 9-30-5 (operating a vehicle while intoxicated) and the person who committed the offense has accumulated at least two (2) prior unrelated convictions under IC 9-30-5;

(q) offense under IC 9-30-5-5(b) (operating a vehicle while intoxicated causing death);

(r) aggravated battery (IC 35-42-2-1.5); or

(s) disarming a law enforcement officer (IC 35-44-3-3.5).

PRACTICE POINTER: Argue that any crime, including an attempt crime, that is not specifically listed in Ind. Code § 35-50-2-2(b)(4) (repealed) is suspendible. Based on the Indiana Supreme Court's reasoning in Ellis v. State, 736 N.E.2d 731 (Ind. 2000), if the Legislature intended an attempt crime to be non-suspendible, the Legislature would have included the attempt crime in the list.

a. Dealing

Ables v. State, 848 N.E.2d 293 (Ind. Ct. App. 2006) (even if defendant did not have exclusive control/possession of firearm found in car, her inferred knowledge can be found by facts that she was in a vehicle in which gun was found, was found in close proximity to the gun, reached down when she saw officers approaching, and admitted gun was in center console with her cell phone; thus, trial court did not abuse its discretion in finding that defendant's sentence for dealing in cocaine was non-suspendible pursuant to Ind. Code § 35-50-2-2(b) (repealed)).

b. Voluntary manslaughter

The minimum sentence for voluntary manslaughter may not be suspended unless the court finds at the sentencing hearing that the crime was not committed by means of a deadly weapon. Ind. Code § 35-50-2-2(d) (repealed).

3. Class A felony child molesting - suspendibility statute does not define minimum sentence

Although the trial court can sentence a defendant convicted of molesting a child under twelve years old to a minimum of twenty years, if the trial court sentences the defendant to more, only the portion of the sentence above thirty years can be suspended under Ind. Code § 35-50-2-2(I) (repealed). Miller v. State, 943 N.E.2d 349 (Ind. 2011).

Hampton v. State, 921 N.E.2d 27 (Ind. Ct. App. 2010) (defendant's twenty-year sentence for Class A felony child molesting was not illegal, even though Ind. Code § 35-50-2-2(I) (repealed) allows trial court to suspend only that part of sentence exceeding thirty years where a person who is at least twenty-one molests a child less that twelve; Ind. Code § 35-50-2-1(c)(2) (repealed) defines minimum sentence for this offense and sets it at twenty years; penal statutes are to be strictly construed against the State).

D. ADULTS WITH JUVENILE RECORDS: Ind. Code § 35-50-2-2.1

1. Partially suspendible

a. After June 30, 2014

A felony may not be suspended if the defendant has a juvenile record including findings that the juvenile acts, if committed by an adult, would constitute:

- one Class A or Class B felony;
- two Class C or Class D felonies;
- one Class C and one Class D felony;

- one Level 1, Level 2, Level 3, or Level 4 felony;
- two Level 5 or Level 6 felonies; or
- one Level 5 and one Level 6 felony; and

less than three years have elapsed between commission of the juvenile acts that would be felonies if committed by an adult and the commission of the felony for which the person is being sentenced. Ind. Code § 35-50-2-2.1(a).

b. Before July 1, 2014

A felony sentence may not be suspended if the defendant has a juvenile record that includes findings that the juvenile acts, if committed by an adult, would constitute:

- one Class A or Class B felony;
- two Class C or Class D felonies; or
- one Class C and one Class D felony; and

less than three years have elapsed between commission of the juvenile acts that would be felonies if committed by an adult and the commission of the felony for which the person is being sentenced. Ind. Code § 35-50-2-2.1(a).

Saintignon v. State, 749 N.E.2d 1134 (Ind. 2001) (because Ind. Code § 35-50-2-2.1 must be read "in pari materia" with Ind. Code § 35-50-2-2 (repealed) similarly to Ind. Code § 35-50-2-2 (repealed), Ind. Code § 35-50-2-2.1 prohibits only suspension below minimum and does not prohibit any suspension of sentence).

Ashley v. State, 757 N.E.2d 1037 (Ind. Ct. App. 2001) (when determining what class of felony out-of-state juvenile adjudication would have been if committed by adult, it is proper for court to use Indiana law; here, Georgia juvenile conviction would have been class B felony dealing cocaine conviction if committed by adult in Indiana).

2. Completely suspendible

Pursuant to Ind. Code § 35-50-2-2.1(b), notwithstanding the above provision, the court may suspend any part of the sentence for a felony, except as provided in Ind. Code § 35-50-2-2 (repealed), if it finds that;

(1) the crime was the result of circumstances unlikely to recur;

(2) the victim of the crime induced or facilitated the offense;

(3) there are substantial grounds tending to excuse or justify the crime, though failing to establish a defense; or

(4) the acts in the juvenile record would not be Class A, Class B, Level 1, Level 2, Level 3, or Level 4 felonies if committed by an adult, and the convicted person is to undergo home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter.

E. ALTERNATIVE MISDEMEANOR SENTENCE IS NOT A CLASS D FELONY

A conviction for a Class D felony on which judgment is later entered as a Class A misdemeanor does not prevent the trial court from modifying a sentence below the statutory minimum on the grounds that the defendant has a prior unrelated felony conviction. Gardiner v. State, 928 N.E.2d 194 (Ind. 2010).

Moss v. State, 6 N.E.3d 958 (Ind. Ct. App. 2013) (trial court should have granted defendant's motion to dismiss enhancement of misdemeanor possession of handgun without a license to a Class C felony because predicate felony used to enhance was later reduced from a Class D felony to a Class A misdemeanor; it was irrelevant that AMS occurred after the State charged defendant with the gun offense).

F. ATTEMPT/CONSPIRACY/ACCOMPLICE LIABILITY

1. Attempt crimes

For sentence suspendibility purposes, individuals who are convicted of attempt crimes are treated as if they were convicted of the underlying crime itself.

Haggenjos v. State, 441 N.E.2d 430 (Ind. 1982) (attempted murder was non-suspendible even though it was not explicitly listed in the statute listing non-suspendible offenses);

Holt v. State, 561 N.E.2d 830 (Ind. Ct. App. 1990) (attempted child molesting minimum sentence was non-suspendible under rationale in Haggenjos).

Strong v. State, 903 N.E.2d 164 (Ind. Ct. App. 2009) (Haggenjos still controls as court's interpretation of Ind. Code § 35-50-2-2 (repealed); thus, trial court correctly concluded that it could not suspend defendant's minimum six-year sentence for attempted robbery);

But see Dvorak v. St. Joseph Superior Court, No. 71S00-0805-OR-248 (Ind., June 30, 2008) (order denying petition for writ but recognizing that the law as to suspendibility of attempt violent crimes is unclear and that cases, such as State ex rel. Camden v. Gibson Circuit Court, 640 N.E.2d 696 (Ind. 1994) call Haggenos into question).

PRACTICE POINTER: Argue that Haggenjos was implicitly overruled by Ellis v. State, 736 N.E.2d 731 (Ind. 2000), in that the Ellis court held that attempted murder was not a crime a violence for purposes of the limitation on consecutive sentencing because attempted murder was not including the list of crimes of violence, which is similar to the list of non-suspendible crimes. The Indiana Supreme Court recognized that the law as to suspendibility of attempt violent crimes is unclear. State ex rel. Dvorak v. St. Joseph Superior Ct., No. 71 S00-0805-OR-248 (Ind. June 30, 2008).

2. Accomplice liability

There is no distinction between accessory and perpetrator of a crime. Rather, both commit the offense, and a person who aids another person to commit a crime is as guilty of the principal offense as the actual perpetrator. Farris v. State, 753 N.E.2d 641 (Ind. 2001). The same rationale applies under Indiana's non-suspendibility statute.

Laney v. State, 868 N.E.2d 561 (Ind. Ct. App. 2007) (because there is no separate crime of being an accessory or aiding and abetting the perpetrator of a crime, it was

unnecessary under Ind. Code § 35-50-2-2 (repealed) to expressly state that it also applies to felony convictions obtained under an accomplice liability theory).

3. Conspiracy

For sentencing purposes, individuals convicted of conspiracy to commit a crime are treated differently than those who are convicted of the underlying offense because conspiracy is a separate offense from the underlying crime. Coleman v. State, 952 N.E.2d 377 (Ind. Ct. App. 2011) (conspiracy to commit a crime a violence is not the same as the crime of violence; thus, if the conspiracy is not listed separately as a crime of violence, then it will not be considered such).

Huff v. State, 443 N.E.2d 1234 (Ind. Ct. App. 1983) (although Class A dealing in cocaine is explicitly non-suspendible, conspiracy to deliver is suspendible).

PRACTICE POINTER: When in plea negotiations, if possible, have the defendant plead to conspiracy to commit the crime rather than the crime itself. This tactic will avoid pleading to a non-suspendible sentence.

G. EFFECT OF SUSPENDED SENTENCE: PROBATION

1. Prior to July 1, 2014

Whenever the court suspends a sentence for a felony, it shall place the person on probation under Ind. Code § 35-38-2 for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire. Ind. Code § 35-50-2-2(c) (repealed). Where a plea agreement is silent in regard to probation in combination with a suspended sentence, the imposition of probation is implied because the court is required by statute to impose probation after suspending a sentence. Minor v. State, 641 N.E.2d 85 (Ind. Ct. App. 1994). See also Davis v. State, 398 N.E.2d 704 (Ind. Ct. App. 1980) (sentence must be suspended before defendant can be placed on probation).

Day v. State, 669 N.E.2d 1072 (Ind. Ct. App. 1996) (trial court had authority to sentence defendant to probation for nine years to begin after his executed term of ten years had been served because ten-year executed sentence and nine-year probation defendant received equaled rather than exceeded his suspended sentence).

Whenever a court modifies the remainder of a defendant's sentence by suspension of that sentence, the defendant is released on probation by operation of Ind. Code § 35-50-2-2(c) (repealed). Wilburn v. State, 671 N.E.2d 143 (Ind. Ct. App. 1996). See also Childers v. State, 656 N.E.2d 514 (Ind. Ct. App. 1995).
However, whenever the court suspends that part of a sentence of a sex or violent offender (as defined in IC 11-8-8-5) that is suspendible, the court shall place the sex or violent offender on probation under Ind. Code § 35-38-2 for not more than ten years. Ind. Code § 35-50-2-2(e) (repealed).

