

STATE OF INDIANA	)	IN THE DUBOIS CIRCUIT COURT
	) SS:	
COUNTY OF DUBOIS	)	CAUSE NO: 19C01-2001-F5-000001
STATE OF INDIANA	)	
	)	
VS	)	
	)	
JOHN T. SCHNEIDER	)	

STATE'S SENTENCING MEMORANDUM OF LAW

Comes now the State of Indiana by Brian D. Lucchi, Deputy Prosecuting Attorney for the 57th Indiana Judicial Circuit, and advises as follows:

1. "A plea agreement is voluntarily entered into between the State and the Defendant. It is a contract and when accepted by the trial court is binding. The parties are free to negotiate the terms and conditions of the plea agreement, and can agree to limit or otherwise exclude what may be considered by the trial court judge. Unless the evidence is forbidden by terms of the plea agreement, the trial court judge may consider all evidence properly before him." *Bethea v. State*, 983 N.E.2d 1134, 1146 (Ind. 2013).
2. "In determining an appropriate sentence, all circumstances of the particular crime and the background of the individual offender should be considered. . . . The task is to determine the type and extent of punishment. This individualized sentencing process requires possession of the fullest information possible concerning the defendant's life and characteristics." *Thomas v. State*, 562 N.E.2d 43, 47 (Ind. Ct. App. 1990).
3. At sentencing, a judge may not consider a prior criminal charge that resulted in acquittal. *McNew v. State*, 391 N.E.2d 607, 612 (Ind. 1979). Likewise, a trial court may not consider prior uncharged crimes to which a defendant admitted during failed plea negotiations. *Hensley v. State*, 573 N.E.2d 913, 917-918 (Ind. Ct. App. 1991). "However, long-standing Indiana precedent establishes that trial courts may consider previous criminal activity, even though uncharged, in the determination of aggravating circumstances at sentencing." *Washington v. State*, 902 N.E.2d 280, 291 (Ind. Ct. App. 2009). *See also Vermillion v. State*, 978 N.E.2d 459, 468 (Ind. Ct. App. 2012).
4. "Uncharged crimes may be considered in assessing 'lack of criminal history' as a claimed mitigating circumstance. Similarly, relevant evidence of another crime is admissible to rebut the defendant's claimed lack of criminal history even if that evidence may not be sufficient to support a conviction." *Wilkes v. State*, 917 N.E.2d 675, 692 (Ind. 2009) (internal citation omitted).
5. The Indiana Supreme Court has "noted [its] approval of the use of uncharged crimes as aggravating circumstances in the particular area of criminal sexual abuse offenses . . . This approval is based on the rationale that prior uncharged crimes of that nature reliably indicate a high probability that the defendant will commit similar crimes in

- the future.” *Russelburg v. State*, 529 N.E.2d 1193, 1197 (Ind. 1988) (internal quotation marks and citation omitted). *See also Mahla v. State*, 496 N.E.2d 568, 575 (Ind. 1986).
6. “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 at sentencing.” *Powell v. State*, 644 N.E.2d 82, 84 (Ind. 1994). *See also Russelburg*, 529 N.E.2d at 1197 (approving aggravator based on uncharged incident testified to by defendant’s ex-girlfriend); *Washington*, 902 N.E.2d at 291 (approving aggravator based on uncharged incident testified to by detective); *but see Chastain v. State*, 144 N.E.3d 732, 734 (Ind. Ct. App. 2020) (in dicta, suggesting that the trial court “be cautious” in finding as an aggravator uncharged conduct to which defendant had not admitted, but failing to cite legal authority supporting a requirement that defendant admit to said conduct).
 7. “Where a defendant seeks to diminish the relevance of a criminal record by emphasizing its remoteness or nonviolent character, neither factor precludes the trial court from using such prior convictions as aggravating circumstances.” *Bowling v. State*, 493 N.E.2d 783, 787 (Ind. 1986).
 8. At sentencing, a judge may properly find the effect of the crime upon the victim to be an aggravator. *Hogan v. State*, 409 N.E.2d 588, 591 (Ind. 1980); *Caccavallo v. State*, 436 N.E.2d 775, 779 (Ind. 1982). However, there is a presumption that “the legislature considered the emotional and psychological impact on the victim when it set the presumptive sentence for a crime. Therefore, 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, 1053 (Ind. Ct. App. 2003) (internal citation omitted). A judge may also find to be an aggravator the emotional and psychological effects that the defendant has had upon victims of crimes that have never been charged. *Durham v. State*, 510 N.E.2d 202, 204-205 (Ind. Ct. App. 1987).
 9. “[T]he fact that the evidence showed that the crime was carefully planned” may properly be considered an aggravating circumstance. *Wethington v. State*, 560 N.E.2d 496, 510 (Ind. 1990).
 10. “In determining the appropriateness of a sentence in light of the ‘very worst offense and offender’ argument, we must concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on the nature, extent, and depravity of the offense for which the defendant was sentenced, and what it reveals about the defendant's character.” *Groves v. State*, 787 N.E.2d 401, 410 (Ind. Ct. App. 2003).

Respectfully submitted,
/s/Brian D. Lucchi

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the defendant by his attorney, Gerald Thom, by e-filing on or about date of filing the same.

/s/ Brian D. Lucchi
Brian D. Lucchi