2. After June 30, 2014

Ind. Code § 35-50-2-2(c) requiring the court to place a person on probation once his or her sentence was suspended, was repealed. Thus, whether a person is on probation as an

operation of law for the period of his or her suspended sentence under the amended code is unclear.

H. TRIAL COURT'S ERRONEOUS CONCLUSION CONCERNING SUSPENDIBILITY

1. Erroneous conclusion that sentence is non-suspendible

When it is apparent that the trial court was under the erroneous conception that sentence was non-suspendible, the appellate court will remand for the purpose of such consideration. Henning v. State, 477 N.E.2d 547, 553 (Ind. 1985).

2. Erroneous conclusion that sentence is suspendible

Where trial court erroneously imposes suspended sentence upon defendant, who has prior unrelated felony conviction, court not only has power to correct sentence, it has duty to do so. Niece v. State, 456 N.E.2d 1081, 1085 (Ind. Ct. App. 1983). See also Chapter 11, Subsection II, *Correction of Erroneous Sentence*.

VI. ENHANCEMENTS OTHER THAN HABITUAL OFFENDER ENHANCEMENTS

A. USE OF FIREARM

1. Additional five to twenty-year sentence

Pursuant to Ind. Code § 35-50-2-11(d), (e), (f) (g) and (h):

> The State may seek, on a page separate from the rest of the charging instrument, to have a person who allegedly committed an offense sentenced to an additional fixed term of imprisonment if the State can show beyond reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense. IC 35-50-2-11(d).
>
> The State may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed a felony or misdemeanor other than an offense (as defined under IC 35-50-2-11(b) sentenced to an additional fixed term of imprisonment if the State can show beyond a reasonable doubt that the person, while committing the felony or misdemeanor, knowingly or intentionally:
>
> (1) pointed a firearm; or
>
> (2) discharged a firearm;
>
> at an individual whom the person knew, or reasonably should have known, was a police officer. IC 35-50-2-11(e).
>
> If the person was convicted of the offense under subsection (d) or the felony or misdemeanor in IC 35-50-2-11(e) 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. IC 35-50-2-11(f).

If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the State has proved beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of the offense under IC 35-50-2-11(d) or a felony or misdemeanor under IC 35-50-2-11(e), the court may sentence the person to an additional fixed term of imprisonment between five (5) years and twenty (20) years. IC 35-50-2-11(g) and (h).

a. Consecutive to underlying offense

If the factfinder determines under IC 35-50-2-11 that a person used a firearm in the commission of the offense for which the person was convicted, the term of imprisonment for the underlying offense and the additional term of imprisonment imposed under IC 35-50-2-11 must be served consecutively IC 35-50-1-2(g) and (h). However, a person may not be sentenced under subsections (g) and (h) for offenses, felonies, and misdemeanors comprising a single episode of criminal conduct. IC 35-50-2-11(i).

b. Consecutive to separate firearm enhancement

Enhancements of separate convictions under firearm enhancement statute can be run consecutively unless a single episode of criminal conduct is present. Lumbley v. State, 74 N.E.3d 234 (Ind. Ct. App. 2017).

c. Definitions

(1) Firearm

The definition of firearm applicable to Ind. Code § 35-50-2-11 is set forth in Ind. Code 35-47-1-5, which states: "'firearm' means any weapon that is capable of or designed to or that may readily be converted to expel a projectile by means of explosion." Ind. Code § 35-50-2-11(a).

A disassembled gun may also constitute a "firearm" for purposes of Ind. Code § 35-50-2-11. Staten v. State, 844 N.E.2d 186 (Ind. Ct. App. 2006).

(2) Offense

Pursuant to Ind. Code § 35-50-2-11(b), "offense" means:

(1) a felony under Ind. Code § 35-42 that resulted in death or serious bodily injury;

(2) kidnapping;

(3) criminal confinement as a Level 2 or 3 felony; or

(4) attempted murder.

(3) Use

"Use" means the *active employment of* a firearm. Some examples of "use" are: brandishing, displaying, bartering, striking with, firing or attempting to fire a firearm. Bailey v. United States, 116 S.Ct. 501, 508 (1995).

Cooper v. State, 940 N.E.2d 1210 (Ind. Ct. App. 2011) (it was reasonable for jury to conclude that defendant's use of shotgun was intentional, even if the actual killing resulted from reckless conduct).

Barnett v. State, 24 N.E.3d 1013 (Ind. Ct. App. 2015) (evidence supported finding both that defendant knowingly used a firearm and that he recklessly killed victim as they struggled for control of gun).

PRACTICE POINTER: Although the Bailey court defined use of firearm as an aggravator for a specific federal enhancement statute, the Court's definition of "use" can still serve as persuasive argument against the imposition of consecutive sentences. Bailey v. United States, 116 S.Ct. 501 (1995) (the mere fact that firearm was stored or placed near drugs is not enough).

d. Constitutionality

Parker v. State, 754 N.E.2d 614 (Ind. Ct. App. 2001) (because State had to prove beyond reasonable doubt that defendant used a handgun during robbery in this case, enhancement did not violate constitutional rule that fact that increases penalty for crime beyond maximum must be submitted to jury and proved beyond reasonable doubt as set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Jones v. U.S., 526 U.S. 227 (2000)).

Barnett v. State, 24 N.E.3d 1013 (Ind. Ct. App. 2015) (defendant's knowing and intelligent waiver of a trial by jury as to facts underlying firearm sentencing enhancement did not violate Sixth Amendment right to jury trial).

PRACTICE POINTER: The handgun, five-year enhancement may be unconstitutional under Apprendi if the State did not charge the use of a handgun in the guilt phase of the trial.

2. Possession of cocaine or narcotic drug while in possession of firearm

a. Procedure

Pursuant to Ind. Code § 35-50-2-13(a), the State may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense of dealing in a controlled substance under IC 35-48-4-1 through IC 35-48-4-4 sentenced to an additional fixed term of imprisonment if the State can show beyond a reasonable doubt that the person knowingly or intentionally, while committing the offense:

1. Used a firearm; or
2. Possessed a:
   (a) Handgun in violation of IC 35-47-2-1;
   (b) Sawed-off shotgun in violation of federal law; or
   (c) Machine gun in violation of IC 35-47-5-8

If the person was convicted of the offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. Ind. Code § 35-50-2-13(b). 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. Id.

b. Additional five to twenty years

Pursuant to Ind. Code § 35-50-2-13(c), if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proven beyond a reasonable doubt that the person knowingly or intentionally committed an offense as described in Ind. Code § 35-50-2-13(a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

1. If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.
2. If the firearm is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may sentence the person to an additional fixed term of imprisonment of not more than twenty (20) years. The additional sentence under this subdivision is in addition to any additional sentence imposed under section 11 of this chapter for use of a firearm in the commission of an offense.

B. CRIMINAL ORGANIZATION ENHANCEMENT

Note: Prior to 2016, Criminal Organization was referred to as "Criminal Gang." See 2016 Ind. SEA 141.

1. Procedure

Pursuant to Ind. Code § 35-50-2-15(b), 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:

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

(2) committed the felony offense:

(a) at the direction of or in affiliation with a criminal organization; or

(b) 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 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 criminal organization enhancement. A waiver of the right to jury trial in the guilt phase may not constitute a voluntary waiver of the defendant's separate statutory or Sixth Amendment right to a jury trial on the criminal organization finding leading to an increased punishment. See, e.g., 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). See also Barnett v. State, 24 N.E.3d 1013 (Ind. Ct. App. 2015).

2. Additional fixed term

Pursuant to Ind. Code § 35-50-2-15(d), if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally was a member of a criminal organization while committing the felony offense and committed the felony offense at the direction of or in affiliation with a criminal organization as described in subsection (b), the court shall:

1. Sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony, if the person is sentenced of only one (1) 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.

3. Non-suspendible/consecutive sentence

A sentenced 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).

a. Definitions/exclusion

Pursuant to Ind. Code § 35-50-2-1.4, for purposes of IC 35-50-2-15, "criminal organization" means a formal or informal group with at least three (3) members that specifically:

(1) either:

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

(B) participates in; or

(2) requires as a condition of membership or continued membership;

the commission of a felony or an act that would be a felony if committed by an adult or a battery offense included in IC 35-42-2.

4. Evidence of membership or affiliation with criminal organization

Pursuant to Ind. Code § 35-50-2-15(g), 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 that the person is a member of a criminal organization by:
   a. A member of the person's family;
   b. The person's guardian; or
   c. A reliable member of the criminal organization;

stating 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 (3) occasions.
8. Communications authored by the person 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.

Although the statute is intended to apply to gang-related activity and lists 10 factors that may be used as evidence that a person was a member of a criminal organization, those factors are neither mandatory nor exclusive. Parrish v. State, 166 N.E.3d 953 (Ind. Ct. App. 2021) (Court found it "concerning" that such a harsh sentencing enhancement can be imposed on a defendant with none of the statutory factors present, but that is a concern for the legislature and not the court).

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 is a nullity.

5. Constitutionality

Armstrong v. State, 22 N.E.3d 629 (Ind. Ct. App. 2014) (prior version of statute was not unconstitutionally vague or disproportional).

C. FELONY CAUSING TERMINATION OF PREGNANCY

1. Ind. Ct. App. Procedure

Pursuant to Ind. Code § 35-50-2-16(b), the State may seek on a page separate from the rest of the charging instrument, to have a person who allegedly committed or attempted to commit a felony sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person, while committing or attempting to commit the felony, caused the termination of a human pregnancy.

Pursuant to Ind. Code § 35-50-2-16(c), if the person is convicted of the felony 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.

a. Additional Term: 6 to 20 years

Pursuant to Ind. Code § 35-50-2-16(d), if the jury (if the hearing is by jury) or the court (if the hearing is by the court alone) finds that the state has proved beyond a reasonable doubt that the person, while committing or attempting to commit a felony, caused the termination of a human pregnancy, the court shall sentence the person to an additional fixed term of imprisonment of not less than six (6) or more than twenty (20) years.

b. Mandatory consecutive

Pursuant to Ind. Code § 35-50-2-16(e), a sentence imposed under this section runs consecutively to the underlying sentence.

c. No required proof of knowledge

Pursuant to Ind. Code § 35-50-2-16(f), for purposes of this section, prosecution of the felony and the enhancement of the penalty for that crime does not require proof that:8

1. The person committing or attempting to commit the felony had knowledge or should have had knowledge that the victim was pregnant; or
2. The defendant intended to cause the termination of a human pregnancy.

White v. State, 978 N.E.2d 475 (Ind. Ct. App. 2012) (feticide enhancement statute is constitutional despite the lack of mens rea requirement).

d. Limitations

Pursuant to Ind. Code § 35-50-2-16(a), this enhancement does not apply to: (1) a pregnant woman who terminates or causes the termination of her own pregnancy; or (2) an abortion performed in compliance with Ind. Code § 16-34.

D. REPEAT OWI OFFENDER: Ind. Code § 9-30-5-15

1. Second OWI

If a person has one previous conviction of operating while intoxicated, in addition to any criminal penalty imposed for an offense under IC 9-30-5, the court shall order that the person be imprisoned for five days or order the person to perform at least two hundred forty (240) hours of community restitution or service, and order the person to receive an assessment of the person's degree of alcohol and drug abuse and, if appropriate, to successfully complete and alcohol deterrent program if the person suffers from alcohol abuse. Ind. Code § 9-30-5-15(a).

2. Third OWI

If a person has at least two previous convictions of operating while intoxicated, in addition to any criminal penalty imposed for an offense under IC 9-30-5, the court shall order that the person be imprisoned for at least ten days or order the person to perform at least four hundred eighty (480) hours of community restitution or service, and order the person to receive an assessment of the person's degree of alcohol and drug abuse and, if appropriate, to successfully complete and alcohol deterrent program if the person suffers from alcohol abuse. Ind. Code § 9-30-5-15(b).

Simmons v. State, 773 N.E.2d 823 (Ind. Ct. App. 2002) (trial court did not err in ordering defendant to serve six months of sentence for third OWI conviction in secure detention, pursuant to Ind. Code § 35-50-2-2(b)(4)(Q); ten-day requirement set forth in Ind. Code § 9-30-5-15, enacted in 1999, applies to person being sentenced for third OWI as misdemeanor, and six month required sentence set forth in Ind. Code § 35-50-2(b)(4)(Q) applies to person being sentenced for third OWI as felony; Ind. Code § 9-30-5-15 is intended as a "gap-filler" for those convicted of repeated OWIs but no felonies).

Schenk v. State, 895 N.E.2d 1271 (Ind. Ct. App. 2008) (if one of the predicate convictions was under a repealed but re-codified statute, the conviction is a "prior conviction" for purposes of determining whether six months of defendant's sentence for current OWI conviction is non-suspendible).

3. Non-suspendible and no credit time

Pursuant to Ind. Code § 9-30-5-15(c), notwithstanding IC 35-50-2-2.2 and IC 35-50-3-1, a sentence under this section may not be suspended. The court may require that the person serve the term of imprisonment in an appropriate facility at whatever time or intervals (consecutive or intermittent) determined appropriate by the court.

However:

(1) at least forty-eight hours of the sentence must be served consecutively; and
(2) the entire sentence must be served within six months after date of sentencing.

Notwithstanding IC 35-50-6, a person does not earn good time credit (as defined in IC 35-50-6-0.5) while serving a sentence imposed under this section. Ind. Code § 9-30-5-15(d).

E. LEVEL 1 CHILD MOLESTING – INCREASED MAXIMUM SENTENCE

The maximum sentence for a person who commits a Level 1 Child Molesting offense described in Ind. Code § 35-31.5-2-72(1) or (2) is fifty years. Ind. Code § 35-50-2-4(c).

Ind. Code § 35-31.5-2-72(1) and (2) refers to:

(1) Child molesting involving sexual intercourse, deviate sexual conduct (IC 35-42-43(a), before its amendment on July 1, 2014) for a crime committed before July 1, 2014, or other sexual conduct (as defined in IC 35-31.5-2-221.5) for a crime committed after June 30, 2014, if:(A) the offense is committed by a person at least twenty-one (21) years of age; and (B) the victim is less than twelve (12) years of age;

(2) Child molesting (IC 35-42-4-3) resulting in serious bodily injury or death.

F. FELONY TERRORIST OFFENSE ENHANCEMENT

1. Procedure

The State may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense with the intent to aid or assist another person in the commission of a felony terrorist offense sentenced to an additional fixed term of imprisonment if the State can show beyond a reasonable doubt that the person committed the offense with the intent to aid or assist another person in the commission of a felony terrorist offense. Ind. Code § 35-50-2-18(b).

If the person is convicted of the 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 § 35-50-2-18(c).

2. Definition of "Felony Terrorist Offense"

As used in this section, "felony terrorist offense" means the following:

(1) An offense described in IC 35-46.5-2.

(2) Money laundering (IC 35-45-15-5) committed with the intent to:

  (a) commit or promote an act of terrorism; or

  (b) obtain or transport a weapon of mass destruction.

(3) Intimidation (IC 35-45-2-1) involving a threat:

  (a) to commit terrorism; or

  (b) made in furtherance of an act of terrorism. Ind. Code § 35-50-2-18(a).

3. Additional Term: sentence imposed for underlying offense or longest sentence if multiple offenses

If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person committed the offense with the intent to aid or assist another person in the commission of a felony terrorist offense, the court shall:

(1) sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying offense, if the person is sentenced for only one (1) offense; or

(2) sentence the person to an additional fixed term of imprisonment equal to the longest sentence imposed for the underlying offenses, if the person is being sentenced for more than one (1) offense. Ind. Code § 35-50-2-18(d).

4. Mandatory Consecutive and Non-suspendible

Pursuant to Ind. Code § 35-50-2-18(e), a sentence imposed under this section runs consecutively to the underlying sentence. Further, a term of imprisonment imposed under this section may not be suspended. Ind. Code § 35-50-2-18(f).

VII. CONSECUTIVE / CONCURRENT SENTENCES

Trial courts have the discretion to determine, subject to certain qualifications, whether sentences are served consecutively or concurrently, but nothing in the statutory sentencing scheme grants a trial court the authority to impose partially consecutive, hybrid or blended sentences for multiple convictions. Wilson v. State, 5 N.E.3d 759 (Ind. 2014).

Wilson v. State, 5 N.E.3d 759 (Ind. 2014) (trial court abused its discretion by ordering only a part of defendant's sentence for robbery consecutive to another sentence).

A. MANDATORY CONSECUTIVE SENTENCE

Generally, it is within the trial court's discretion to determine whether terms of imprisonment shall be served concurrently or consecutively (*see* Section B, below). However, in the following circumstances, a consecutive sentence is mandated by statute.

1. Ind. Code § 35-50-1-2(e): on probation, parole, etc.

Regardless of the order in which the crimes are tried and sentences are imposed, the court must impose consecutive sentences if after being arrested for one crime the person commits another crime before the date the person is discharged from probation, parole, or a term of imprisonment for the first crime or while the person is released on the person's own recognizance or on bond. Ind. Code § 35-50-1-2(e).

Scott v. State, 632 N.E.2d 761 (Ind. Ct. App. 1994) (Ind. Code § 35-50-1-2(b) (now (e)) required that sentence for robbery conviction be served consecutively with yet to be decided probation revocation case).

Harris v. State, 598 N.E.2d 639 (Ind. Ct. App. 1992) (trial court ordered sentence imposed upon revocation of probation to be served consecutively to sentence imposed for burglary committed while on probation, even though revocation determination occurred after sentencing on burglary).

PRACTICE POINTER: Although an individual who commits a new crime while still on probation or parole will be subjected to consecutive sentences for the new conviction and the probation or parole violation, the individual's new sentence may still be suspendible under Ind. Code § 35-50-2-2, according to Hill v. State, 751 N.E.2d 273 (Ind. Ct. App. 2001). For a more complete discussion, see Subsection V.B. of this Chapter, *Partially Suspendible Sentences*.

a. Crime committed while on probation

Ind. Code § 35-50-1-2(e), mandating consecutive sentences if defendant commits another crime while on probation, requires only that sentence imposed in instant case be consecutive to remainder of sentence imposed on probation violation, not that multiple instant sentences be imposed consecutively to each other.

Garner v. State, 646 N.E.2d 349 (Ind. 1995) (it is proper and mandatory under Ind. Code § 35-50-1-2(d) (now (e)) for court to order resisting law enforcement sentence to run consecutively to both pending probation violation and pending possession of cocaine charge where defendant committed crime while on probation and released on recognizance or bond).

Scott v. State, 632 N.E.2d 761 (Ind. Ct. App. 1994) (no error where trial court ordered defendant's six-year sentence for battery served consecutively to any violation of probation imposed subsequently from other case).

Barker v. State, 622 N.E.2d 1336 (Ind. Ct. App. 1993) (remanded for specific and individualized statement of whether facts supported imposition of consecutive terms was required where, after guilty plea, court-imposed sentence based on the erroneous belief that sentences for all crimes committed while defendant was on probation must run consecutively to one another and not just to sentence for probation violation).

Pawloski v. State, 555 N.E.2d 851 (Ind. Ct. App. 1990) (although defendant was arrested while on probation, where record was devoid of evidence indicating that defendant actually committed crime while on probation and not before being placed on probation, Ind. Code § 35-50-1-2 did not apply).

Jiggets v. State, 978 N.E.2d 29 (Ind. Ct. App. 2012) (fact that defendant was on probation for a federal conviction when he committed the Indiana crime did not alter the fact his sentences had to be served consecutively; the statute does not make a distinction between federal and state convictions, and there is no logical reason to do so).

b. Crime committed while on parole

Ind. Code § 35-50-1-2(e), mandating consecutive sentences if defendant commits another crime while on parole, requires only that sentence imposed in instant case be consecutive to remainder of sentence imposed on parole violation, not that multiple instant sentences be imposed consecutively to each other. LeMaster v. State, 498 N.E.2d 1185 (Ind. 1986).

Arnold v. State, 539 N.E.2d 969 (Ind. Ct. App. 1989) (trial court is not required to anticipate effect of subsequent sentence or prior sentence in different proceeding and advise with respect to it).

c. Crime committed while on bond or released on recognizance

Note that prior to 1987 amendments, consecutive sentences were not mandatory when crime was committed while defendant was out on bond. Haggard v. State, 445 N.E.2d 969 (Ind. 1983).

Hardley v. State, 905 N.E.2d 399, 404 (Ind. 2009), *summarily affirming* Hardley v. State, 893 N.E.2d 1140 (Ind. Ct. App. 2008) (Ind. Code § 35-50-1-2(d)(2)(A) requires consecutive sentences where after being arrested for one (1) crime, a person commits another crime while released on the person's own recognizance).

Thorne v. State, 687 N.E.2d 604 (Ind. Ct. App. 1997) (mandatory application of IC 35-50-1-2(e)(2)(B), requiring that person who commits crime while released on bond for another crime serve resulting sentences consecutively, does not preclude trial court from imposing enhanced sentence based upon same crime for which defendant was released on bond).

A pretrial diversion agreement constitutes either being "released on own recognizance" or "on bond" within meaning of Ind. Code § 35-50-1-2(e). Christmas v. State, 812 N.E.2d 174 (Ind. Ct. App. 2004); see also Martin v. State, 645 N.E.2d 1100 (Ind. Ct. App. 1995).

d. Crimes committed while on appeal bond

When a defendant commits a new crime while on appeal bond from a previous conviction, Ind. Code § 35-50-1-2(e) requires that the sentences be served consecutively. Groff v. State, 488 N.E.2d 711 (Ind. 1986).

e. Statute may not be expanded

Consecutive sentences are not mandatory under Ind. Code § 35-50-1-2(e) unless one of the situations explicitly stated in the statute occurs.

Hutchinson v. State, 477 N.E.2d 850, 857 (Ind. 1985) (where defendant committed another offense while on funeral leave from trial and prior to sentencing for first offense, Ind. Code § 35-50-1-2(b) (now (e)) did not mandate consecutive sentences).

Where a defendant is detained awaiting trial, and subsequently escapes, Ind. Code § 35-50-1-2(e) does not mandate consecutive sentences. Newsome v. State, 654 N.E.2d 11 (Ind. Ct. App. 1995). See also Williams v. State, 787 N.E.2d 461 (Ind. Ct. App. 2003); and Dragon v. State, 774 N.E.2d 103 (Ind. Ct. App. 2002).

f. Habitual enhancements not served consecutively even where underlying must be served consecutively

The trial court cannot order enhanced sentences based on habitual offender determinations to be served consecutively. Starks v. State, 523 N.E.2d 735, 736 (Ind.

1988); Weaver v. State, 676 N.E.2d 22, 26 (Ind. Ct. App. 1997). This is so even when the underlying sentences are mandatory consecutive.

Breaston v. State, 907 N.E.2d 992 (Ind. 2009) (even when underlying sentences are required to run consecutively under Ind. Code § 35-50-1-2(d) (now (e)) (requiring consecutive sentences when a person commits a second crime after being arrest for, but before, being discharged from a first crime), a trial court cannot order habitual offender enhancements attached to the first and second crimes consecutively).

Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002) (trial court improperly sentenced defendant to serve consecutive habitual offender enhancements, even though sentencing did not take place in single proceeding).

Young v. State, 57 N.E.3d 857 (Ind. Ct. App. 2015) (trial court may not run general and specialized habitual offender enhancements consecutively).

2. Crime committed in other jurisdiction

Sentences to penal institutions in different jurisdictions are cumulative and not concurrent. Reaves v. State, 586 N.E.2d 847, 851-52 (Ind. 1992); Chanley v. State, 583 N.E.2d 126, 132 (Ind. 1991).

Perry v. State, 921 N.E.2d 525 (Ind. Ct. App. 2010) (trial court did not err by ordering defendant to serve his aggregate ten-year sentence consecutively to previously imposed Michigan sentence on unrelated charges; absent statutory authority, there is no right to concurrent sentences for different crimes).

Carrion v. State, 619 N.E.2d 972 (Ind. Ct. App. 1993) (defendant's sentences were to be served consecutively to life sentences in other jurisdictions).

Carneal v. State, 859 N.E.2d 1255 (Ind. Ct. App. 2007) (trial court did not abuse its discretion by refusing to grant credit time for time served in Illinois despite an Illinois plea agreement that the Illinois sentence was to run concurrent with the Indiana sentence and the defendant had already served the Illinois sentence).

3. Statement of reasons

Even where imposition of consecutive sentence is mandatory under Ind. Code § 35-50-1-2(e), a statement on the record of reasons for imposing such sentence is still required. Bartuff v. State, 553 N.E.2d 485, 488 (Ind. 1990). See also Ray v. State, 585 N.E.2d 36, 37 (Ind. Ct. App. 1992).

PRACTICE POINTER: However, the general purpose of this rule was based on Kendrick v. State, 529 N.E.2d 1311 (Ind. 1988), and the discretionary provision of the Ind. Code § 35-50-1-2 which limited the imposition of consecutive sentences to situations in which the trial court is contemporaneously imposing two sentences to be served consecutively. That rule is no longer in effect for sentences imposed under the 1994 amendment to Ind. Code § 35-50-1-2(c).

B. DISCRETIONARY CONSECUTIVE AND CONCURRENT SENTENCES

Except as provided in IC 35-50-1-2 (d) or (e) (discussed above), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the aggravating and mitigating circumstances in IC 35-38-1-7.1(a) and IC 35-38-1-7.1(b) in making a determination under this subsection. Ind. Code § 35-50-1-2(c); See Chapter 4, Subsection III, *Aggravating Circumstances*, and Subsection IV, *Mitigating Circumstances,* for detailed discussion of specific aggravating and mitigating circumstances.

1. Concurrent sentences

There is no right to serve sentences concurrently. Shropshire v. State, 501 N.E.2d 445, 446 (Ind. 1986).

Kubiak v. State, 508 N.E.2d 559 (Ind. Ct. App. 1987) (mere absence of collateral brutality is not mitigating factor and does not mandate sentences be concurrent).

a. Sentencing record

Concurrent sentences are within trial court's discretion so long as the factors at which the court considered in arriving at the length of the sentence are clear from the record. Fisher v. State, 671 N.E.2d 119, 121 (Ind. 1996).

b. Limitation on discretion: same institution

Because a defendant is not entitled to credit time on an Indiana sentence while serving a sentence in another jurisdiction, the trial court may only order concurrent sentences when they are to be served in the same institution, *i.e.*, not in another state or in the federal system. Penick v. State, 659 N.E.2d 484, 489 (Ind. 1995).

Saylor v. State, 565 N.E.2d 348 (Ind. Ct. App. 1991) (trial court has no authority to order concurrent Indiana and Kentucky sentences).

Carneal v. State, 859 N.E.2d 1255 (Ind. Ct. App. 2007) (trial court did not abuse its discretion by refusing to grant credit time for time served in Illinois despite an Illinois plea agreement that the Illinois sentence was to run concurrent with the Indiana sentence and the defendant had already served the Illinois sentence).

2. Consecutive sentences

Trial court cannot order consecutive sentences without express statutory authority. Harris v. State, 671 N.E.2d 864, 872 (Ind. Ct. App. 1996). See also Ind. Code § 35-50-1-2(c) (giving court authority to impose consecutive sentences). A reviewing court is duty bound to correct sentences that violate the trial court's authority to impose consecutive sentences. Ballard v. State, 715 N.E.2d 1276, 1279 (Ind. Ct. App. 1999).

a. Sentencing record

Where the trial court uses its discretion to impose consecutive sentences, there must be specific findings disclosed in the record. Ind. Code § 35-38-1-3; Wethington v. State, 560 N.E.2d 496, 510 (Ind. 1990); Lindsey v. State, 485 N.E.2d 102, 108 (Ind. 1985);

Richardson v. State, 481 N.E.2d 1310, 1314 (Ind. 1985); Shippen v. State, 477 N.E.2d 903, 905 (Ind. 1985); and Meriweather v. State, 659 N.E.2d 133, 146 (Ind. Ct. App. 1995).

Where the record is silent as to whether the sentences were consecutive or concurrent, the presumption is not that the sentence is consecutive.

> Jones v. State, 536 N.E.2d 1051 (Ind. Ct. App.1989) (it was illegal for DOC to hold defendant for mandatory consecutive sentences when court order was silent as to whether sentences were to be served consecutively or concurrently).

b. Use of advisory sentence

As of April 25, 2005, a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense. A court is not required to use an advisory sentence except when imposing: (1) consecutive sentences for felony convictions that are not crimes of violence (as defined in IC 35-50-1-2(a)) arising out of an episode of criminal conduct, in accordance with IC 35-50-1-2; (2) an additional fixed term to a repeat sexual offender under section 14 [IC 35-50-2-14] of this chapter. Ind. Code § 35-50-2-1.3(b) and (c).

Ind. Code § 35-50-2-1.3 does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct. Ind. Code § 35-50-2-1.3 (effective July 1, 2007).

For purposes of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider when imposing sentence. Ind. Code § 35-50-2-1.3(a).

> Robertson v. State, 871 N.E.2d 280 (Ind. 2007) (overruling White v. State, 849 N.E.2d 735 (Ind. Ct. App. 2006), court held under Ind. Code § 35-50-2-1.3, a trial court imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence; rather, trial court may impose any sentence within the applicable range; IC 35-50-2-1.3(c) does no more than retain the fixed maximum sentences permissible under Ind. Code § 35-50-1-2 ("episode" statute) and the repeat sexual offender provisions); see also Miller v. State, 138 N.E.3d 314 (Ind. Ct. App. 2019).
>
> Quiroz v. State, 885 N.E.2d 740 (Ind. Ct. App. 2008) (the rule of lenity does not allow courts to ignore the Supreme Court's precedent in Robertson and prohibit enhanced, consecutive sentences during the time there was a split in the Court of Appeals concerning this issue). See also Freyn v. State, 884 N.E.2d 901 (Ind. Ct. App. 2008).

c. Required aggravator

The court may consider the: (1) aggravating circumstances in Ind. Code § 35-38-1-7.1(a); and (2) mitigating circumstances in Ind. Code § 35-38-1-7.1(b); in making a determination under Ind. Code § 35-50-1-2. Ind. Code § 35-50-1-2(c). In order to justify consecutive sentences, the court must be able to articulate at least one reason why the sentence should run consecutively rather than concurrently. Brown v. State, 497 N.E.2d

1049, 1052 (Ind. 1986); Spivey v. State, 638 N.E.2d 1308, 1312 (Ind. Ct. App. 1994); Frazier v. State, 512 N.E.2d 215, 216 (Ind. Ct. App. 1987). Thus, when the trial court imposes consecutive terms of imprisonment the record should disclose what factors were considered by the court to be mitigating or aggravating. Kahn v. State, 493 N.E.2d 790 (Ind. Ct. App. 1986); see also Chapter 3, Subsection II, *Record of Sentencing Hearing*, for discussion on required analysis in statement of reasons.

Where a trial court fails to find any aggravating or mitigating circumstances, it is error to impose consecutive sentences. Brown v. State, 442 N.E.2d 1109 (Ind. 1982).

The Sixth Amendment right to jury trial does not apply to a court's finding that justifies consecutive sentences. In other words, consecutive sentence based on a factual finding does not present a *Blakely* problem. Smylie v. State, 823 N.E.2d 679 (Ind. 2005); Oregon v. Ice, 129 S.Ct. 711 (2009).

If the trial court fails to give any statement of reasons for imposing consecutive sentences, the cause must be remanded for correction of the deficiency. However, where statement of reasons is given but it lacks required specificity, the appellate court may review the record to determine if there is an adequate basis for imposing consecutive sentences. Pearson v. State, 543 N.E.2d 1141 (Ind. Ct. App. 1989).

Sanquenetti v. State, 727 N.E.2d 437 (Ind. 2000) (trial court's statement that sentences for two murders should be served consecutively because they were "crimes of violence" fell short of requirement that sentencing statement identify, explain, and evaluate any aggravators used to impose consecutive sentences; however, appellate court upheld consecutive sentences); see also Lewis v. State, 31 N.E.3d 539 (Ind. Ct. App. 2015).

Taylor v. State, 710 N.E.2d 921 (Ind. 1999) (where trial court state in its sentencing order that it found aggravator in defendant's prior criminal history and did not find mitigators, consecutive sentences were justified).

Mitchem v. State, 685 N.E.2d 671 (Ind. 1997) (although trial court did not state specific reasons why each factor was aggravating or mitigating, where trial court engaged in evaluative balancing process, court satisfied requirement of articulating reasons).

Lewis v. State, 755 N.E.2d 1116 (Ind. Ct. App. 2001) (where court failed to give adequate justification for consecutive sentences, appellate court modified sentences to run concurrently).

Allen v. State, 722 N.E.2d 1246 (Ind. Ct. App. 2000) (trial court's finding that defendant was in need of correctional treatment in penal facility due to fact that he committed three armed robberies was sufficient to justify consecutive sentences).

d. Failure to recognize significant mitigators makes maximum consecutive sentences an abuse of discretion

Failure to recognize or otherwise take into account significant mitigators can make maximum and/or consecutive sentences an abuse of discretion.

Ashby v. State, 904 N.E.2d 361 (Ind. Ct. App. 2009) (trial court erred in sentencing defendant to three consecutive twenty-year maximum sentences following his 1999 open guilty plea to Class B felony robbery while armed with a deadly weapon. Defendant was remorseful and received nothing in exchange from State for pleading guilty. Trial court's statements relating to absence of mitigating factors were inconsistent with its prior statements at same hearing and constitute an abuse of discretion).

e. Improper considerations

(1) Personal or political message

It is improper to impose consecutive sentences to send a personal, philosophical or political message. Scheckel v. State, 655 N.E.2d 506, 510 (Ind. 1995). This includes statements made at sentencing that the judge is going to make an example of defendant to others.

Beno v. State, 581 N.E.2d 922 (Ind. 1991) (in imposing consecutive maximum sentence, trial court improperly stated that it was going to make an example of defendant to other drug dealers).

(2) Series of offenses in state-sponsored sting

Depending on whether the defendant plead guilty, the length of the overall sentence imposed and the purpose for which the court imposed the sentence, it may be improper to impose consecutive sentences where crimes committed were nearly identical State-sponsored buys within a short period of time or were possession offenses related to the State-sponsored buys. The State may not "pile on" sentences by postponing prosecution in order to gather more evidence. Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008) (quoting Gregory v. State, 644 N.E.2d 543 (Ind. 1994)).

Gregory v. State, 644 N.E.2d 543 (Ind. 1994) (trial court erroneously ordered sentences based on drug sales to same informant within short period of time to be served consecutively; appellate court remanded with instruction to order concurrent sentences).

Williams v. State, 891 N.E.2d 621 (Ind. Ct. App. 2008) (Gregory applies equally to convictions arising from evidence gathered as a direct result of State-sponsored criminal activity; thus trial court erred in ordering consecutive sentences where State sponsored two controlled drug buys from same informant, then seized additional cocaine and marijuana from defendant's home pursuant to search warrant within 24 hours of second transaction); see also Walton v. State, 81 N.E.3d 621 (Ind. Ct. App. 2017).

Eckelbarger v. State, 51 N.E.3d 169 (Ind. 2016) (where State initiated identical controlled buys that led to discovery of drugs at defendant's house, trial court should have ordered defendant to serve set of sentences related to drugs found at his home concurrently to sentences arising from controlled buys because the second set of sentences was a direct result of facts related to first set of offenses); see also Walton v. State, 81 N.E.3d 679 (Ind. Ct. App. 2017).

Courts regularly strike down maximum and/or consecutive sentences arising out of multiple buys over a short, and sometimes lengthy period of time:

- Two drug dealings arising out of nearly identical State-sponsored buys within a four-day period. Beno v. State, 581 N.E.2d 922 (Ind. 1991). See also Alvarez v. State, 983 N.E.2d 626 (Ind. Ct. App. 2013).
- Different drug types but one sting operation. Hendrickson v. State, 690 N.E.2d 765 (Ind. Ct. App. 1998).
- Three separate police-controlled buys of cocaine over four-month period. Robertson v. State, 650 N.E.2d 1177 (Ind. Ct. App. 1995), *overruled on other grounds*, Wright v. State, 658 N.E.2d 563 (Ind. 1995).
- Multiple deals of different types of drugs spanning a two-year period. Davis v. State, 142 N.E.3d 495 (Ind. Ct. App. 2020).
- Two nearly identical incidents that occurred within one week of each other, state-sponsored, using same informant, and same drug. Hopkins v. State, 668 N.E.2d 686 (Ind. Ct. App. 1996).

But where the sentence is below the maximum, crimes are independent and distinct, or where other aggravating factors are present, courts may impose consecutive sentences.

Cannon v. State, 117 N.E.3d 643 (Ind. Ct. App. 2018) (second case was separate and not derivative of first case, which involved completed State-sponsored drug purchase investigation).

Ragland v. State, 670 N.E.2d 51 (Ind. Ct. App. 1996) (trial court properly imposed consecutive fifteen-year sentences for dealing in cocaine where charges were based on sale of same drug to same informant within six-day period).

Pritscher v. State, 675 N.E.2d 727 (Ind. Ct. App. 1996) (imposition of consecutive sentences totaling thirty-eight years of imprisonment on defendant, who pleaded guilty to three counts of dealing in cocaine, was not manifestly unreasonable because sales occurred within fifty-two day time frame, each time informant approached defendant to buy drugs defendant had drugs ready for sale, trial court did not act against sentencing recommendations of State or attempt to make example out of defendant).

Howard v. State, 626 N.E.2d 574 (Ind. Ct. App. 1993) (trial court properly imposed consecutive maximum sentences for three counts of dealing in marijuana because sentence was not unreasonable under circumstances).

Bray v. State, 611 N.E.2d 187 (Ind. Ct. App. 1993) (because defendant sold two different drugs at two different places, two days apart, and initiated second transaction himself, imposition of maximum, consecutive sentences pursuant to guilty plea by agreement was not manifestly unreasonable).

PRACTICE POINTER: Courts in Ragland and Howard distinguished Beno by noting that in Ragland and Howard: 1) the defendants were sentenced after pleading guilty pursuant to an agreement which gave the court discretion to order consecutive sentences; 2) trial courts did not impose consecutive sentences to send personal, philosophical, or political message, or to make defendants examples for other drug dealers; and 3) defendants' sentences were considerably less than Beno's seventy-four year maximum sentence.

(3) Element of crime

(a) Presumptive sentencing scheme

It is improper to impose a consecutive sentence based on an element of the crime.

Hampton v. State, 719 N.E.2d 803 (Ind. 1999) (seriousness and heinousness of crime may not be considered in order to impose consecutive rather than concurrent sentences).

Burch v. State, 487 N.E.2d 176 (Ind. Ct. App. 1985) (where use of deadly weapon was part of crimes charged, it could not support imposition of consecutive sentences).

However, when a perpetrator commits the same offense against multiple victims, enhanced and consecutive sentences "seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Vance v. State, 860 N.E.2d 617 (Ind. Ct. App. 2007) (quoting Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003)).

Vance v. State, 860 N.E.2d 617 (Ind. Ct. App. 2007) (where there were three people in the car the defendant's car hit, the three criminal reckless convictions could be run consecutively to one another based on the multiple victims).

(b) Advisory sentencing scheme

Under the advisory sentencing scheme, it is proper to use the same prior crime to aggravate and enhance a sentence. However, if two convictions are enhanced by the same prior crime, the sentences for those convictions cannot be run consecutively. Sweatt v. State, 887 N.E.2d 81 (Ind. 2008).

(4) When aggravators and mitigators are in equipoise

A trial court may not order consecutive sentences when finding the aggravators and mitigators are in equipoise, such that a defendant is entitled to presumptive sentences. Marcum v. State, 725 N.E.2d 852 (Ind. 2000). Thus, imposition of consecutive sentences, without finding an additional aggravator, is improper when the court finds that aggravators and mitigators are balanced for purposes of entering a presumptive sentence. Feeney v. State, 874 N.E.2d 382 (Ind. Ct. App. 2007).

White v. State, 847 N.E.2d 1043 (Ind. Ct. App. 2006) (in robbery and confinement prosecution, trial court erred in ordering some of defendant's

sentences to be served consecutively when the court implicitly found the mitigating circumstances outweighed the aggravating circumstances).

Townsend v. State, 860 N.E.2d 1268 (Ind. Ct. App. 2007) (where trial court specifically found no aggravators or mitigators, trial court could still impose consecutive sentences based on the harm to each victim of attempted murder and murder); see also Dowdell v. State, 70 N.E.3d 884 (Ind. Ct. App. 2017); Gleaves v. State, 859 N.E.2d 766 (Ind. Ct. App. 2007); Lopez v. State, 869 N.E.2d 1254 (Ind. Ct. App. 2007).

It is permissible for the trial court to consider aggravators and mitigators in determining each underlying offense and then to independently consider aggravators and mitigators in determining whether to impose concurrent or consecutive sentences for each underlying offense.

Frentz v. State, 875 N.E.2d 453 (2007) (trial court did not abuse its discretion in ordering consecutive sentences based on defendant's criminal history, notwithstanding its determination that the mitigators and aggravators (including criminal history) were in equipoise with respect to murder conviction).

f. Imposing sentences at same time or different times

(1) Sentence imposed before 1994 amendment

Court's authority to order consecutive sentences granted by Ind. Code § 35-50-1-2(a) is limited to those occasions when a court is meting out two or more terms of imprisonment contemporaneously. See Weaver v. State, 664 N.E.2d 1169, 1170 (Ind. 1996); Bartruff v. State, 553 N.E.2d 485, 488 (Ind. 1990); Seay v. State, 550 N.E.2d 1284, 1289 (Ind. 1990); Thompson v. State, 634 N.E.2d 775, 777 (Ind. Ct. App. 1994); Saylor v. State, 565 N.E.2d 348, 349 (Ind. Ct. App. 1991).

Kendrick v. State, 529 N.E.2d 1311 (Ind. 1988) (trial court erred by allowing defendant to plead guilty in one courtroom and later receive consecutive sentence for unrelated charges in another courtroom).

Badger v. State, 754 N.E.2d 930 (Ind. Ct. App. 2001) (even though defendant received some benefit in plea agreement, plea to consecutive sentences, which court did not have authority to order under Kendrick v. State, 529 N.E.2d 1311 (Ind. 1988), invalidated plea).

Niksich v. State, 596 N.E.2d 268 (Ind. Ct. App. 1992) (court lacked authority to order sentence to run consecutive to sentence imposed in unrelated cause heard by same judge).

(a) Modification of sentence

Lamirand v. State, 640 N.E.2d 79 (Ind. Ct. App. 1994) (under discretionary provision of Ind. Code § 35-50-1-2(a) (now c), it is improper for trial court, while modifying sentence on one count at same time it enters judgment on second count, to order these sentences served consecutively).

(b) Related charges in same court

Kendrick does not apply where related charges were filed in same information and jury convicted on one offense but hung on second offense. Buell v. State, 668 N.E.2d 251 (Ind. 1996).

One court of appeals case has expanded Buell to find that a court can run a sentence consecutively to a sentence imposed at an earlier time by the same court as long as the two convictions are related. See Elswick v. State, 706 N.E.2d 592 (Ind. Ct. App. 1999) (Sullivan, J., dissenting).

PRACTICE POINTER: Counsel representing an individual prior to the 1994 amendment may even be held ineffective for failing to seek automatic severance of the charges that ultimately result in one court simultaneously sentencing the individual on two charges and ordering consecutive sentences. Wilkerson v. State, 728 N.E.2d 239 (Ind. Ct. App. 2000). But see Peace v. State, 736 N.E.2d 1261 (Ind. Ct. App. 2000) and Davidson v. State, 763 N.E.2d 441 (Ind. 2002).

(2) Sentence imposed after 1994 amendment

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. Ind. Code § 35-50-1-2(c).

Berry v. State, 689 N.E.2d 444 (Ind. 1997) (under amended Ind. Code § 35-50-1-2, trial court properly imposed defendant's sentences consecutively to sentence in separate, unrelated case from a different court; however, two justices dissented claiming that although court may order sentences imposed at different times to run consecutively to one another, court cannot order sentence to run consecutively to sentence imposed by another court).

Weaver v. State, 664 N.E.2d 1169 (Ind. 1996) (noting that legislature essentially overturned contemporaneity requirement of Seay and Kendrick with 1994 amendment).

Shafer v. State, 856 N.E.2d 752 (Ind. Ct. App. 2006) (trial court did not abuse its discretion in ordering defendant to serve his sentence for a 2001 robbery of Elks Club consecutive to a sentence for a 1999 robbery of same Elks Club which would be ordered by another court later that same day in same county).

McGriff v. State, 20 N.E.3d 156 (Ind. Ct. App. 2014) (trial court was within its authority to order its sentence to be served consecutively, despite earlier conflicting orders of other counties).

g. Limitation on court's discretion - Ind. Code § 35-50-1-2(c)

IC 35-50-1-2(c) provides: except for crimes of violence[1], and use of a firearm, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10 (before its repeal), to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the period described in subsection (d).[2]

Pursuant to Ind. Code § 35-50-1-2(d), except as provided in subsection (c), the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct may not exceed the following:

Most serious crime	*May not exceed*	*Ind. Code §*
Level 6 Felony	4 years	35-50-1-2(d)(1)
Level 5 Felony	7 years	35-50-1-2(d)(2)
Level 4 Felony	15 years	35-50-1-2(d)(3)
Level 3 Felony	20 years	35-50-1-2(d)(4)
Level 2 Felony	32 years	35-50-1-2(d)(5)
Level 1 Felony	42 years	35-50-1-2(d)(6)

"Term of imprisonment" in context of IC 35-50-1-2(c) does not mean the period of executed time alone, but also includes any suspended sentence imposed. Mask v. State, 829 N.E.2d 932 (Ind. 2005). Thus, any period of a suspended sentence must be included when calculating the maximum aggregate sentence under statute.

Amendment to IC 35-50-1-2 capping number of years which could be ordered served consecutively for episode of criminal conduct was ameliorative, and thus, applies to crimes committed prior to amendment. Richards v. State, 681 N.E.2d 208 (Ind. 1997). See also Martin v. State, 714 N.E.2d 1140 (Ind. Ct. App. 1999).

(1) Applying statutory limitation to misdemeanors

Because the Legislature could not have intended for a person who is convicted of misdemeanors to not benefit from the statutory limitation upon consecutive sentences but allow those convicted of felonies to benefit from the limitation, the limitation on consecutive sentences must apply to misdemeanors where a person is convicted of both felonies and misdemeanors. See Purdy v. State, 727 N.E.2d 1091 (Ind. Ct. App. 2000) and Deshazier v. State, 877 N.E.2d 200 (Ind. Ct. App. 2007). But see Lewis v. State, 31 N.E.3d 539 (Ind. Ct. App. 2015).

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[1] The specific crimes of violence were added in 1995. Prior to 1995, the court could impose consecutive sentences for crimes arising out of a single episode of criminal conduct if the defendant knowingly or intentionally caused serious bodily injury. Greer v. State, 684 N.E.2d 1140, 1141 (Ind. 1997); Becker v. State, 695 N.E.2d 968 (Ind. Ct. App. 1998), *reaffirmed on appeal after remand*, 719 N.E.2d 8585 (Ind. Ct. App. 1999); Ford v. State, 755 N.E.2d 1138 (Ind. Ct. App. 2001).

[2] Episode of criminal conduct language was added to this statute in 1994. Definition of Episode of criminal conduct was defined in a 1995 amendment.

However, where a defendant is sentenced to only misdemeanors and not misdemeanors and felonies, the statutory limitation does not apply. Dunn v. State, 900 N.E.2d 1291, 1292 (Ind. Ct. App. 2009); see also Henderson v. State, 44 N.E.3d 811 (Ind. Ct. App. 2015). But the limitation might apply to misdemeanors if raised as a constitutional Equal Protection issue. Akers v. State, 963 N.E.2d 615 (Ind. Ct. App. 2012) (holding that because misdemeanant could not show his convictions were from an episode of criminal conduct, the statute would not apply to him even if his constitutional argument was otherwise "well-taken."

(2) Crime of violence

Pursuant to Ind. Code § 35-50-1-2(a), the crimes of violence are:

Crime	Ind. Code §	Crime	Ind. Code §
Murder	35-42-1-1	Attempted Murder	35-41-5-1
Voluntary Manslaughter	35-41-5-1	Involuntary Manslaughter	35-42-1-4
Reckless Homicide	35-32-1-4	Aggravated Battery	35-42-2-1.5
Battery (Level 2, 3, 4, or 5 Felony)	35-42-2-1	Domestic Battery (Level 2, 3, 4, or 5 Felony)	35-42-2-1.3
Kidnapping	35-42-3-2	Rape	35-42-4-1
Criminal Deviate Conduct	35-42-4-2	Child Molesting	35-42-4-3
Sexual Misconduct with a minor[3]	35-42-4-9	Robbery (Level 2 or 3 Felony)	35-42-5-1
Burglary (Level 1, 2, 3, or 4 Felony)	35-43-2-1	OVWI causing death	9-30-5-5
OVWI causing serious bodily injury	9-30-5-4	Child Exploitation[4]	35-42-4-4
Resisting Law Enforcement (felony)	35-44.1-3-1	Possession of Firearm by SVF	35-47-4-5
Strangulation (Level 5 Felony)	35-42-2-9		

The list in Ind. Code § 35-50-1-2 is strictly construed. If the Legislature intended a crime to be a "crime of violence," then the Legislature would have included that crime on the list. Maxwell v. State, 731 N.E.2d 459 (Ind. Ct. App. 2000). See also Ellis v. State, 736 N.E.2d 731 (Ind. 2000).

> Maxwell v. State, 731 N.E.2d 459 (Ind. Ct. App. 2000) (imposition of 123-year sentence for attempted murder, confinement and criminal recklessness convictions was erroneous because it exceeded statutory authority to impose consecutive sentences; none of these crimes were listed as "crimes of violence").
>
> Ballard v. State, 715 N.E.2d 1276 (Ind. Ct. App. 1999) (because defendant was convicted of residential entry and battery as a Class D and Class C felony, which were not included in list of crimes of violence, defendant's consecutive sentence was subject to limitation).

But see:

> Thompson v. State, 5 N.E.3d 383 (Ind. Ct. App. 2013) (although Ind. Code § 35-5-1-2(a)(15) does not specifically list Operating a Motor Vehicle with a BAC of .08 Causing SBI, it refers to Ind. Code § 9-30-5-4; thus, Operating a Motor

[3] As a level 1 Felony under Ind. Code § 35-42-4-9(a)(2) or a Level 2 Felony under Ind. Code § 35-42-4-9(b)(2).
[4] As a level 5 Felony under Ind. Code § 35-42-4-4(b) or a Level 4 Felony under Ind. Code § 35-42-4-4(c).

Vehicle with a BAC of .08 is a crime of violence just as is Operating While Intoxicated Causing SBI).

(a) Attempt crimes

If a specific attempt crime is not specifically included in the list of crimes of violence, then it is subject to the limitation on consecutive sentences.

Ellis v. State, 736 N.E.2d 731 (Ind. 2000) (attempted murder is not a crime of violence because it is not listed in Ind. Code § 35-50-1-2(a)). See also Hopkins v. State, 747 N.E.2d 598 (Ind. Ct. App. 2001).

Fight v. State, 768 N.E.2d 881 (Ind. 2002) (for multiple attempted murder convictions before July 1, 2001, trial court cannot avoid the limitation on consecutive sentences by distinguishing one count as resulting in "serious bodily injury").

(b) Conspiracy

Conspiracy to commit a crime of violence—as enumerated in Ind. Code § 35-50-1-2(a)—is not the same as the crime of violence, unless the conspiracy is listed separately as a crime of violence, and thus will not be considered as a crime of violence. Coleman v. State, 952 N.E.2d 377 (Ind. Ct. App. 2011).

(c) Aiding in crime

Because an accomplice and a principal are treated similarly under the Indiana Code, an individual who aids in a violent offense is exempted from the limitation on consecutive sentences, unlike someone who attempts a violent offense. Farris v. State, 753 N.E.2d 641 (Ind. 2001).

(d) Defendant sentenced to one crime of violence and additional crimes which are not crimes of violence

Exempted from consecutive sentence limitation are (1) consecutive sentencing among crimes of violence, and (2) consecutive sentencing between crime of violence and those that are not crimes of violence. However, limitation should apply for consecutive sentences between and among those crimes that are not crimes of violence. Ellis v. State, 736 N.E.2d 731 (Ind. 2000); Williams v. State, 741 N.E.2d 1209 (Ind. 2001).

Ellis v. State, 736 N.E.2d 731 (Ind. 2000) (trial court did not err in ordering consecutive sentencing between attempted murders and murder; however, it did err by ordering consecutive sentencing between attempted murders).

(3) Episode of criminal conduct

Pursuant to Ind. Code § 35-50-1-2(b), an episode of criminal conduct is, "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a defendant's

conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather, the courts must look to the timing of the offenses. Reed v. State, 856 N.E.2d 1189 (Ind. 2006). The Indiana Supreme Court in Reed, supra, and Harris v. State, 861 N.E.2d 1182 (Ind. 2007), at least questioned many of the cases below which held there was no criminal episode solely because one crime could be explained without reference to the other.

Tedlock v. State, 656 N.E.2d 273 (Ind. Ct. App. 1995) (1995 amendment to Ind. Code § 35-50-1-2 which added definition of term "episode" was intended to clarify, and not change, 1994 version of statute; term "episode" as used in 1994 has same meaning as definition provided in 1995 amendment as set out above).

NOTE: Be aware of cases that still apply the overly restrictive standard set forth in Tedlock and disapproved of in Reed. See, e.g., Reeves v. State, 953 N.E.2d 665 (Ind. Ct. App. 2011).

There is a split among court of appeals panels regarding the interaction between possession crimes and the consecutive-sentence limitations. See Edwards v. State, 147 N.E.3d 1019 (Ind. Ct. App. 2020). "In cases where the illegal possession at issue is completely passive and has no relation in circumstance with other continuing, illegal possessions, we believe that it is the act of acquisition that should be used to evaluate whether those offenses were part of an episode of criminal conduct." Id. at 1025.

(a) Crimes not a single criminal episode

Gilliam v. State, 901 N.E.2d 72 (Ind. Ct. App. 2009) (trial court did not err in imposing twenty-four-year consecutive sentences for three counts of nonsupport; defendant's failure to pay child support for three children under count I can be related without reference to details of his failure to pay child-support for two children under count II, or for three children under count III).

Monyhan v. State, 780 N.E.2d 1187 (Ind. Ct. App. 2003) (attempted battery arose from throwing punches at two officers, one battery from spitting on officer's shirt, second for spitting blood in another officer's eye, and final battery for kicking another officer; defendant's sentence was not subject to consecutive sentence limitations of Ind. Code § 35-50-1-2 because accounting of each charge could be made without referring to details of other charges).

Smith v. State, 770 N.E.2d 290 (Ind. 2002) (defendant's six convictions for forgery did not constitute single episode of criminal conduct where court concluded that they were not simultaneous nor were they contemporaneous with one another - defendant went from one bank branch to another branch, with about a half hour between visits, depositing checks for differing amounts of money; court could recount each of forgeries without referring to other forgeries, as each occurred at separate time, separate place, and for separate amount of money from other).

Catt v. State, 749 N.E.2d 633 (Ind. Ct. App. 2001) (conduct of stamping clerk's certification on pleading while representing estate and using money from estate for other purposes did not constitute "single episode of criminal conduct;"

forgery was not at all related to the misappropriation of estate funds despite fact that both acts pertained to the same estate).

Ratliff v. State, 741 N.E.2d 424 (Ind. Ct. App. 2000) (defendant's possession of marijuana was separate and distinct act from his acts of operating while intoxicated and resisting law enforcement). See also Evans v. State, 81 N.E.3d 634 (Ind. Ct. App. 2017) and Akers v. State, 963 N.E.2d 615 (Ind. Ct. App. 2012); but see Johnican v. State, 804 N.E.2d 211 (Ind. Ct. App. 2004) (where a defendant possesses contraband on his person as he simultaneously commits other criminal offenses, offenses should be deemed part of a single episode of criminal conduct); and Cole v. State, 850 N.E.2d 417 (Ind. Ct. App. 2006).

Lockhart v. State, 671 N.E.2d 893 (Ind. Ct. App. 1996) (commission of four distinct acts of molestation against one victim at four different times did not constitute "episode of criminal conduct;" fact that molestation involved same victim did not make acts one episode); See also Grimes v. State, 84 N.E.3d 635 (Ind. Ct. App. 2017) (18 convictions for incest).

Reynolds v. State, 657 N.E.2d 438 (Ind. Ct. App. 1995) (three burglaries of three different houses did not constitute one criminal episode, although all houses were near one another, and burglaries occurred on same night). See also Williams v. State, 889 N.E.2d 1274 (Ind. Ct. App. 2008).

Slone v. State, 11 N.E.3d 969 (Ind. Ct. App. 2014) (burglaries occurring on different days over one year were not part of the same episode of criminal conduct; fact that they were joined for trial did not make them, per se, part of the same criminal episode).

Tedlock v. State, 656 N.E.2d 273 (Ind. Ct. App. 1995) (four convictions arising out of crimes committed against different victims at different times spanning approximately two years did not constitute episode of criminal conduct; fact that defendant sold same type of security to each victim in order to finance real estate scheme did not make all four transactions (or any of four) one criminal episode any more than robber's use of same gun to commit four different robberies upon four different victims on four different occasions would constitute one criminal episode). See also Hightower v. State, 735 N.E.2d 803 (Ind. Ct. App. 2000).

Eckelbarger v. State, 46 N.E.3d 1267 (Ind. Ct. App. 2015), *sum. aff'd*, 51 N.E.3d 169 (Ind. 2016) (two counts of delivering methamphetamine seven days apart and one count of manufacturing were distinct in nature and not part of a continuous transaction, thus defendant's crimes were not part of a single episode of criminal conduct). **NOTE:** On transfer, Indiana Supreme Court revised sentence downward under Appellate Rule 7(B), noting that consecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses.

(b) Crimes part of one criminal episode

Reed v. State, 856 N.E.2d 1189 (Ind. 2006) (one criminal episode existed where there was a time lapse of approximately five seconds between the first and last shots fired that served the basis of two attempted murder convictions).

Harris v. State, 861 N.E.2d 1182 (Ind. 2007) (just because the act involves two separate victims does not mean the acts cannot be part of the same criminal episode; here, two acts of sexual misconduct that occurred five minutes apart in the same bed and based on the same reason– the girls' need for a place to stay for the night– are a connected series of offenses that are closely connected in time, place, and circumstance).

Fields v. State, 825 N.E.2d 841 (Ind. Ct. App. 2005) (conspiracy to commit burglary and attempted robbery that took place as conspiracy was carried out amount to a single episode of criminal conduct; while formulation of conspiracy and execution of conspiracy took place in different locations, two offenses had same victims and same criminal objectives); See also Green v. State, 850 N.E.2d 977 (Ind. Ct. App. 2006).

Massey v. State, 816 N.E.2d 979 (Ind. Ct. App. 2004) (because defendant was a serious violent felon in possession of a handgun and simultaneously was in possession of cocaine, convictions in this case arose from a single episode of criminal conduct).

Ballard v. State, 715 N.E.2d 1276 (Ind. Ct. App. 1999) (where defendant's crimes were committed within half an hour at same location, offense were part of same criminal episode and defendant's sentence was subject to limitation on consecutive sentences). See also Armstrong v. State, 742 N.E.2d 972 (Ind. Ct. App. 1999).

Jennings v. State, 687 N.E.2d 621 (Ind. Ct. App. 1997) (where all of offenses were committed by defendant at same place on same night, and burglary/arson was committed to conceal burglary/theft, all counts against defendant related to single criminal episode).

Henson v. State, 881 N.E.2d 36 (Ind. Ct. App. 2008) (where defendant burglarized two neighboring, unattached garages on the same night, the burglaries were part of a single criminal episode). See also Gallien v. State, 19 N.E.3d 303 (Ind. Ct. App. 2014).

Timberlake v. State, 679 N.E.2d 1337 (Ind. Ct. App. 1997) (where there was single robbery with three people present, sentences for robbery, confinement and carrying handgun stemmed from same episode of criminal conduct).

Trei v. State, 658 N.E.2d 131 (Ind. Ct. App. 1995) (where defendant used knife to keep victims from leaving and had sexual intercourse with one victim, two counts of criminal confinement and one count of sexual misconduct were part of same criminal episode).

Haggard v. State, 810 N.E.2d 751 (Ind. Ct. App. 2004) (defendant's appellate counsel was ineffective for failing to argue that a conviction for unlawful use of body armor should have been grouped with several other charges to constitute a single episode of criminal conduct).

Smith v. State, 717 N.E.2d 939 (Ind. Ct. App. 1999) (failure to pay child support for four children during single period of time).

Cole v. State, 850 N.E.2d 417 (Ind. Ct. App. 2006) (simultaneous possession and another offense can constitute one criminal episode; here, defendant's possession of ammonia occurred at same time and place as his act of fleeing from police and would not have been discovered had defendant not been driving while being habitual traffic violator and fled).

Vermillion v. State, 978 N.E.2d 459 (Ind. Ct. App. 2013) (where defendant's convictions for Class C felony sexual misconduct with a minor happened the same night with the same victim around the same time, they were part of one episode).

Edwards v. State, 147 N.E.3d 1019 (Ind. Ct. App. 2020) (multiple counts of possession of child pornography constituted a single episode of criminal conduct, where State did not produce any evidence defendant acquired some or all of the illegal images separately).

Daugherty v. State, 52 N.E.3d 885 (Ind. Ct. App. 2016) (even though events occurred at two locations, defendant's crimes were committed within a single episode because neither episode could be explained without referring to the other where officers stopped defendant for OWI, discovered illegal weapons, and when having brought him to hospital for treatment of his injuries, defendant threatened their lives).

(4) Procedure and analysis of the court: if criminal episode exists

If the trial court finds that a single episode of criminal conduct exists:

(1) Court must first identify the presumptive sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted. Ind. Code § 35-50-1-2(a) (now (c)), [Note: Under the current statute, the court must first identify the limit set out in IC 35-50-1-2(d).]

(2) Court must next separate the convictions into two categories.

  (a) Crimes of violence as defined above and,

  (b) All other felonies.

(3) Imposition of sentence

  (a) Court has discretion to impose consecutive sentences for crimes under all other felonies, provided that the total term of the consecutive sentences does not exceed the presumptive sentence for the next greater offense. [Now, the total term cannot exceed the limits set out in IC 35-50-1-2(d)]

  (b) Court retains discretion under Ind. Code § 35-50-1-2(a) (now (c))) to order that the sentence for each crime of violence be served consecutively to the total sentence imposed for all other felonies.

Salone v. State, 652 N.E.2d 552, 562-63 (Ind. Ct. App. 1995).

C. MANDATORY CONCURRENT SENTENCES

1. Multiple habitual offender enhancements

Trial court cannot order enhanced sentences based on habitual offender determinations to be served consecutively. The power to order consecutive sentences is subject to the rule of rationality and the limitations in the Constitution. Weaver v. State, 676 N.E.2d 22, 26 (Ind. Ct. App. 1997).

Even when the underlying sentences are required to run consecutively (e.g. when a person commits a second crime after being arrested for but before being discharged from a first crime pursuant to Ind. Code § 35-5-1-2(d)), a trial court cannot order habitual offender enhancements attached to both crimes to run consecutively. Breaston v. State, 907 N.E.2d 985 (Ind. 2009). Thus, even if sentencing does not take place in a single proceeding, the trial court still may not sentence a defendant to consecutive habitual offender enhancements. Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002).

> Starks v. State, 523 N.E.2d 735 (Ind. 1988) (sentencing court exceeded its legislative authorization when it imposed consecutive felony sentences, both of which were enhanced by thirty years, because of habitual offender status at single criminal trial).
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> Ingram v. State, 761 N.E.2d 883 (Ind. Ct. App. 2002) (although defendant's consecutive habitual offender sentences did not rise from single criminal trial, they did arise from single sentencing proceeding and therefore, trial court erred when it ordered habitual offender sentences to run consecutively). See also McCotry v. State, 722 N.E.2d 1265 (Ind. Ct. App. 2000).

Further, other general enhancements—such as the repeat sexual offender enhancements—may not be ordered to run consecutively to the specialized habitual offender enhancement. Young v. State, 57 N.E.3d 857 (Ind. Ct. App. 2015).

2. Two sentences enhanced by same prior crime

Under the advisory scheme, two sentences enhanced by the same prior crime cannot be run consecutively. Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) (holding the double enhancement law set forth in McVey v. State, 531 N.E.2d 458 (Ind. 1998), and Townsend v. State, 498 N.E.2d 1198 (Ind. 1986), no longer apply under the advisory scheme). Whether a sentence is appropriate with a double enhancement will vary from offense to offense and from one prior criminal record to another. Id.

> Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) (trial court properly used defendant's same prior OWI as an aggravator and a predicate support a habitual offender determination on one offense, and as an aggravator and a prior offense supporting an enhancement of an OWI Causing Serious Bodily Injury conviction to a Class C felony on a different offense; however, trial court erred by running the sentences for the two offenses consecutively).
>
> Sweatt v. State, 887 N.E.2d 81 (Ind. 2008) (trial court abused its discretion by running a possession of a firearm by a serious violent felon (SVF) and a burglary conviction to

which a habitual offender (HO) enhancement was attached consecutively where the same prior felony supported the SVF and the HO).

D. EFFECT OF FAILURE TO SPECIFY CONSECUTIVE OR CONCURRENT SENTENCES

1. Where consecutive sentence is mandatory

Where the terms of imprisonment are required to be served consecutively under Ind. Code § 35-50-1-2 (d), the failure to specify in the commitment order that the terms were to run consecutively does not exempt the defendant from serving the sentences consecutively. Hutcherson v. State, 269 Ind. 331, 380 N.E.2d 1219, 1223 (1978); Banton v. State, 180 Ind.App. 698, 390 N.E.2d 687, 692 (1979).

However, absent proof in the record of the sentencing hearing that the defendant committed the crime after having been arrested for another crime, or evidence that he committed the crime before the date that he was discharged from probation, parole, or a term of imprisonment imposed for another crime, the serving of consecutive sentences should be challenged as erroneous. See Perry v. State, 177 Ind. App. 334, 379 N.E.2d 531 (1978) (court erroneously believed consecutive sentences were mandatory).

2. Where consecutive sentence is discretionary

Pursuant to Ind. Code § 35-38-3-2(d), the term of imprisonment begins on the day the sentence is imposed, unless execution of sentence is stayed according to law. Thus, where consecutive sentences are not required and the order of commitment neither specifies concurrent or consecutive sentencing, the sentences should be served concurrently and not consecutively

E. USING SAME AGGRAVATOR TO ENHANCE SENTENCE AND IMPOSE CONSECUTIVE SENTENCES

There is no constitutional or statutory prohibition against using the same factors to both enhance a sentence and impose consecutive sentences. Williams v. State, 690 N.E.2d 162, 172 (Ind. 1997); Owens v. State, 916 N.E.2d 913 (Ind. Ct. App. 2009); Lavoie v. State, 903 N.E.2d 135 (Ind. Ct. App. 2009). Moreover, a court may properly rely on prior and distinct offense to enhance a sentence and impose consecutive sentences. Beatty v. State, 567 N.E.2d 1134, 1137 (Ind. 1991).

1. Record

Although the better and preferable practice is for a trial court to state unequivocally that the aggravating circumstances justify both the enhanced sentences and the consecutive sentences, a trial court's failure to make to specify the aggravating circumstances supporting consecutive sentences is harmless where the court specified the factors supporting the enhanced sentences. Wethington v. State, 560 N.E.2d 496, 510 (Ind. 1990); Ratliff v. State, 741 N.E.2d 424 (Ind. Ct. App. 2000).

PRACTICE POINTER: The law is still clear that where the court fails to state any aggravators, and not just fails to be specify whether aggravators are to be used to support enhancement or consecutive sentences, the sentencing statement is insufficient. Pearson v. State, 543 N.E.2d 1141, 1145 (Ind. Ct. App. 1989).

2. Limitations

Although all appellate courts agree that one aggravator can be used to support enhanced sentences and consecutive sentences, there is a split among the courts as to whether the aggravator has to be particularly egregious.

Cox v. State, 780 N.E.2d 1150, 1161 (Ind. Ct. App. 2002) (interpreting Deane v. State, 759 N.E.2d 210, 201 (Ind. 2001), to mean that "at the very least...there must be some qualification upon the use of a single aggravator to both enhance a sentence and to impose consecutive sentences").

Staton v. State, 640 N.E.2d 741 (Ind. Ct. App. 1994) (in order for same factor to be used to support enhanced and consecutive sentences, aggravating factor must be particularly egregious; evidence that defendant displayed tendency toward violence and might commit other crimes was sufficient aggravator to both enhance sentences on both counts of child molesting to maximum, and order sentences served consecutively). See also Smith v. State, 655 N.E.2d 532 (Ind. Ct. App. 1995).

But see:

Payne v. State, 687 N.E.2d 252 (Ind. Ct. App. 1997) (same aggravator may be used to enhance and run sentences consecutively even if aggravator is not particularly egregious). See also Thorne v. State, 687 N.E.2d 604 (Ind. Ct. App. 1997).

PRACTICE POINTER: In Buchanan v. State, 669 N.E.2d 655 (Ind. 1998), the court found that enhanced and consecutive sentences based on the same aggravator was excessive when considering the nature of the crime committed. Although the Indiana Supreme Court has not yet addressed the issue of whether an aggravator need be egregious to support both enhanced and consecutive sentence, the Buchanan holding suggests that it does. If any factor can be used to "stack and max," excessive sentences will follow.